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GLOSSARY OF TERMS/ABBREVIATIONS

AMSA	Australian Maritime Safety Authority
API	American Petroleum Institute
BPEM	Best Practice Environmental Management
CEMC	continuous emissions monitoring systems
CEPA	Commonwealth Environment Protection Authority
CRTK	Community Right to Know
DDT	dichloro-diphenyl-trichloroethane
EEZ	exclusive economic zone
EMP	Environmental Management Plan
EOPA	*Environmental Offences and Penalties Act 1989* (NSW)
EPA	Environment Protection Authority
EPAA	*Environmental Planning and Assessment Act 1979* (NSW)
EPCRA	Emergency Planning and Community Right to Know Act 1986 (US)
GBRMPA	Great Barrier Reef Marine Park Authority
IGAE	Intergovernmental Agreement on the Environment
IMO	International Maritime Organization
IPIECA	International Petroleum Industry Environmental Conservation Association
IPIECA	International Petroleum Industry Environmental Conservation Association
MARPOL 73/78	International Convention for the Prevention of Pollution from Ships
MSDS	material safety data sheets
NATA	National Association of Testing Authorities
NEPA	National Environmental Protection Authority
NGOs	non-governmental organistions

NPI	National Pollutant Inventory
OCS	Offshore Constitutional Settlement
OILPOL	International Convention for the Prevention of Pollution of the Sea by Oil
PCB	polychlorinated biphenyl
PIGs	public interest groups
SOE	state-owned enterprise
SPCC	State Pollution Control Commission
SMCRA	Surface Mining Control and Reclamation Act (US)
TRI	Toxic Release Inventory
UNCLOS	United Nations Law of the Sea Convention
UNEP	United Nations Environment Program

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.

THE NATURE OF ENVIRONMENTAL CRIME

Brian Robinson

ENVIRONMENTAL LAWS HAVE A LONG HISTORY EVOLVING, IN VARIOUS societies, out of a need to protect water supplies, soil fertility and human health in general, from the economic and social activities of man.

As a recognised separate body of law, however, environmental law has a relatively short history spanning little more than twenty years. As such it is primarily a creature of statute. Its origins stem from the excesses of the industrial revolution, the growing influence of middle-class "quality of life" values and the increasing scientific understanding of the interdependence of eco-systems.

Laws such as Disraeli's Rivers (Prevention of Pollution) Act of 1876 in England and the findings of Royal Commissions into pollution in that country in the late 19th and early 20th century provided a base for the development of environmental statute law around the world. The serious consequences of air pollution incidents in London, Pennsylvania and elsewhere in the 1950s drew particular attention to the need for pollution control legislation and this was reflected in, for example, the *Clean Air Act* in Victoria in 1958 and the *Clean Air Act* of 1961 in New South Wales.

Such legislation was simple, prescriptive and narrowly focused. It was less concerned with activating a desired environmental outcome than with ensuring specific waste discharges did not cause local health effects. There were few prosecutions and little sense of "environmental crime".

The 1960s was a period of great social change, a period of questioning and challenging the accepted norm. Worldwide publicity about mercury poisoning at Minemata and the environmental impact of defoliants in Vietnam, along with growing concern about the spread of DDT and similar non-degradable chemicals, brought the environment into focus.

Soon a new kind of environmental legislation was being introduced and the first few tentative steps were taken towards consideration of the environmental consequences of development proposals.

The late 1960s and early 70s saw a proliferation of environmental legislation and the establishment of specific environmental agencies. A new acronym, which was to become generic, came into the language—"EPA" (environment protection authority). The concept of an EPA as a broadly based environmental watchdog has been much debated over the succeeding 23 years both in Australia and overseas. Much of the debate has been conscious of the symbolism on the one hand, and the loss of control by the traditional bureaucracies on the other. There is little doubt, however, that the public in most developed countries want an "EPA" by whatever name.

The establishment of EPAs heralded a new attitude towards environmental protection with criminal sanctions being imposed on wrongdoers and in some jurisdictions the introduction of civil penalties. Environmental "crime" became an accepted concept by the community at large. Those charged, however, seemed initially not to share that view while it took the courts in many jurisdictions even longer to reflect the new community attitudes.

The comprehensive nature of much of the legislation meant that activities not previously regulated or prohibited became subject to criminal penalties. This had a number of consequences: a new criminal class, often blue chip corporations that were previously admired, developed; new outlets for the traditional criminal class and for those happy to sail close to the wind in search of profit, appeared; an increase in use of expert evidence in the courts occurred, much of it of a type not commonly used in other areas of the law, and there was some confusion generated between criminal sanction and civil liability.

Notwithstanding these difficulties, over time the concept of environmental crime became more firmly established in the public mind. Environmental vigilance by the new "green police" and by the public, uncovered an increasing number of serious environmental situations. Many of these provided fertile material for media sensationalism which in turn hardened the public attitude towards those responsible.

A runaway chemical process at Seveso contaminated a wide area around the plant with chemicals, including the now infamous dioxin, resulting in the death of a number of animals and the quarantining of the affected land. The public was highly alarmed, the military was brought in to secure the quarantined area and a number of women accepted advice to terminate their pregnancies. In spite of the publicity surrounding the issue, the authorities failed to properly control the transport and disposal of the contaminated soil, some of which was later found abandoned in drums in a French barn.

The compulsory acquisition of land from a chemical company in Love Canal near Niagra in the USA led to the exposure of families and schoolchildren to a range of chemical waste products. The land had been used as a waste chemical landfill, no doubt employing the acceptable standards of the time. A housing development was built nearby and a school was built on the affected land. Seepage of the chemicals to the surface and via drainage lines into the basements of nearby houses resulted ultimately in the area being evacuated and placed in quarantine.

Add to these, incidents such as: Bhopal, where several thousand people died a painful death and many others suffered severe illness as a result of a toxic gas escape; Prince William Sound in Alaska, coated in the oil cargo of the Exxon Valdez; the use of PCB (polychlorinated biphenyl) and dioxin contaminated oil as a dust suppressant at Times Beach in New York State, USA, and the industrial discharges that continue today into water supplies in many developing countries, and the basis for community attitudes becomes clear.

Less dramatic but nonetheless similar examples can be readily found in Australia: the hospitalisation of a number of schoolchildren in Geelong as a result of a sulphur dioxide plume from a nearby factory impinging upon their school; the sale by a major electrical company of large PCB containing transformers for $1 each, one month before legislation controlling their storage, transport and disposal became effective, to a small waste oil contractor who subsequently mixed the PCBs with oil and sold the mixture as fuel oil to unsuspecting companies, and the subdivision of clearly

contaminated land for residential development in a number of areas around the country, provide clear evidence that all is not well in the "lucky country".

The nature of environmental crime is not, however, jurisdiction specific. Revelations about damage to the ozone layer by synthetic chemicals; concern over damage to the oceans by sea dumping, and predictions about dramatic climate change resulting from the cumulative impact of human activity has led to international action over the environment and to a growing body of international environmental law.

While the undertakings involved in dealing with international or global environmental issues are, in general, reflected in national or sub national statutes, there are significant international aspects to enforcement. The illegal dumping of hazardous wastes at sea or in a developing country with a weak institutional framework for environmental control are crimes not easily dealt with within a single jurisdiction. Thus the Basle Convention and national laws flowing from it on the control of the transfrontier movement of wastes require the involvement of authorities in all countries through which the wastes pass. The processes involved are of necessity complex, and the opportunities for international environmental crime significant.

Similar problems can arise in federal nations such as the United States and Australia. The use of "pollution havens" to avoid stringent State laws and the complexity of tracking activities across State boundaries with different requirements have received inadequate attention, particularly in Australia. These issues are further complicated by the fact that activities on Commonwealth land by and large are not subject to State law.

Environmental law in Australia is still developing but in New South Wales and Victoria it has reached a stage of moderate maturity. This is evidenced by a body of case law including decisions in the Supreme Courts and the High Court, established enforcement procedures within the EPAs, experienced legal and enforcement staff and, particularly in Victoria, a stabilising of offence and penalty provisions. Other States are building on this experience and are developing similar statutory mechanisms.

Since environmental problems are not always immediately obvious and can persist well beyond the duration of activity giving rise to the problem, for example, contaminated land or groundwater, there is a need for environmental legislation to reflect this. This has given rise to a perception of retrospectivity in some quarters. While such offences generally do not have a time limit, under the Victorian legislation they must have been illegal at the time of the Act. Criminal proceedings must also be brought within twelve months of the offence being detected. Thus there is no retrospectivity for criminal liability.

Civil liability, however, with respect to clean-up costs remains despite the original act not being illegal at the time. This is the cause of much of the confusion. Liability for clean up is best regarded, in most cases, as a commercial liability which flows from a devalued asset.

However, where a contaminated site is giving rise to offsite impacts, then it is a continuing act and potentially a continuing offence. Here traditional private property law interacts with public environmental law. Much of the case law relating to this interaction is drawn from the United States and may not be appropriate to Australia. It is likely to be some time before a substantial body of Australian case law exists as most issues that arise in this area are settled without litigation.

One of the unusual aspects of environmental crime is the extent to which it concerns damage to public goods. The increasing body of scientific knowledge on the interdependence of natural systems is reflected in the growing climate of public opinion

concerned about damage to common property. This is reinforced by the formal acceptance of the principle of intergenerational equity. While various proposals have been developed for making use of the well-established concepts embodied in private property rights (cf enclosure of the commons) as a means of achieving environmental objectives efficiently, these have in the main, so far been unconvincing to the public. It is likely therefore that environmental law will continue to develop with a heavy emphasis on the protection of common property.

This public concern with common property has seen the introduction of a number of specific concepts into environmental law. Among these are the polluter pays principle, the precautionary principle, the protection of biodiversity and the preservation of intergenerational equity. The legal consequences of each of these are quite complex and as yet not fully developed in Australia. However, in seeking to apply these principles to the regulation of corporations, environmental law has embraced director's liabilities, minimum as well as maximum penalties (including prison terms), strict and absolute liability, certain reverse onus provisions and provision for restitution and compensation.

These features have been interpreted by some as draconian but in reality owe more to the nature of environmental crime. For example, the prevention of a cumulative degradation of an aquatic eco-system may depend as much on a company's training and supervisory requirements than on any specific action in time. Such activity is clearly subject to company policy and as such the responsibility of directors.

The ongoing health of the atmosphere or of rivers, lakes and coastal waters is highly dependent on individuals not abusing their access to these public goods. The licensing of waste discharges is a common legal mechanism for achieving this. Breaches of the licence are therefore often treated as criminal acts and not merely as administrative failures.

The focus on the protection of public goods has had two other consequences: a high level of public participation, and the binding of the Crown, especially with respect to state owned enterprises (SOE).

Environmental legislation (which now includes land use planning legislation) has three major facets:

- the establishment of acceptable environmental quality objectives;
- a system of approvals for proposed activities; and
- the regulation and enforcement of controls on these activities.

Typically, there is substantial public input into the first two with some form of appeal mechanism to a body not responsible for the initial decision. This may be a quasi-judicial tribunal, a special court or in some cases the responsible government Minister. While there is some debate about the adequacy of these processes it is the third facet that attracts the greatest divergence of opinion.

In essence this comes down to the standing of third parties before the courts and their ability to initiate a criminal prosecution. Such standing is provided and used in some overseas jurisdictions. In Australia, only New South Wales incorporates the ability of a private citizen to initiate prosecution for protection of a public good. There is limited ability elsewhere, for example, in Victoria where a specific personal injury is incurred (that is residential noise). The NSW provision has not yet been successfully employed.

The debate is most likely largely hypothetical since the technical nature of the evidence required to establish proof of an offence is generally well beyond that of the private citizen or even the moderately well resourced community group. Evidence frequently can only be collected through the use of powers of entry, the ability to take, analyse and interpret appropriate samples and a good knowledge of the processes or activities giving rise to the offence. It will be interesting to follow future developments in this area.

The desire for third party rights in the initiation of prosecutions does, however, raise the question of the attitude of environment agencies towards enforcement action. The only comprehensive published study of this topic is that of Grabosky and Braithwaite (1986). At that time, only two Australian environmental agencies rated the classification of "modest enforcers" (the maximum classification given for business regulatory agencies) and only one identified enforcement as an important strategic tool (Grabosky & Braithwaite 1986, pp. 38 & 221).

Most jurisdictions would claim that the situation has changed significantly since 1986 reflecting the hardening of public opinion against polluters. This has been reflected or promised in legislation. Thus in 1988 Victoria introduced prison sentences for offenders (other than EPA officers for whom such penalties already existed in relation to revealing commercially confidential information) and in 1989 New South Wales did likewise. Other States are in the process of following suit. The Australian and New Zealand Environment Council adopted a resolution in 1991 to develop a common hierarchy of offences and penalties to deter pollution haven seekers. The complexities involved, however, have meant that progress in achieving this has been slow. Nonetheless, the importance of this concept is reflected in the inclusion of the commitment in the Intergovernmental Agreement on the Environment signed by first Ministers (Australia 1992, p. 26).

At the other end of the scale both Victoria and New South Wales have introduced systems of on-the-spot fines for minor infringements. These have been used effectively to provide a "slap-on-the-wrist" to companies, thereby deterring them from developing attitudes that could lead to more serious offences. There is, however, a tendency to overuse these in cases where court proceedings would be more appropriate, because of the resource implications of a full prosecution and the still lenient attitude of some sections of the magistracy towards environmental offences.

The hierarchy of offences which has evolved in Victoria reflects four categories:

> *Minor offences*: do not pose a significant threat to environmental quality but are symptomatic of an attitude that could lead to a more serious offence. This could include failure to report an incident, failure to carry out monitoring as required or a minor odour incident. Dealt with by the issue of an infringement notice.
>
> *Standard offences*: cause actual environmental damage or pose an environmental hazard but there has been no intent to offend. These could include breach of licence conditions, air, water, land or noise pollution, the creation of an environmental hazard or obstruction of an authorised officer. Dealt with in the Magistrates' Court.

Offences with intent: these are usually carried out for commercial gain and include waste dumping, pollution, or providing misleading information. Dealt with in the Magistrates' Court but with a higher maximum penalty.

Indictable offences: these involve intent or negligence and serious or potentially serious environmental damage. These could include serious waste dumping incidents; spills or discharges threatening public health or causing death or serious injury to wildlife. These may be heard in the Magistrates' Court or in a higher court.

New South Wales has a similar but slightly different hierarchy which is based more on levels of proof required and was the result of design rather than evolution.

A significant point of ongoing debate is the question of whether special environmental courts should be established. The Land and Environment Court in New South Wales serves this purpose, while in other jurisdictions cases are heard in the normal courts. Victoria has a halfway house with a special division of the Administrative Appeals Tribunal which deals with appeals against decisions in planning and environment matters. Prosecutions are heard in the criminal courts.

Although there appears to have been no study published of the relative effectiveness of special courts, anecdotal evidence suggests that higher penalties are generally awarded for similar offences in New South Wales than in Victoria. Whether this is effective in behaviour modification would be difficult to test because of the many other enforcement and cooperative activities conducted in both jurisdictions.

Environmental crime is undoubtedly more highly developed in North America and Europe than in Australia. This stems from several factors; the extent of waste production; the shortage and cost of legitimate waste disposal options; the greater sophistication and penetration of organised crime, and more prescriptive and stringent environmental laws. In the United States, strong regulation of waste transport and disposal has created a major industry in waste management. The nature of the industry and high cost of compliance has attracted criminal elements into legitimate business as well as into illegal operations. Hazardous waste inspectors in the environmental agencies are, as a result, sometimes armed and the police and FBI are frequently engaged in the investigation of environmental crime.

The development of the concept of environmental crime particularly in Europe and North America has led to a re-evaluation of the responsibilities of corporations by their boards. This has resulted in the adoption by most major multi-national companies of environmental policies which they are gradually imposing on their operations worldwide.

This has had an impact in Australia not only on the local operations of overseas companies, but also on major Australian corporations. Reinforcing this is the growing concern about the personal liabilities of directors for environmental offences. It is worthwhile noting that similar attitudes are also reflected in the boards of corporatised SOEs.

This explicit acceptance by boards of their environmental responsibilities has in turn resulted in the development of new environmental management regimes. The best of these are integrated with the quality management movement and are thus subject to measurement and accreditation. Since this also implies a commitment to continuous improvement, the whole question of the place of enforcement of environmental requirements takes on a new dimension.

It is in the interest of EPAs and the environment to encourage these developments, but there is still a strongly held view in the community about the importance of surveillance and enforcement.

High quality environmental management involves environmental audits, cleaner production, openness with the local community and clearly stated milestones for improvements and benchmarking. The Australian Manufacturing Council has published a report on *Best Practice Environmental Management* (1992) which provides encouragement and guidance to industry. At the other end of the scale the Australian Chamber of Manufactures has published a handbook on environmental management for small business (1992).

While these developments have flowed in part from the activities of the EPAs they also provide new problems and new opportunities for them.

Best Practice Environmental Management (BPEM) requires companies to collect much more detailed information on their environmental performance and on their overall processes than ever before. There is some concern that this potentially places them at greater risk of legal action or provides more information to assist in a prosecution. There is particular concern about environmental audits and there are unsubstantiated claims that these concerns are discouraging some companies from going down this path.

This issue, as with community concerns about industry undertakings, is a question of trust. EPAs are thus faced with the need to facilitate the development of these new attitudes and approaches in industry, while maintaining faith with the community by thorough and effective enforcement action when necessary.

The Victorian EPA has taken a multi-faceted approach to this situation. First, in encouraging the use of internal environmental audits it has made it quite clear that the results or conclusions of such audits would not be used to initiate a prosecution. The EPA has also extended this undertaking to self-monitoring data. The EPA also carries out cooperative audits with companies subject to a specific written agreement. The *Environment Protection Act 1970* provides additional protection under s. 54 (3).

The Victorian cleaner production/waste minimisation program, which has been going for more than five years, is a further means of building trust, involving as it does the sharing of sensitive process information.

However, the most effective tool to date would appear to be the involvement of companies with their local communities in the development of formal or informal environment improvement plans. These satisfy the multiple objectives of community right to know, clearly established milestones, corporate commitment to a management system, improved measurement and an increase in trust between all parties.

A natural development from here is to reflect that increased trust in the legal relationship between EPA and those companies that have demonstrated their commitment and competence. The EPA has developed the concept of accredited licences. Existing prescriptive licences would be replaced by licences with broad environmental outcomes and annual reporting as their sole conditions. Companies operating within such licences would require no further approval for plant modifications except where these changed the fundamental nature of the plant. The reduced regulatory work for EPA would be reflected in lower licence fees. A betrayal of the trust, implicit in such an arrangement, would lead to loss of accredited status and enforcement action.

Not all companies are yet in a position to take advantage of the accredited licensing system and a process that will enable those who wish to move in that direction to do so is under consideration.

To maintain trust in the EPA in these circumstances, the ground rules must be very clear. The EPA has therefore formally published its enforcement policy for the first time. It has also established a system of private sector based, appointed auditors to provide a market based approach to contaminated land thus separating the commercial and criminal aspects of this complex area. By removing uncertainty and confusion the EPA hopes that environmental crime will be demystified and be more readily subject to the normal course of criminal law and accepted as such by both the courts and the community.

The future direction of environment protection is clearly established in international treaties, conventions and protocols, in national agreements and proposed national laws, and in the policies, processes and statutes of State agencies. In particular the principles of ecologically sustainable development, intergenerational equity, precaution and the protection of biodiversity are almost all universally accepted, and compliance with those principles will depend more on cooperation than coercion. However, as more emphasis is placed on effective enforcement measures to deal with those who pursue anti-social activities for personal gain, this cooperation is threatened.

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CRIMINAL LAW AND ENVIRONMENT PROTECTION¾ OVERVIEW OF ISSUES AND THEMES

Nicola Pain

THIS PAPER FOCUSSES 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?

- 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

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.

Criminal law and environment protection

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 Law¾ 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 anthropocentricism 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 targetted 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.

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OLD WINE IN NEW BOTTLES: DIFFICULTIES IN THE APPLICATION OF GENERAL PRINCIPLES OF CRIMINAL LAW TO ENVIRONMENTAL LAW

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UNTIL RECENTLY IN AUSTRALIA, ENVIRONMENTAL LEGISLATION WAS regarded as being of a purely regulatory nature and quite distinct from "real" crime. For this reason, the general principles of criminal law were considered inappropriate and proof of mens rea was usually not a requirement for conviction. However, there has been gradual recognition that environmental offences do not always conform to the regulatory model because of the wider dangers that they may pose. The political response has been to introduce new legislation imposing high penalties and imprisonment for serious environmental offences. In these statutes, mens rea, in some form or another, is generally required. Consequently, the boundaries between regulatory offences and "real" crime are becoming indistinct.

This paper will consider the difficulties in the application of general principles of criminal law to environmental law. These difficulties will be discussed in relation to the New South Wales *Environmental Offences and Penalties Act 1989* (EOPA). The focus of the paper will be on the application of mens rea under the legislation. This will be discussed in relation to mens rea offences, strict liability offences, vicarious or constructive liability for owners, employers, corporations and directors. Divergences from traditional criminal law, such as the reversal of the burden of proof, will also be considered. The ambit of the privilege against self-incrimination will then be examined. Finally, some conclusions will be drawn as to the efficacy of the criminal law in environmental control.

As background, it is relevant to consider the development of the distinction between crimes and regulatory offences.

The Distinction between Crimes and Regulatory Offences

The classic conception of a crime required proof of mens rea. However, in the nineteenth century, a distinct class of offences was evolved by the courts in England as a means of dispensing with proof of mens rea in petty offences (*R v. Woodrow* (1846) 15 M & W 404, 153 ER 907; *R v. Stephens* (1866) LR 1 QB 702).

This new principle won gradual acceptance and began to be applied to common law as well as minor statutory offences (Sayre 1933, p. 70). A similar principle was developed independently in America during the same period (Sayre 1933, p. 67). These developments were largely a response to the difficulties in applying the criminal law to new fields of activities and a shift in emphasis from individual to public and social interests (Sayre 1993, p. 83).

These offences were punishable without proof of mens rea. However, penalties were low and imprisonment was not an option. The emphasis was more on preventing recurrences of the act, rather than on punishing the offender. In *Sherras v. De Rutzen* [1895] 1 QB 918 at 922, the Court referred to these cases as, acts "which are not criminal in any real sense, but . . . which in the public interest are prohibited under a penalty".

These offences are known as "regulatory", "public welfare" (Sayre 1933, p. 56) or "white collar crime" (Sutherland 1945, p. 10). In *R v. City of Sault Ste Marie* (1978) 85 DLR (3rd) 161, (approved by the High Court of Australia in *He Kaw Teh v. The Queen* (1985) 157 CLR 523 per Gibbs CJ at 533), Dickson J characterised pollution as falling within this category of offences. He described these offences as follows:

> Although enforced as penal laws through the utilisation of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application. They relate to such everyday matters as traffic infractions, sales of impure food, violations of liquor laws, and the like (*R v. City of Sault Ste Marie* at 165).

The ambivalence about their status, has resulted in environmental offences being treated as trivial and "quasi-criminal". Most major offenders are factory owners, managers or government agencies who do not fit comfortably into any criminal stereotype. Consequently, enforcement and penalties were designed so that the stigma of crime would not attach to offenders.

However, there has been a growing recognition that there are different types of environmental offences, and that differential treatment is required. The Law Reform Commission of Canada (LRCC 1985, p. 4) has stated:

> . . . it would be simplistic and out of step with present-day perceptions to characterise *all* pollution offences as only and always regulatory or "quasi-criminal" in nature. In terms of harm done, risks caused, degree of intent and values threatened, environmental pollution spans a continuum from minor to catastrophic.

The Commission recommended that for serious cases of pollution, a new and distinct offence be added to the Criminal Code, namely, that of "crimes against the environment" (LRCC 1985, p. 67).

The solution in most of the Australian States has been new legislation, with penalties designed to reflect the seriousness of the case.

The EOPA (NSW) provides for a three-tiered structure of offences and penalties. Convicted offenders are also liable to clean up their pollution. Tier 1 is designed for serious environmental offences. It provides for maximum penalties of up to $1m for corporations and 7 years imprisonment for individuals. Liability for principal offenders is contingent on proof of mens rea. Tiers 2 and 3 do not require proof of fault and thus conform more to the "regulatory" model. The EOPA is thus an interesting amalgam of criminal and regulatory approaches to pollution within the same statute.

Mens Rea Offences

The principal offences in Tier 1 of the EOPA, are constituted by:

> "without lawful authority, wilfully or negligently" disposing of waste, or causing of "any substance to leak, spill or otherwise escape in a manner which harms or is likely to harm the environment": ss. 5(1); 6(1) and s. 6A(1).

The applicability of mens rea to all components of the offence

The Act makes it clear that mens rea must be shown in relation to the first component of the act of disposing of waste or the emission of substances. However, it is silent as to whether there is any mens rea requirement in relation to the second component of harm or likely harm to the environment. The general principle of criminal law is that mens rea applies to all the ingredients of an offence: *R v. Turnbull* (1943) 44 SR (NSW) 108. Mens rea can be excluded by statute, either expressly or by necessary implication (*He Kaw Teh v. The Queen*, per Gibbs CJ at 528-30).

There have been conflicting decisions in the Land and Environment Court as to whether there is a necessary implication of mens rea in relation to the second component of the offence. This highlights the difficulties which face the court in deciding between competing individual and social interests. This leads to conflict between general principles of criminal law which require mens rea, on the one hand, and the public interest in preventing pollution, on the other.

In *State Pollution Control Commission v. Hunt* (1990) 72 LGRA 316 at 324, Bignold J held that the element of mens rea was required to be shown in relation to both components of the offence: However, in *State Pollution Control Commission v. Blue Mountains City Council* (1991) 72 LGRA 345, Stein J held that there is no requirement of proof of mens rea in relation to harm to the environment, and that to hold otherwise would be likely to defeat the object and purpose of the legislation. In *State Pollution Control Commission v. New South Wales Sugar Milling Co-operative Ltd* (1991) 73 LGRA 86, Cripps J followed the decision in the *Hunt* case, reasoning that since "offences under the *Environmental Offences and Penalties Act* must be regarded as criminal", the legislature could not have intended that persons should be held liable without fault (at 104).

The matter was finally resolved by way of a stated case to the Court of Criminal Appeal in *Environment Protection Authority v. N* (1992) 26 NSWLR 352. Hunt CJ (with whom Enderby and Allen JJ agreed), held (at 359), that in a prosecution for an offence under s. 5(1) of the Act, the prosecution must prove wilfulness not only in relation to the disposal of waste, but also that the disposal was done either with intent or with an awareness of harm, or likely harm to the environment. However, proof of actual knowledge of harm to the environment was not essential, and could be inferred

from "wilful blindness" (at 358). Hunt CJ based his judgment on a construction of the Act as well as the common law principle, (as stated by Jordan CJ in *R v. Turnbull* (1943) 44 SR (NSW) 108, that criminal liability should be based on fault.

Negligence

Offences under Tier 1 extend not only to "wilful" acts but also to "negligence". This is a clear departure from traditional common law principles where criminal liability is contingent on intent or knowledge.

The EOPA is silent as to whether the relevant standard of negligence is the criminal standard of "gross" negligence or the lower civil standard. This matter was considered in *State Pollution Control Commission v. Kelly* (Unreported, Land and Environment Court, 21 June 1991 Nos 50190, 50191 and 50226 of 1990). Hemmings J (at 15) rejected the argument by the defence that only gross departures from appropriate standards of conduct should lead to conviction, stating that the appropriate standard of care will vary according to the severity of the case.

Hemmings J at (15) then stated the test of negligence as follows:

> Negligence . . . in my opinion is the failure to exercise such care, skill and foresight that would be expected of a reasonable person in the particular situation of the person charged.

According to this judgment, the standard of negligence is not fixed and in appropriate circumstances the lower standard imposed in civil cases can be applied.

In *New South Wales Sugar Milling Co-operative Ltd v. Environment Protection Authority* (1992) 75 LGRA 320, the Court held that the word "negligently" in s. 6 of the EOPA is determined not by a subjective test but by an objective test. However, Enderby J (with whom Hunt CJ and Allen J substantially agreed) commented (at 325) that, "the negligence which is required to be proved by the prosecutor in such a case, is negligence of the criminal type".

These decisions have raised a doubt as to the requisite standard of negligence in respect of Tier 1 offences. In *Environment Protection Authority v. Ampol Ltd* (Unreported, Land and Environment Court, 25 February 1993, No 50025), a case was stated to the Court of Criminal Appeal. The questions posed in relation to negligence were:

1. Is a high degree of negligence required entailing recklessness or wantonness, that is the criminal standard; or
2. Is the degree of negligence a failure to respond to a foreseeable risk in a manner to be expected of a reasonable person in the circumstances, that is the civil standard; or
3. If neither one or two applies, what is the test of negligence?

In *Environment Protection Authority v. Ampol Ltd.* (1993) 81 LGERA 433) the Court of Appeal indicated that statutory "negligence" is a matter of statutory construction to be determined independently of traditional criminal law concepts of negligence. Thus, it would appear that "negligence" could mean any one of "gross" negligence (as associated with the traditional criminal law), the civil standard, or some statutory half-measure depending on the circumstances of the case. On the return of

the matter to the Land and Environment Court, Pearlman CJ in convicting Ampol, applied a statutory obligation to avoid and minimise environmental harm (*Environment Protection Authority v. Ampol Ltd*, Unreported, 18 March 1994 No. 50025 of 1992). Since Ampol's conduct does not appear to amount to "negligence" in the criminal sense, it seems that Pearlman CJ applied the civil standard. Unfortunately, the issue still requires clarification.

Strict Liability Offences

The second Tier of the Act incorporates the mid-range offences which were previously dealt with in other pollution legislation, such as the *Clean Air Act 1961* and the *Clean Waters Act 1970*. Maximum penalties which can be imposed are $125 000 for corporations and $60 000 for individuals. The third Tier introduces an "on-the-spot" infringement notice system for dealing with minor environmental law enforcement issues. The Act is silent as to whether mens rea is a requirement in relation to these offences.

In *He Kaw Teh v. The Queen* (1985) 157 CLR 523 (at 533-4), the High Court recognised a tripartite classification of statutory offences. This can be summarised as follows:

- that mens rea applies in full;
- that the offence is one of strict liability;
- that the offence creates absolute liability.

As a general rule, in the absence of a contrary statutory intent, mens rea applies to all statutory offences (*Sherras v. De Rutzen* [1895] 1 QB 918 (at 921), adopted by Gibbs CJ in *He Kaw Teh* (at 528)). This usually requires proof of intention; although sometimes a statute expressly provides that negligence will suffice. The common feature of offences of absolute liability and strict liability is that they dispense with proof of mens rea. However, strict liability offences allow a defence of honest and reasonable mistake of fact. Strict liability is therefore a middle ground between imposing absolute liability and requiring proof of guilty knowledge or intention.

Traditionally, the offences incorporated in Tier 2 of the EOPA were relegated to the "regulatory" model and mens rea did not apply. This view has persisted since their incorporation in the EOPA although the penalties have been substantially increased. It has been held that Tier 2 offences impose strict liability, "in respect of which mens rea, knowledge or negligence are not ingredients" (*State Pollution Control Commission v. Tiger Nominees Pty Ltd* (1991) 72 LGRA 337, per Hemmings J at 342).

The penalty notice system under Tier 3 also imposes strict liability. This system does not fit into traditional notions of criminal law. Although the notice is issued when an offence has been committed, the payment of the fine does not lead to a criminal conviction. If the fine is not paid, it can be recovered as a debt in a civil court. However, if the person elects to have the matter dealt with in court, proceedings take place in the criminal jurisdiction of the Local Court.

For strict liability offences, the defence of "honest and reasonable mistake of fact" is available to the defendant (*State Pollution Control Commission v. Australian Iron & Steel Ltd* (1992) 74 LGRA 387 at 393; *Hunter Water Board v. State Rail Authority of*

New South Wales [No 1] (1992) 75 LGRA 15 at 19). The defence derives from the decision of the High Court in *Proudman v. Dayman* (1941) 67 CLR 536.

Interestingly, the Victorian courts have taken a much stricter view. In *Allen v. United Carpet Mills Pty Ltd* [1989] VR 323, Nathan J held that the offence of "causing pollution" to waters under s. 39(1) of the *Environment Protection Act 1970* (Vic.) was one of absolute liability. Thus, the defence of "honest and reasonable mistake" does not apply.

The New South Wales Court of Criminal Appeal has held that there is no defence of "due diligence" for strict liability offences either as a separate defence at common law or as an extension of the defence of "honest and reasonable mistake" (*Australian Iron & Steel Pty Ltd v. Environment Protection Authority*, (1991) 29 NSWLR 497).

Vicarious or Constructive Liability

Vicarious liability is an established common law principle in the field of civil liability. However, the common law, with its requirement of fault, has always been reluctant to impose criminal liability for the fault of others. In recent times, however, statutes have adopted the notion of vicarious criminal liability. This type of liability is being increasingly imposed in environmental legislation.

The question of whether Parliament intended to impose vicarious or constructive criminal liability in the EOPA has been considered in several cases all arising out of the same facts. Hunt, a bulldozer operator, was convicted of several offences under Tier 1 and Tier 2 of the Act arising out of his action in breaching the wall of a leachate dam and thereby polluting a nearby creek (*State Pollution Control Commission v. Hunt* (1990) 72 LGRA 316). Hunt was an employee of Tiger Landfill Services at the North Katoomba garbage site. The site was owned by the Blue Mountains City Council.

The case was the first successful prosecution since the Act had commenced, some thirteen months previously. It highlights the temptation for prosecutors to proceed under Tier 1 where "wilful" harm to the environment can be established, because of the difficulty of getting convictions and public and political pressure to do so. No lasting harm was occasioned to the environment, and the defendant was supporting a wife and child on a modest weekly wage of $430. He was fined $10 000 and ordered to pay the costs of the State Pollution Control Commission which amounted to $11 648.62, quite apart from his own costs. This seems to exalt political and community expectations over social justice and undermines the efficacy of the criminal law.

Liability of owners under Tier 1

Once a contravention under Tier 1 has been established, "owners of waste" in s. 5(1)(b) and "owners of substances" in ss. 6(1)(b) and 6A(1)(b), are liable without fault. In the sequel to the *Hunt* case, the Council was charged with an offence based on ownership of the tip *(State Pollution Control Commission v. Blue Mountains City Council* (1991) 72 LGRA 345). The Council successfully relied on the statutory defence in s. 7. Stein J found that Hunt's decision to breach the dam wall to allow the leachate to escape was one which the Council could not have been aware of and could not have had any control over (at 354). It would thus seem that s. 7 effectively eliminates the possibility of vicarious criminal liability, provided the person had no control over events and had acted with due diligence.

Liability of employees/independent contractors under Tier 2

The *Hunt* saga continued in *Tiger Nominees Pty Ltd v. State Pollution Control Commission* (1991) 25 NSWLR 715. In an action, premised on vicarious liability under Tier 2 of the Act, the Court of Criminal Appeal imposed vicarious responsibility on Hunt's employers, Tiger Nominees Pty Ltd. The Court did, however, point out that this liability only arises where the employee is acting within the course of his/her employment (at 721).

Uncertainty has arisen as to whether there is vicarious criminal liability for the acts of an employee of an independent contractor under Tier 2 of the Act. Whilst Bignold J in *State Pollution Control Commission v. Blue Mountains City Council (No 2*) (1991) 73 LGRA 337 at 348, considered that vicarious criminal liability would attach in these circumstances, Hemmings J in *State Pollution Control Commission v. Tiger Nominees Pty Ltd* (1991) 72 LGRA 337 at 342-343, was not prepared to commit himself to that view. The weight of subsequent authority in New South Wales supports the imposition of liability (*State Pollution Control Commission v. Australian Iron & Steel Ltd* (1992) 74 LGRA 387). A similar position was taken by the Victorian Supreme Court in *Allen v. United Carpet Mills Pty Ltd* [1989] VR 323.

Liability of corporations

According to the principle in *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153, the responsibility of the corporation was limited to the conduct and fault of the board of directors, the managing director, or persons to whom a function of the board had been wholly delegated. The Act has abandoned the principle of personal corporate criminal liability in favour of vicarious liability. Evidence that an officer, employee or agent of a corporation had, at any particular time, a particular intention, is evidence that the corporation had that particular intention at that time (s. 10(4)). There is no requirement, that the "officer, employee or agent" be acting within the scope of his or her actual or apparent authority at the time. However, in respect of Tier 1 offences, there seems to be no reason why the corporation should not be able to rely on the defence in s. 7.

The defence of honest and reasonable mistake would also be available in relation to offences under Tier 2, though in the case of corporations it may also be necessary to show that the person who made the mistake, had authority to act on behalf of the company *(State Pollution Control Commission v. Broken Hill Pty Co Ltd* (1991) 74 LGRA 351).

The system of basing corporate liability on the fault of individual members, may create more problems than it resolves (Fisse 1990, p. 604). To be an effective deterrent, corporate liability should be based on organisational blameworthiness. It should be imposed where a corporation has adopted a policy of non-compliance with environmental standards or "failed to exercise its collective capacity to avoid the offence for which blame attaches" (Fisse & Braithwaite 1988, p. 482).

Liability of directors and managers

Section 10 provides extensive liability for company directors and persons "concerned in the management" of a corporation. Each director or manager is deemed to have contravened the same provision of the EOPA as the corporation, irrespective of whether the company is proceeded against or convicted of the contravention.

The crucial issue in a decision to prosecute, will be "the persons's actual control over the corporation in relation to its criminal conduct" (EPA 1993, p. 12).

The Act does not define the term "director" or specify when a person will be "concerned in management", thus creating further uncertainty in application. Presumably, the courts will have regard to the definition of "director" in the corporations legislation (s. 60 of the *Corporations Law)*.

According to the *Draft Prosecution Guidelines* (EPA 1993, p. 12), it will be a question of fact in each case as to who is concerned in the management of the corporation. However, what is important is not the management role or capacity to influence, but whether there is evidence linking the person with the corporation's unlawful conduct (EPA 1993, p. 12).

It is unclear whether the courts will restrict the phrase to actual involvement in internal management or apply a wider interpretation extending to persons outside the corporation who have a certain amount of control over the affairs of the corporation (Segal 1991, p. 26).

In *Commissioner for Corporate Affairs v. Bracht* [1989] VR 821, a case under the Companies Code (Victoria), the phrase "concerned in management" was very widely construed. On that interpretation, it could refer to senior management, middle management or lesser employees who have been delegated full discretionary responsibilities, as well as persons outside the corporation.

As Segal (1991, p. 26) correctly points out:

> This uncertainty makes it even more important for financiers and insolvency practitioners to tread carefully particularly in informal work-outs when dealing with environmentally "suspect" assets.

The NSW Minister for the Environment, has foreshadowed new legislation to provide protection for lenders, mortgagees in possession, receivers for sale, and other such persons, provided they confine themselves to statutory rights for possession or sale and do not take further action to build up the business (Hartcher 1993).

Defences

The Act provides three statutory defences for directors and managers. These defences are available in prosecutions under all Tiers of the Act. These defences are, first, that the contravention was without the knowledge, actual, imputed or constructive of the person charged (s. 10(1)(a)). This is a departure from traditional notions of criminal law where actual knowledge is required. It would seem to incorporate the three kinds of knowledge recognised in equity (Meagher et al. 1992, para. 825-54*)*. It may be difficult to apply these equitable concepts in a criminal context. A second defence is available where the person establishes that he or she was not in a position to influence the conduct or the corporation in relation to the contravention (s. 10(1)(b)). Finally, it is a defence to establish that all "due diligence" was exercised (s. 10(1)(c)). This appears to be the most promising defence for directors and managers.

The ambit of "due diligence" was considered by the Land and Environment Court in *State Pollution Control Commission v. Kelly* (1991) 5 ACSR 607. Hemmings J pointed out (at 608) that due diligence does not require a standard of perfection and that whilst "all" must have its proper connotation, similar stress must be given to "due".

Hemmings J then stated (at 608-9):

> due diligence . . . depends on the circumstances of the case, but contemplates a mind concentrated on the likely risks. The requirements are not satisfied by precautions merely as a general matter in the business of the corporation, unless also designed to prevent the contravention. Whether a defendant took the precautions that ought to have been taken must always be a question of fact and, in my opinion, must be decided objectively according to the standard of a reasonable man in the circumstances. It would be no answer for such person to say that he did his best given his particular abilities, resources and circumstances.

"Due diligence" was considered in *The Queen v. Bata Industries Ltd* (1992) 7 CELR (N.S.) 293 (Ontario Provincial Court), affirmed (1993) 11 CELR (N.S.) 208 (Ontario General Division). Factors relevant to a "due diligence" program included remedial and contingency plans for spills, a system of ongoing environmental audit, training programs, sufficient authority to act and other indices of a pro-active environmental policy. To satisfy the requirements of "due diligence" a director should personally ensure that a pollution prevention system was established which complied with the terms and practices of the relevant industry.

Although the decisions of Canadian courts are not binding on Australian courts, it is likely that they will have regard to this judgment, given the paucity of case law in point.

The defence of "honest and reasonable mistake" would also apply for Tier 2 offences under general principles of criminal law.

The availability of the "due diligence" defence for "directors" and "managers" to some extent mitigates the fact that these persons are liable without proof of mens rea. At least, they can avoid liability if they can establish an absence of negligence.

Reversal of the Onus of Proof

The "golden thread" throughout the common law has been the principle "that it is the duty of the prosecution to prove the prisoner's guilt" beyond reasonable doubt (*Woolmington v. Director of Public Prosecutions* [1935] AC 462 at 481).

Tier 1 offences are premised on *unlawful* acts and generally require the prosecution to prove the guilt of the offender beyond reasonable doubt. However, in a clear divergence from the *Woolmington* ideal of justice, s. 10A of the EOPA places the onus of proving that the person had lawful authority on the defendant.

The Act provides for two statutory defences: s. 7 of the Act creates a statutory defence for Tier 1 offences, s. 10 provides a statutory defence for directors which applies to all Tiers of the Act. However, in each case, the onus of proof lies on the person wishing to establish the defence.

The Privilege Against Self-Incrimination

The Environment Protection Authority (EPA) has encountered significant evidentiary difficulties in obtaining self-monitoring records from industry. The central issue is whether the privilege against self-incrimination extends to protect corporations. In the Land and Environment Court, Stein J held that the privilege should not extend to a corporation (*State Pollution Control Commission v. Caltex Refining Co Pty Ltd* (1991) 72 LGRA 212). However, the Court of Appeal overruled Stein J, and held that "corporations are entitled to the privilege against self-incrimination" (*Caltex Refining*

Co Pty Ltd v. State Pollution Control Commission (1991) 74 LGRA 46 at 54). Although the Court held that s. 29(2)(a) of the *Clean Waters Act 1970* abrogates this principle in a proper case, this does not extend to requiring its production for the sole purpose of use in a criminal prosecution.

This case again highlights the conflict between upholding the rights of the individual and the public interest. According to the Court of Criminal Appeal (at 53), the privilege served three main purposes:

> First, it is an aspect of individual privacy and dignity . . . [second] it assists to hold a proper balance between the powers of the State and the rights and interests of citizens . . . [and; third] it is a significant element maintaining the integrity of our accusatorial system of criminal justice, which obliges the Crown to make out a case before the accused must answer.

It is ironic that in upholding the integrity of the administration of justice, that the Court of Criminal Appeal has simultaneously undermined its efficacy. Self-monitoring by industry is the cornerstone of the current system of pollution control. The EPA does not have the resources to conduct its own monitoring and is largely reliant on self-monitoring by industry. If results cannot be used in prosecutions, it will be extremely difficult for the EPA to prove its case.

On appeal, the High Court concluded, by a majority of four to three, like Stein J. at first instance, that the privilege against self-incrimination does not at common law extend to protect corporations (*Environment Protection Authority v. Caltex Refining Co Pty. Ltd.* (1993) 68 ALJR 127).

Conclusion

This analysis has identified a number of major difficulties in the application of general principles of criminal law to environmental law. Tier 1 offences impose high penalties, including imprisonment, yet many civil law principles have been incorporated into the legislation. Liability can arise from negligence and not necessarily of the criminal type. Quasi-strict liability is imposed for certain categories of persons. Even where statutory defences have been provided, the onus of proving them has been placed on the defendant. In the case of Tier 1 offences, where the legislature has been silent as to whether fault is required, the courts have been divided between maintaining the orthodox principles of the criminal law and applying the legislation in accordance with the public interest in eliminating pollution. The legislature should address these issues, instead of leaving the courts to grapple with the problems.

The experience with the EOPA has shown that the criminal law is a blunt instrument in pollution control. The criminal law can play a role in environmental law but it should be reserved for serious offences and the traditional requirement of mens rea should be applied. The stigma of a criminal conviction is an important deterrent. However, Sayre (1933, p. 80) points out the danger in imposing liability without fault:

> When the law begins to permit convictions for serious offenses of men who are morally innocent and free from fault, who may even be respected and useful members of the community, its restraining power becomes undermined. Once it becomes respectable to be convicted, the vitality of the criminal law has been sapped.

In the environmental context, the criminal law needs to be rethought and more innovative mechanisms developed for ensuring compliance. Polluters should be accountable, but the public sanctions of criminal law are not necessarily the most

effective ways of dealing with the situation. The use of the criminal law for minor offences was an arbitrary development in nineteenth-century England which saw the criminal law as a "convenient instrument for enforcing . . . petty regulation" in new areas of activity (Sayre 1933, p. 69). However, the solution should be not merely to increase penalties or to push the criminal law into these areas. For less serious environmental offences, civil sanctions may be more appropriate.

The difficulties in applying general principles of the criminal law to environmental law are only part of wider problems that need to be addressed. Also necessary is a pro-active program which focuses on preventing pollution before it occurs. This could be achieved through a commitment to the precautionary principle and clean production. The EOPA should be amended to require polluters to clean-up their pollution independently of whether a conviction is obtained. Public participation should be encouraged in all aspects of the process and vigorous educational programs should be pursued.

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PRACTICAL DIFFICULTIES IN PROSECUTING ENVIRONMENTAL OFFENDERS

Steven Molino

IN RECENT YEARS THERE HAS BEEN A TREND TOWARDS THE USE OF criminal sanctions against environmental offenders (Hemming 1992). Guilt must be proven beyond reasonable doubt. Sufficient and appropriate evidence is required but often prosecutions are dismissed because of inadequacies in evidence rather than the innocence of the accused (McCotter 1992).

There may be practical difficulties in collecting evidence of an environmental offence because of the time and nature of the offence, problems of access and inclement weather. Frequently, however, the wrong type or insufficient evidence is collected even when there is ample opportunity to collect adequate information. This often reflects a poor understanding of criminal proceedings on the part of control authorities.

This paper explores the practical difficulties of obtaining environmental evidence and then of using it to prosecute environmental offenders.

Hearsay Evidence

The nature of most environmental offences is that unless the offender is caught in the act it is difficult to prove beyond reasonable doubt that it was the accused who committed the offence.

This is particularly the case with noise offences because they have no residual effect. Once the noise emission ceases there may be no evidence that it ever took place. Where noise pollution breaches regularly occur, it is possible to set up noise loggers to record offences. But without an independent expert present at the time of recording it is impossible to prove what made the noise. Tape recorders can be set up to record when noise levels exceed a prescribed threshold but this is not always reliable or practical.

An acoustic consultant or a control authority inspector can be on call where repeat offences are anticipated. Even so, they often arrive too late to collect evidence. Isolated incidents are usually only reported if they occur at night or outside permitted operating hours. This, too, is usually outside control authority work hours and cannot be acted upon.

Even offences which leave lingering evidence are difficult to prove beyond reasonable doubt unless their occurrence has been witnessed. In these cases it is a matter of demonstrating that the pollution could not have possibly come from any other source. Most sediment, organic matter, odours and gases could be attributed to more than one source. It is only where the pollution contains a "fingerprint", a particular chemical which only the accused could have released, that this difficulty is overcome.

A further related difficulty is determining the duration of an offence. This is particularly relevant where it is necessary to prove that the offence harmed the environment. It is often difficult, if not impossible, to determine how long a pollutant was released prior to it being observed.

Data Collection

A pollution emission usually has to be measured in some way to prove that it falls within the definition of pollution and/or that it is harmful to the environment. The way in which this evidence is collected and used is crucial to successful prosecution. The person responsible for gathering it needs not only to understand the technical aspects of the sampling and the environmental impacts of the pollution but also needs to know how the evidence is going to be used and scrutinised in criminal proceedings.

Such evidence is open to challenge in the areas of sampling, storing, testing and interpretation.

Sampling

Technique

Samples must be collected using appropriate procedures and equipment but frequently they are not. There are usually, although not always, published standards for sampling. For example, *Australian Standard AS 2031-1986 Selection of Containers and Preservation of Water Samples for Chemical and Microbiological Analysis* (Standards Association of Australia 1986) sets out requirements for water samples. For various water quality parameters, it specifies whether sampling containers should be opaque or clear, glass or plastic, rinsed or sterilised. The standards should be followed because dirt, bacteria, light and even the material of the container itself can change the characteristics of the samples.

There are no similar standards for water sample collection methods but an adequate record of technique should be kept to prove that extraneous matter such as floating insects or bottom sediment has been excluded from the sample.

In the case of noise and air pollution, electronic equipment is used to take measurements directly. The reliability of measurements can be questioned if non-standard equipment is used or the equipment is not calibrated before and after measuring.

Location

Not only can poor technique and incorrect equipment devalue evidence but so can sampling locations. Sampling in the wrong location can raise the possibility of another party or mechanism being responsible for the pollution.

Air and water discharges should be sampled as close to the source as possible. Too often water samples are collected hundreds of metres from the discharge point. Other discharges or the ingress of contaminants between the discharge point and the sampling point then becomes a possibility which cannot be overlooked by a court.

It is not always possible to gain access to the discharge point because it might be in a small drain or sewer. Frequently, however, samples are collected at remote locations for no good reason. It can be, and often is argued, that what has been measured is someone else's pollution.

Samples should also be collected just upstream and just downstream of the discharge point to give an indication of the effect of the discharge on the receiving waters. Collection points need to be close enough to ensure that there are no other potential discharges entering between the sampling locations but also far enough downstream to ensure that the discharge and receiving waters are sufficiently mixed.

Noise measurements can often be corrupted by extraneous sources such as wind in trees or traffic noise. A monitoring location free from these effects should be chosen. Traffic can also have a significant effect on air quality measurements and unless a suitable sampling point has been chosen doubts can be cast upon test results.

Ambient conditions

It is rarely sufficient to simply sample or measure pollution. For evidence to be properly interpreted, and in many cases validated, it is essential to have information about ambient conditions.

Water pollution is measured as a concentration of pollutant in a sample but if some simple flow rate estimates are also made in the field then the evidence is far more useful. Most importantly, pollution concentrations plus flow rate estimates from the discharge point, and upstream and downstream sampling points enable a mass balance calculation to be carried out. The total quantity of pollution can be estimated and it may be possible to establish beyond reasonable doubt that the accused was solely responsible for the pollution of the receiving waters. It is remarkable how frequently such simple estimates are overlooked.

Such information also helps to assess the degree of harm which has been done to the environment. If the pollution can be traced as far downstream as possible then the distance from the source and the velocity of the flow will indicate a minimum duration for the pollution event. Combined with concentration and flow rate it can be used to estimate the total pollutant discharge.

Ambient weather conditions are also important in interpreting results and assessing environmental harm. Rainfall can affect the quality of natural receiving waters, increase the probability of other pollutants entering the system between sampling points, and dilute pollution effects. A simple observation as to whether or not it is raining at the time of sampling is helpful but often overlooked.

It is difficult, however, to get better rainfall information because rainfall varies considerably over time and space. Most official rainfall data is of total rain over a 24-hour period and usually at some location remote from the area in question.

Wind speed and direction and the presence of temperature inversions are important in the assessment of air and noise pollution. Most pollution licences apply under neutral weather conditions which means low wind speeds and the absence of temperature inversions. Stronger wind and temperature inversions can both refract noise and cause it to be louder than it would be at the same point under neutral conditions. Wind will increase the dispersion of air pollution but inversions can inhibit its dispersion.

In proving that pollution licence conditions have been breached it is necessary to assess whether neutral weather conditions occurred at the time. One practical difficulty in doing this is that most pollution measurements are taken at ground level. If the source is above ground there can be significant differences between wind speeds at the source and at the point of measurement. Another difficulty is determining whether or not a temperature inversion is present. It often cannot be determined rigorously without flying a weather balloon.

Storage

Sample storage arrangements are particularly pertinent to water samples. Standard procedures must be followed otherwise temperature, light or simply elapsed time can cause chemical or biological activity which will alter water quality between collection and testing.

Biological parameters should preferably be tested within six hours of sampling and most other parameters within 24 hours. Most samples should be refrigerated. This is often overlooked through carelessness. It is not unusual for samples to be carried around in the field in someone's sweaty hands and then left in a car in the sun. When they are finally taken to the laboratory more than 24 hours may elapse before they are tested. The validity of pollution evidence collected under such circumstances can be seriously questioned.

Often the travel time between the field and laboratory, and the laboratory's office hours and workload are practical limitations to testing samples within the required time frame. Yet even when everything has been done correctly the evidence can still be challenged if there is an inadequate record of procedures and times.

It may also be necessary to demonstrate that there is no possibility of samples having been swapped or confused, or deliberately or accidentally tampered with between collection and testing. This may mean tamper-proof sealing of sample bottles, locking of refrigerators and accurate recording of sample handling by each person involved from collection to testing.

Evidence can lack credibility if these things are overlooked but it frequently happens because those responsible do not anticipate how evidence may be challenged in court.

Testing

Once samples reach a laboratory there are standard testing procedures which need to be followed. It is prudent to use a NATA (National Association of Testing Authorities)

registered laboratory. Registration involves meeting standards for equipment, staff training and analytical procedures. However, registration is a safeguard and not a guarantee that test results will be free of errors.

It is not unusual, particularly when a laboratory is busy, for technicians to take short cuts in testing procedures. For 99 per cent of their work this does not affect the usefulness of the results yet it is a point at which evidence could be challenged.

Even if procedures have been strictly followed there may be insufficient record to demonstrate that this was indeed the case. It is most unlikely that any technician can be relied upon to distinctly recall testing a particular set of samples. For this reason, an adequate written record is invaluable. Accurate procedural records are also essential to eliminate doubts about sample substitution, sample contamination or equipment calibration.

Interpretation

The first step in interpretation is to see whether all of the evidence makes sense. This may seem obvious but can be overlooked. Such checks can pick up the presence of extraneous pollution sources, sample substitutions, procedural errors or calculation errors. If these errors are not found before evidence is presented to a court, the credibility of expert witnesses and any evidence they present may be undermined.

Another important part of interpretation is understanding the nature of the environment which has been polluted. This is important in establishing whether harm has been caused and in determining the appropriate penalty for the offence. It is remarkable how often interpretation of impact is based upon textbook information rather than inspection of the impacted environment. It is not unusual for evidence to be presented on how water pollution would affect aquatic vegetation, fish and benthos without any evidence that these organisms were actually present in the receiving waters. They may have been present further downstream but it would need to be demonstrated that the pollutants were still of sufficiently high concentration to cause harm at that location. This highlights the need to sample at appropriate locations and observe ambient conditions.

But what are ambient conditions? Are they the conditions which were occurring at the time of the offence or are they the range of conditions to which that environment is likely to be subjected? This may be an issue where the environment is not pristine and is subject to pollution from many sources. For example, a water discharge may have higher concentrations of sediment than the receiving waters at one time but those same waters may have considerably higher sediment concentrations after rain and in the absence of the discharge. In such circumstances it is questionable whether the discharge could be deemed to have harmed the environment and it could possibly be argued that the discharge is not in fact pollution. The practical difficulty in arguing such a point is being able to obtain the necessary water quality records to support or refute it.

Conclusion

There are numerous practical difficulties in prosecuting environmental offenders. Many arise from the need to gather evidence that will satisfy a criminal standard of proof. Often

the time of the offence or physical constraints prevent suitable evidence being gathered. However, a poor appreciation of how evidence will be used can lead to inadequate or questionable evidence being collected and incorrect conclusions being drawn. This is a practical difficulty which needs to be addressed by control authorities.

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TASMANIAN APPROACHES TO ENVIRONMENTAL OFFENCES

Richard Bingham
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TASMANIA'S *ENVIRONMENT PROTECTION ACT 1973* IS A CONSOLIDATED pollution control Act, which deals with pollution of all sorts.

Other miscellaneous Acts administered by the Department include the:

- *Litter Control Act 1973*;
- *Chlorofluorocarbon and Other Ozone Depleting Substances Control Act 1987;*
- *Pollution of Waters by Oil and Noxious Substances Act 1987.*

In common with many other jurisdictions, Tasmania has recently reviewed its environment protection legislation. The new Act, the *Environmental Management and Pollution Control Act 1994*, involves a very different approach to environmental offences than has been the case in the past. It is expected to commence operation early in 1995.

The *Environment Protection Act 1973*

The current Act imposes obligations on operators either to ensure that pollution does not occur or to ensure that, if it does, point source emission standards are not exceeded.

There are two enforcement systems under the legislation:

- A licensing system, with provision for public involvement in the terms and conditions upon which licences are granted. These "bubble" licences deal, or have the potential to deal, with all environmental issues arising from a particular operation.

  Public involvement in the assessment process is through a right to object to and appeal against the terms and conditions of a licence. By administrative policy, significant proposals are required to include a Development Proposal and Environmental Management Plan to describe what environmental impacts are likely and what environmental management measures are proposed.

- A series of offences, including operating without a licence or in breach of a licence condition, or "causing, permitting or knowingly permitting" pollution. The act uses the terms "emit, discharge, put and flow" in describing the act of pollution.

A pollutant may be:

- a substance prescribed to be so;
- a substance adversely affecting any beneficial use;
- a substance detrimental or hazardous to humans, animals, plants, microbes or property;
- offensive noise or odours.

Licences are required to operate any premise undertaking a "scheduled" activity, including:

- metallurgical works;
- mines, quarries, crushing and cement works;
- chemical works;
- gas works, oil refineries;
- woodchip, pulp and paper mills;
- boilers, incinerators, furnaces;
- dairy, meat and food processors;
- wool scours, tanneries and textile works;
- breweries;
- laundries;
- sewage treatment plants;
- refuse disposal sites;
- timber preserving plants.

Initially, such premises were scheduled without any threshold but subsequently thresholds were introduced to drop off minor operations.

A recent administrative change has been to introduce registration (as opposed to licensing) for minor operations.

The functioning of the licensing component of the Act is limited by a series of exemptions, granted by the Minister of the day.

Up until 1991, the Minister could exempt an otherwise scheduled premise from the need to hold a licence. Exemptions were used for premises that fell into the scheduled category but were not considered to pose an environmental threat. These exemptions have since been replaced by a requirement to register (as opposed to licence) the premise.

A different type of ministerial exemption—that exempting an operator from the requirement to comply with those sections of the Act prohibiting pollution—still exists,

however. There are approximately ten major industries operating under ministerial exemptions at present, almost all of them mining or metallurgical premises. There are approximately twenty municipal sewage treatment plants operating under exemptions.

As a part of the transition to the new 1994 Act, all ministerial exemptions are being phased out. Those operations which are still unable to comply with environmental regulations at the end of the five-year phase-out period—which expired on 30 June 1994—have been required to enter into binding environmental improvement programs under the new Act, to ensure their compliance with appropriate standards for the operation.

Since the Environment Protection Act took effect there has been a steady climb in the number of licensed premises in the State. The total number currently stands at approximately 800. In addition, there are some 300 minor premises registered. A number of legislative changes over the last 20 years has seen fluctuations in the total number of licensed premises and economic circumstances have also led to rises or falls in that number.

There has been a corresponding rise in the number of complaints although it is likely that this reflects a growing environmental awareness more than a strict correlation with the amount of industrial activity.

Prosecution is the only sanction against environmental offences provided for by the Environment Protection Act. The number of convictions achieved averages less than ten per year. Greatest success occurred in the mid-1980s but an increasing number of prosecutions came to be lost because of legal technicalities. This has lead to frustration and a reduction in the desire to prosecute in the first place. During the 1990s, convictions have been less than five per year.

The emphasis has shifted from prosecution towards an educative and encouragement role. In part this is a reflection of the frustrations associated with the 1973 Act and with the perennial problem of achieving a satisfactory nexus between the scientific and legal components of any environmental prosecution. However, it is also a recognition that prosecution is not an ideal solution even if the legal technicalities could be overcome.

The Act as it stands reflects the classic command and control approach to environmental management: "Do as I say or I will hit you with a stick". This is inflexible and ineffective. A far more productive approach is to use community attitudes as the driving force behind environmental protection. The government's role is then not to wield the big stick (although recourse to it as the ultimate sanction cannot be ruled out); its role is to educate, facilitate and encourage both the community and industry to actively participate in environmental management.

The *Environmental Management and Pollution Control Act 1994*: A New Approach

Two principal thrusts of public administration at present are the implementation of sustainable development (or in the Australian context, ecologically sustainable development), and micro-economic reform. Both these factors require an integration and rationalisation of regulatory controls and management mechanisms.

Simple command and control instruments do not deal with environmental issues in the integrated way demanded by the nature of those issues. In addition, existing environmental controls overlay a whole series of other controls (planning, economic controls and so on) in a way which wrongly encourages regulators and the community

to focus on components of the regulatory scheme (such as licences) rather than the "big picture"—the environmental outcomes.

In general, there is an increasing recognition that improved environmental outcomes require broader community and industry commitment to environmental goals. Governments certainly cannot now, if they ever could, do it all alone.

Sustainable development requires a commitment from all players in the environmental arena. Everyone has an environmental responsibility.

In these circumstances, the role of government changes. It becomes a persuader, coordinator, and advocate, as well as an enforcer. New environmental management mechanisms need to reflect this changed role. In Tasmania, these concepts have been enacted in the *Environmental Management and Pollution Control Act 1994*, which is expected to commence operation early in 1995.

The application of the sustainable development and micro-economic reform objectives has meant that the policy and regulatory environment has become outcome focused, and increasingly in individual cases will be created as the result of a process of negotiation between the regulated and the regulator.

The policy and regulatory initiatives under the new Act will seek to lessen the environmental impact of industry through the encouragement of resource efficiency, through continuous improvement and through the optimisation of pollution management.

In common with other regulatory agencies in Australia, the Tasmanian Department of Environment and Land Management recognises the limitations of an approach to environmental protection which is based solely on standard setting and policing. In order to be effective, and to achieve the best overall outcomes for the environment, we need to work with the other players, rather than attempting to control them. The new Act provides the instruments necessary to do this effectively.

That is not to say that there is not a place for strong and effective sanctions under the new legislation. There must always be a capacity to deal with the worst case scenario, and legislation must be drafted with that in mind. Nonetheless, those types of sanctions need to be seen as a last resort, to be utilised in circumstances where a cooperative approach has not delivered the necessary improvements in environmental outcomes.

Environmental standards have been vital to achieving improved environmental performance, and will continue to have a very important role to play. Increasingly, it is likely that measures—which may include standards—developed by the proposed National Environment Protection Authority will be adopted in Tasmania, on the assumption that they will incorporate sufficient recognition of the particular circumstances affecting the Tasmanian environment.

These national standards, like earlier standards before them, are likely to lead to improvements in technology, and to inform and improve the increasing environmental skills and environmental awareness that now characterises industry.

However, standards need to be augmented by other regulatory tools, which focus more specifically upon the particular operation and its effect on the ambient environment. These new tools need to focus on the equipment to be employed, or the technical requirements necessary to meet a prescribed effluent/emission standard. In this respect, they will move the focus away from end-of-pipe solutions, back up the pipe to the processes which produce the waste in the first place, and away from the end of the pipe to the impact of those wastes on the ambient environment.

The underlying philosophy is to incorporate sensible environmental thinking into the mainstream of business development. Throughout the whole industry sector, technologies and systems of production are changing rapidly, and over the next five to ten years will continue to change. Industries will be undertaking new investment and going through technological change and restructuring. As that change and restructuring occurs, regulators will want to make sure that it is carried out in a way which raises environmental efficiency. This will mean installing different equipment from that which they might have done without the environmental policy—using different production processes, perhaps making different products.

It is also choosing a path which others will be pointing to. Lenders, for example, increasingly are becoming aware of potential environmental liabilities stemming from their business activities. It is not just government or the community which is demanding environmental responsibility.

Nonetheless, there are obvious difficulties in the implementation of such an approach in the Tasmanian context, with the constraints and difficulties which currently face Tasmanian industry. In many instances, it is a question of survival rather than a question of environmentally-friendly development. But in those situations where investment is occurring, the regulatory scheme should ensure that that investment is environmentally efficient.

The means by which these new directions can be set in place will involve negotiation with operators. Plainly, there must be a bottom line, and the community will demand that this is met and enforced. However, the bottom line should not become a constraint which causes operators to focus on what is prescribed and diminishes the incentive to achieve continuous improvement. Furthermore, from the regulatory agency's perspective, there is an increasing recognition that policing of standards is both expensive and reactive and fails to sufficiently emphasise pollution prevention.

The instruments which are available need to be much more flexible. They need to take account of the particular circumstances of particular operators, and the particular effects upon the environment which those operations entail. Similarly, the enforcement processes need to be much more imaginative than the simple command and control model which currently exists.

It needs to be acknowledged that the other side of the flexibility coin is a loss of certainty. Nonetheless, this is in essence a problem of timing and implementation strategies, rather than a reason to abandon this approach. Operators need realistic time frames to deliver environmental improvements.

Similarly, there must be openness and public accountability, to ensure that negotiated agreements reflect the community interest, and are not abused to provide preferential treatment or to impose commercial disadvantage.

What Evidence is there that this Change is Occurring?

Sustainable development is recognised at an international, at a national and at a State level. In the State context, the *Environmental Management and Pollution Control Act 1994*, and new planning legislation in Tasmania has enshrined sustainable development as the principal objective of the State's resource management and planning system.

There is also widespread acceptance of sustainable development as a community and industry goal. The ramifications of its implementation are starting to be considered.

An example of the more recent industry approach to this issue is the Australian Manufacturing Council work on best practice environmental regulation. This attempts to introduce a component of international competitiveness into the other two dimensions which have characterised environmental regulation in the past, namely:

- domestic environmental concerns and community expectations; and
- the need to fulfil the obligations of international environmental conventions.

Approaches of this nature demand a more strategic, open and efficient environmental regulatory framework.

Increasingly, commercial opportunities flow from "being seen to be a good environmental performer". Industries which take this attitude are seen to be responding to community demands, and they benefit accordingly. Environmental advertising claims manifest this approach.

It follows from this that government endorsement of an operation's environmental performance can be seen to be an asset in the hands of the regulator. Commercial operators may seek, and be prepared to pay for, that endorsement.

Implications for Environmental Offences

It needs to be understood that any regulatory regime must include criminal sanctions as the bottom line enforcement tool. Environmental performance needs to be seen in the same way as any other type of conduct which we as a community wish to require of our members.

It is also reasonable to ensure that consistency of approach is obtained where jurisdictional boundaries are crossed. The commitment contained in Item 18 of Schedule 4 of the Intergovernmental Agreement on the Environment—to establish a uniform hierarchy of offences and related penalty structures to apply to breaches of any requirements applied under any agreed law for the purposes of complying with national environmental protection measures—is directly relevant.

However, uniformity of approach is not as critical where environmental issues are location specific. In these circumstances it is more important that the approach should complement all the other components of the sustainable development regime that applies to that operation.

Although there will always be a role for prosecutions, the obstacles need to be recognised. Prosecution is a blunt instrument. It is:

- hard to prove the commission of an offence, and often detailed scientific evidence is required;
- resource intensive;
- susceptible to undue legal hurdles;
- most importantly, prosecution does not prevent the environmental harm. It is an *ex post facto* sanction.

In Tasmania, prosecutions have been limited almost—but not quite—exclusively to the Litter Act. In a number of recent instances, it has not been possible to prosecute because of evidentiary difficulties arising from the factors listed above.

In summary, criminal sanctions are but one component of a comprehensive environmental management regime.

When prosecution or criminal sanction is necessary, attention should be paid to the use of less resource intensive mechanisms such as infringement notices for more minor offences.

In addition, legislation can provide assistance with some of the more difficult evidentiary issues, through the use of presumptions and averments.

Finally, liability needs to be targeted to where responsibility for the environmental offence lies. This is the philosophy underlying the extensions of liability in relation to corporations.

Other Components of a Regulatory Regime

Whilst retaining command and control tools, it is desirable that enforcement mechanisms other than prosecutions should be available. These may include notices requiring an environmental operator to improve performance, with a sanction of prosecution for failure to comply with the notice, rather than prosecution for a substantive environmental offence.

A further option is greater use of civil enforcement powers—injunctions and the like—both by government, and by empowering other members of the community to seek such enforcement mechanisms. This broadening of the enforcement responsibility is consistent with tenets of sustainable development, but care needs to be taken to avoid the "busybody" factor. In Tasmania, the endorsement of a tribunal is required before a member of the public can take enforcement action.

Attention also needs to be paid to incentives as well as sanctions. These can include the way in which fees are structured, and the use of economic instruments. A recent example is the proposal to increase the price of unleaded petrol because of its harmful environmental impacts.

Another possibility is the encouragement and utilisation of government endorsement of environmental performance as an asset. This is the principle underlying the Environmental Choice Program, but it is capable of application far beyond the question of endorsement of the environmental credentials of products.

A further step is the introduction of market based measures. They are in their infancy at present, but could conceivably encompass issues such as transferable pollution rights.

The new Tasmanian legislation, like that recently enacted in South Australia, includes a variety of enforcement mechanisms, which reflect the changing demands on environmental regulators.

PROBLEMS WITH DEFENDING CRIMES AGAINST THE ENVIRONMENT

Philip Clifford and Sharon Ivey

THE ENVIRONMENT WE LIVE IN IS OUR MOST PRECIOUS RESOURCE—OUR key to the future. Individuals or companies who wantonly and wilfully damage the environment or who are grossly negligent ought to be punished. Those are propositions which are unlikely to meet with much resistance. Like other areas of law which affect public health and safety, the environment ought to be subject to regulatory control. The question of how to police and enforce the protection of the environment reasonably and effectively, however, is a complex one. Certain basic principles of the common law protect a defendant facing criminal prosecution, including: the requirement of intention to commit a crime (mens rea); the presumption of innocence until proof of guilt beyond reasonable doubt in a court of law; the requirement that the prosecution carry the burden of proving all of the elements of an alleged offence beyond reasonable doubt; the privilege against self-incrimination and legal professional privilege. How far should "public welfare" legislation go in abrogating some or all of those basic principles in order to ensure that those who offend against regulatory statutes do not escape with impunity? What role should prosecutions and penalties play in prevention and deterrence in the area of environmental law? Should that role be different where companies or company officers are involved? When should an offender be sent to gaol for a crime against the environment? Is cooperation more important than coercion? These are hard questions which have been dealt with in different ways in different Australian and overseas jurisdictions.

Under the common law there were (and are) certain remedies against harming the environment—for example: negligence, nuisance, trespass and liability under the *Rylands v. Fletcher* (1868) LR 3 HL 330 rule for dangerous substances, which following *Burnie Port Authority v. General Jones Pty Ltd* (1994) 120 ALR 42 has been absorbed into general principles of negligence (*see* Bates 1992, pp. 36-46). There is now in addition to those civil causes of action a proliferation of State and federal legislation. In Western Australia alone there are over twenty statutes dealing with the environment, including the *Environmental Protection Act 1986* (WA) (referred to hereareafter as the EPA). Each State in Australia has a similar range of statutes and

there are at least twenty-five Commonwealth statutes dealing with air quality, water quality, hazardous substances, pollution, land use and various other environmental issues. The requirements differ (sometimes markedly) according to the jurisdiction, as do the penalties. Grabosky and Braithwaite (1986, p. 38) found that environmental regulation was marked by a greater diversity of regulatory behaviour than any other area reviewed in the course of their research.

The recent proliferation of such legislation reflects modern public concern for the environment, which must certainly be viewed in a positive light. The negative aspect of the legislation explosion can be seen, however, in the difficulties faced by the lay person in assimilating the changes and complying with such multifaceted legislation. It is a well-known adage that ignorance of the law is no excuse and it is clear that today's individuals and corporations must acquire an awareness and understanding of the requirements of a myriad of environmental and health-related legislation if they are to avoid (or at least minimise their chances of) prosecution. Once the requisite knowledge is acquired, the changing face of the law must be monitored continually. There is a time and monetary cost to such an education process (*see* Kube & Marr 1990, p. 4) and in today's economic climate the major concern for many businesses is mere survival.

That is not to say that the cost ought not to be borne or that the guilty ought not to be punished. However, while it is of vital importance that offenders be prosecuted, it is of equal importance that the laws governing such prosecutions be both fair and perceived as fair (*see* Ipp J in *Mallesons Stephen Jaques v. KPMG Peat Marwick* (1990) WAR 357 at 374). This paper will canvass some of the problems faced by defendants, especially corporate defendants, when prosecuted for alleged breaches of regulatory "public welfare" legislation and the effect of those problems on the public perception of the criminal justice system. The focus of the paper will be on the need for clarity, certainty, consistency and cooperation in environmental law.

Difficulties in Defending Prosecutions from a Western Australian Perspective

Mens rea v. strict/absolute liability

In the American case of *Morissette v. United States* 342 US 246 (1952) (at 250-1), the United States Supreme Court reaffirmed the importance of mens rea in criminal law:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to", and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecutions.

The doctrine of the guilty mind expressed in terms of intention or recklessness is at the foundation of criminal law in common law countries (*see R v. City of Sault Ste Marie* (1978) 85 DLR (3rd) 161 at 165 and Blackstone's *Commentaries on the Laws of England* (Blackstone 1809, p. 21)). However, the elimination of the common law requirement of mens rea in certain English, Canadian and various Australian State and

Commonwealth "public welfare" statutes has been justified by the alleged difficulties faced by the prosecution in proving fault and the need to protect community interests by enforcing a high standard of care (*see*, for example: Fisher 1981, pp. 194-9 and 207-208; Lipman 1991, p. 333; *Alphacell Ltd v. Woodward* [1972] AC 824 and *R v. City of Sault Ste Marie* (1978) 85 DLR (3rd) 161 at 171).

Although the US Congress (like the Australian Commonwealth and State Parliaments) can create strict liability offences, there is a strong presumption in common law countries that some level of mental culpability is required for a criminal offence (*Morissette v. United States*; Harris, Cavanaugh & Zisk 1988, p. 215). The element of mens rea is considered to be an element which the prosecution must prove in any alleged criminal offence unless that requirement is expressly or by clear implication abrogated by the relevant statute. The American federal government has argued that the presumption applies with substantially less force in the context of "public welfare" offences and that such statutes ought to be construed in a manner that will effectuate their regulatory purpose (*see United States v. Johnston & Towers Inc* 741 FC 2d 662, 666 (3rd Cir 1984)). Nevertheless, Congress has generally elected not to make environmental crimes strict liability offences. No American environmental statute imposes criminal liability absent proof of a particular state of mind (*see* Harris, Cavanaugh & Zisk 1988, p. 219).

The three approaches to the state of mind requirement in statutory offences set out by the High Court of Australia in *He Kaw Teh v. The Queen* (1985) 157 CLR 523 are: (a) mens rea; (b) strict liability (that is no need to prove intent but the defence of honest and reasonable mistake is available); and (c) absolute liability. The United States has generally followed the approach in (a). Canada has wavered between (a) and (b) and England has followed the approach in (c) (*see Alphacell Ltd v. Woodward* [1972] 2 All ER 475 and the discussion of that case in Fisher 1981, pp. 192-201). Australia has hovered between (b) and (c), depending on the legislation in question and the jurisdiction (*see*, for example, the conflicting views for NSW and Victoria expressed in *Cooper v. ICI Australia Operations Pty Ltd* (1987) 64 LGRA 58 and *Allen v. United Carpet Mills Pty Ltd* [1989] VR 323 respectively). *Cooper* held that the defence of honest and reasonable mistake applied at least to an offence of causing pollution under s. 16 of the *Clean Waters Act* 1970 (NSW), while *Allen* held that it did not apply to s. 39(i) of the *Environmental Protection Act* 1970 (Vic). A discussion of those cases can be found in Bates 1992, pp. 315-16).

While the English and Australian Parliaments have been less reluctant to dispose with the requirement of intention (wilfulness, recklessness) in "public welfare" statutes setting out specific requirements for the public good, in each country there has been some reluctance to abandon fault entirely (*see*, for example, the discussion of causation in *Alphacell* in Fisher 1981, pp. 196-201). The realisation that strict or absolute liability offences imposing large penalties should not be brought lightly has been reflected in certain protective provisions and policies such as:

- tiered offences requiring differing degrees of mens rea (for example the three tiered system in the *Environmental Offences and Penalties Act 1989* (NSW) (EOPA) where proof of intention or negligence is required for the offences with the most severe penalties);

- a requirement that the minister or some other high ranking individual must approve all prosecutions;

- systems of warning notices;
- policies supporting prosecution as a last resort.

The width and vagueness of pollution provisions

Environmental offences are generally expressed in broad terms and are thus difficult to defend (*see* Hemmings 1992, pp. 1, 5-8). In the case of s. 49(1) of the EPA, for example, if the Full Court had not decided to read down the provisions of the legislation in *Palos Verdes Estates Pty Ltd v. Carbon* (1991) 72 LGRA 414, the pollution provision would have been effectively undefendable.

Section 49(1) of the EPA makes it an offence to cause (or allow to be caused) pollution. The term "pollution" is defined in the EPA as "a direct or indirect alteration of the environment: to its detriment or degradation; to the detriment of any beneficial use; or of a prescribed kind". The term "environment" is defined to mean "living things, their physical, biological and social surroundings, and interaction between all of these; . . . ". The pollution offence is so broadly defined it covers almost any act associated with the environment, including: treading on an ant or pulling out a flower (Rowland J in *Palos Verdes* at 442), cutting a lawn, pruning roses, cutting down a tree, clearing a housing block to create access, driving a motor vehicle, lighting a fire or burning rubbish (Malcolm CJ in *Palos Verdes* at 427 & 428).

Mr Justice Wallace, referring to the breadth of the pollution provision in the *Palos Verdes* case, said (at 433) that "a breach of the section, as framed in the legislation, can only be in the eye of the beholder". Chief Justice Malcolm found in the same case (at 428) that, if the words of the provision were given a literal interpretation, the legislation would be ambiguous and uncertain and have an absurd and capricious operation by creating such a wide class of offenders who would be guilty of an absolute liability offence. For that reason, the Full Court took a purposive approach to the interpretation of the provision, finding (at 429) that the words "detriment" and "degradation" in the definition of "pollution" in s. 3(1) must take their colour from the ordinary meaning of "pollution" which was said to be consistent with the purposes of the EPA, the objectives of the Authority (s. 15) and the functions of the Authority (ss. 16(b),(c),(d),&(e)). On that approach, unauthorised bulldozing of a track (to which access had been granted) through Crown bush to obtain access to the defendant's land did not constitute pollution (*see* the discussion in Hemmings 1992 of the approaches taken by courts to broad environmental provisions, pp. 5-8).

An offence which is drawn so widely does not provide much in the way of guidance to industry as to what constitutes unlawful conduct and thus cannot be seen as a deterrent. Where a standard is not capable of being met, a penalty, regardless of its severity, will not have a deterrent effect.

Possible defences under the EPA

An individual or corporation faced with prosecution under s. 49(1) of the EPA would appear to have three possible defences:

- compliance with any of the standards, notices and so on set out in s. 74(3)(a) or in the exercise of any power conferred by the EPA (s. 74(3)(b));

- accident or emergency combined with due diligence and early reporting to the Environmental Protection Authority (s. 74(1)); and perhaps

- honest and reasonable mistake of fact (s. 24 of the Criminal Code (WA)), provided that the pollution offence is a strict liability, not an absolute liability, offence.

The defences under s. 74(1) of the EPA are tightly worded. They rule out negligence in cases of accident. They confine emergency situations which will serve as a defence to a discharge or emission which occurred "for the purpose of preventing danger to human life or health or irreversible damage to a significant portion of the environment". In both cases they apply only where the occupier took "all responsible precautions to prevent that discharge or emission" and notified the Authority in writing "as soon as was reasonably practicable" after the event. The term "significant portion" is not defined in the legislation and must therefore be decided by a court of law in the circumstances of each case.

Section 36 of the Criminal Code states that the provisions of Chapter V of the Code apply to all persons charged with any WA statutory offence. Despite s. 36, it appears that the Chapter V defences of due diligence, accident and emergency have been overridden by the specific requirements of s. 74 of the EPA. It is also unlikely, as a matter of public policy, that the Chapter V defence of honest and reasonable mistake will be successful in prosecutions in WA involving health and safety or the environment in any but the most exceptional cases, at least in courts of first instance.

The Role of Common Law Privileges

Privilege against self-incrimination

The privilege against self-incrimination, which can be excluded expressly or by clear implication by statute, is not expressly excluded by the EPA. The privilege has been affirmed as an important principle of the common law by the High Court on various occasions (for example *Petty v. The Queen* (1991) 173 CLR 95) and very recently in *Environment Protection Authority v. Caltex Refining Co Pty Ltd* (1993) 118 ALR 392). The privilege was confirmed for corporations in environmental cases by the New South Wales Court of Criminal Appeal in *Caltex Refining Co Pty Ltd v. State Pollution Control Commission* (1991) 74 LGRA 46. However, that decision was overturned by the High Court in a 4:3 decision in *EPA v. Caltex*. The privilege against self-incrimination was found by a narrow majority of the High Court (Mason CJ, Toohey, Brennan and McHugh JJ) not to apply to corporations, although the related privilege against self-exposure to a penalty was held by Brennan J to apply to corporations and Deane, Dawson and Gaudron JJ, in a strong minority judgment, found that the privilege against self-incrimination applied to corporations (*see also Trade Practices Commission v. Abbco Ice Works Pty Ltd*, unreported, Full Court Federal Court, 19 August 1994).

The EPA contains certain self-reporting requirements which have the effect of overriding at least some of the protection offered by the privilege against self-incrimination or the privilege against self-exposure to a penalty. Section 72(1), for example, requires that (subject to s. 72(2)) where a discharge of waste occurs as a result of an emergency, accident or malfunction or otherwise than in accordance with a works approval licence or an abatement notice requirement, or is of a "prescribed

kind" and has caused (or is likely to cause) pollution, the occupier of the relevant premises must notify the Environmental Protection Authority as soon as practicable after the discharge. The accident or emergency defence under s. 74(1) of the EPA also requires any person who may wish to rely on that defence to have reported themselves in a timely fashion—that is before knowing whether or not they will be prosecuted and probably before having access to legal advice. Those disclosure requirements, combined with the wide powers of entry, inspection and production allowed to authorised persons or police under ss. 81-83 of the EPA and to inspectors under ss. 88-93 of the EPA (and the heavy penalties for obstructing inspectors) add to the difficulties of defending an allegation under the EPA.

Legal professional privilege

While legal professional privilege is firmly established at common law (*see*, for example, *Baker v. Campbell* (1983) 153 CLR 52 and *Grant v. Downs* (1976) 135 CLR 674), that privilege is being continually eroded by legislation aimed at regulatory enforcement, despite criticisms by various commentators (for example, *see Corporate Affairs Commission of NSW v. Yuill* (1991) 100 ALR 609 and Longo 1993 in regard to the Companies Code). Currently, it would appear that although a report prepared for the purpose of legal advice or pending litigation will receive the protection of legal professional privilege, a report or environmental audit prepared for internal use to assess and improve compliance with environmental legislation may not (*see* Hemmings 1992, p. 4; Lipman 1991, p. 324; & Buckley 1991). Given the fact that such audits may be used against the defendant during a prosecution, companies are unlikely (or less likely) to pursue an active and open policy of environmental audits.

Certain Australian commentators have endorsed the American Environmental Protection Authority's willingness to allow voluntary environmental audits to be exempt from disclosure requirements in order to encourage such audits and the improved pollution control which may result (*see*, for example, Bisits & Jamieson 1990, pp. 30-1). New South Wales has indicated an intention to guarantee confidentiality for voluntary audits and to exempt them from the court process, including discovery (*see* Ministry for the Environment 1991, p. 8 and para. 19.1 of the recently published *EPA Protection Guidelines* 1993). Victoria has also published an enforcement policy indicating a similar intention (*see* Environment Protection Authority (Vic.) 1993, p. 10). This practice was encouraged in a paper presented by Brennan and Garrett (1990, pp. 17-18). It is evident that requiring disclosure of audit reports forces firms to protect themselves by adopting an approach based on minimal cooperation (Farrier 1992, p. 108).

We recommend the non-disclosure of voluntary audits for other Australian jurisdictions in order to encourage, rather than punish, individuals and corporations who wish to take active steps to improve pollution control. However, we note that it would be preferable to set out such guarantees more clearly in the legislation itself. Guidelines tend to be more loosely drafted than statutes or regulations and are not legally binding (*see* para. 2.2, *EPA Protection Guidelines 1993* and the comments by Technical Support on p. ii, Environment Protection Authority (Vic.) 1993). A few Australian jurisdictions (South Australia, Tasmania and Queensland) are in the process of introducing legislation to remedy the problem—an approach which is to be commended.

Multiple Charges arising out of One Incident

Increasingly it is becoming the practice for complainants bringing prosecutions under regulatory legislation, such as the EPA, to charge the defendant with a series of offences arising out of the same incident. While this practice has often been criticised by the courts, the approach adopted by them has generally been to leave such decisions in the hands of the prosecuting authority (*see* the discussion in Hemmings 1992, pp. 4-5 and in Farrier 1992, p. 102, note 72 and the cases cited therein). This practice is especially unfair where the defendant is a first offender who has exercised due diligence, but who does not fit into the narrow statutory defences and where little harm was done. In such a case, the defendant is likely to feel victimised and may well be reluctant to pursue a close cooperative relationship with the regulatory body in the future.

An act by an individual or corporation causing pollution may breach more than one statute in a particular jurisdiction. If the pollution moves through the air or water into another jurisdiction, it may also breach one or more statutes in a second jurisdiction and/or activate liability under Commonwealth legislation (*see* Bates 1992, pp. 312-13). While prosecution in more than one jurisdiction may be a just result in cases of wanton or grossly negligent harm to the environment, it may not be warranted in a case where the breach is minor and little harm was done.

The Cost of Defending Prosecutions

Defending prosecutions under regulatory enforcement legislation is expensive, often running into thousands or even tens of thousands of dollars. Such costs are not generally recoverable even if the defendant is acquitted, although a small proportion of the costs may be allowed in the judge's discretion where statutory provision is made for costs orders. While convictions can be appealed, the defendant may be reluctant or unable to expend further sums on the possibility that the finding may be overturned on appeal.

Special Problems for Corporate Defendants

Corporations

According to common law principles of corporate liability most widely accepted in Australia today, a corporation will only be liable for negligence or wilful default if top end management (the guiding mind of the corporation) has exhibited the required degree of fault (*see Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153; *G J Coles & Co Ltd v. Goldsworthy* [1985] WAR 183; and Thomson 1992, p. 112). The confusion engendered by the various approaches taken by the courts in tracing corporate responsibility makes it difficult for defendants and prosecutors alike to know with any precision when a corporation will be found guilty of the conduct of an officer or employee.

The difficulties experienced in successfully prosecuting corporations, combined with the doubts expressed by some commentators about the effect of fines on corporations, has led to:

- legislative provisions imposing vicarious liability on companies for acts done by officers and managers; and

- an increasing willingness on the part of government agencies to pursue prosecutions against senior individuals within the corporate structure as well as, or instead of, the offending corporation.

This approach has been criticised as focussing away from organisational blameworthiness and discarding the elements of rehabilitation and deterrence in favour of retribution (Lipman 1991, p. 334).

Company officers and managers

Company officers and managers bear an especially onerous burden under the new legislative schemes, due to the growing trend in Australia and elsewhere of holding company officers liable for the acts or omissions of employees of the company or of the company itself, in some cases whether or not the officers have knowledge of such acts or omissions (*see* McDonald 1992, p. 9 & footnote 54).

Some recent Australian statutes have abandoned the *Tesco* principle (that is, that vicarious liability has no place in criminal law) in favour of vicarious criminal liability for corporate officers and managers. Under s. 10 of the New South Wales EOPA, for example, every director or manager of a corporation is deemed to have contravened the same provision as the corporation regardless of whether the corporation is prosecuted, subject to three possible defences:

- due diligence;
- no knowledge of the contravention; or
- not having been in a position to influence the conduct of the corporation

(*see* the discussion in Lipman 1991, p. 332; *see also* s. 118 of the EPA which imposes derivative liability on officers or managers in respect of a Part V offence by the company). The effect of such deeming provisions is to force the onus of proving those matters onto the defendant. Fisse (1990, p. 5) has criticised the liability imposed on officers and managers in s. 10 of the EOPA, where the stakes are very high (seven years in prison and/or a heavy fine for Tier 1 offences), as "an extreme and unjustified form of rugged individualism"—a view which we share.

In the United States, the developing doctrine of the "responsible corporate officer" (originally developed for strict liability offences such as those under the Food and Drug Act and being expanded in the Federal Courts to environmental offences which include a mens rea element) allows for corporate officers to be held vicariously liable for violations of statutes without regard to their intent only where they are "vested with the responsibility, and power commensurate with that responsibility, to devise whatever means are necessary to ensure compliance with the Act" (*United States v. Park* 421 US at 672 (1975) & note 14; Harris, Cavanaugh & Zisk 1988, pp. 228-33; Celebrezze, Jr, Muchnicki, Marous and Jenkins-Smith 1990, p. 230). More than mere corporate position is necessary to impose vicarious liability on an officer (*United States v. Park* 421 US 458, 674 (1975)). The "responsible corporate officer" approach appears to be a more accurate approach to the analysis of individual fault within corporations and was applied recently in the Canadian case of *R v. Bata Industries Ltd* (1992) 9 OR (3rd) 329 at 365.

Are Higher Penalties the Answer?

At a time when many are questioning whether incarceration really fulfils the intended purposes of rehabilitation or deterrence in regard to minor crimes against the person and property, more and more regulatory legislation is imposing imprisonment as a possible sanction against company officers and managers for "public welfare" offences. In our experience, prosecutions in the areas of health and safety and the environment are taken very seriously by corporations and their corporate officers and managers, regardless of the severity of the penalty. The very idea of being found to have committed a criminal offence is generally repugnant and frightening to upper management. As stated by Frederick Barnes (1986, p. 5, note 18):

> As one commentator has put it:
>
> Industrial corporations (and their actors), like anyone else, want to be regarded as responsible members of the community in which they operate, and a criminal conviction for pollution is not a highly valued mark of good citizenship.

Within a corporation or firm, such prosecutions cause repercussions against those seen to be responsible. Externally, publicity associated with such prosecutions is a source of embarrassment and often loss of business (for example, due to union unrest and/or lost contracts) for the firm or company in question. While the imposition of penalties against corporate officers is not objectionable per se, the problem arises from the combination of severe penalties with strict liability offences not requiring intent, negligence or even knowledge. The concept of intent (mens rea) is an important one at common law. Society ought to be very careful when imposing a last resort penalty like incarceration as a punishment for strict or absolute liability offences.

Various commentators have emphasised the importance of cooperation between government and industry (for example, Farrier 1992, pp. 86-94 & 108ff) and suggested that more appropriate sanctions than fines ought to be levied against corporations, including: corporate probation; punitive injunctions; community service orders; equity fines (stock dilution); adverse publicity; managerial intervention and/or a system of enforced internal accountability (*see* Fowler 1990, at p. 273 and the articles cited in note 17; Fisse 1990, p. 911; Barker 1984; and Lipman 1991, pp. 334-8). The US Sentencing Commission's *Draft Guidelines for Organizational Defendants* (1990) have adopted such an approach in combination with more traditional penalties such as fines. In our view, some or all of the above approaches ought to be pursued in regard to strict liability offences, whereas offences of dishonesty and intent (such as wanton or wilful damage to the environment) ought to retain the possibility of more punitive penalties (*see* Farrier 1992, pp. 123-4).

The Need for Clarity, Certainty, Consistency and Cooperation

The recent rapid proliferation of State and federal environmental legislation, combined with a dilution of certain basic tenets of the criminal law to facilitate prosecutions under such legislation, has complicated the law unnecessarily and rendered the requirements for compliance less than clear. Clarity, certainty and consistency in the law is necessary to encourage compliance and to ensure fairness to defendants accused of criminal conduct. We would encourage the Commonwealth and State governments to move toward a more unified national approach to environmental law to simplify and

assist compliance. The input of various interest groups, including State Law Societies, could prove very useful in that regard.

In order to encourage industry cooperation and maximum compliance, it is important that regulatory standards be seen as achievable, that offences be seen as defendable and that:

- regulation not be used to take the place of communication and cooperation between industry and government;
- strict liability offences be expressed as narrowly as possible;
- minor or accidental breaches not be prosecuted where to do so would be unjust in the circumstances;
- large fines or imprisonment be seen as a last resort for serious or repeat offenders;
- legal protection, rewards and incentives be offered for initiatives shown by individuals and companies to ensure compliance;
- creative alternatives to fines be instigated in relation to corporations;
- the approach to corporate liability be clarified;
- where large maximum fines or terms of imprisonment are imposed as penalties by the legislation (for example, Tier 1 offences), the requirement of mens rea (in the form of at least criminal negligence and preferably with a minimum standard of recklessness) be retained; and
- Tier 2 and Tier 3 offences be distinguished clearly from Tier 1 offences both from the point of view of mens rea (for example, negligence or strict liability as opposed to mens rea) and penalties.

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THE ROLE OF THE NSW LAND AND ENVIRONMENT COURT IN ENVIRONMENTAL CRIME

Paul Stein

IT IS NOT THE PLACE OF THIS PAPER TO EXPLORE THE NATURE OF environmental crime and the role of criminal law in the protection of the environment, nor to appraise the response of the NSW Land and Environment Court or the NSW Court of Criminal Appeal to environmental protection through the application of the criminal law. While the court's role is more reactive than creative, it nonetheless continues to impact on the development of legal principle, procedural rules and the imposition of penalties. In this way the court is confronted with the ongoing delineation of the role of criminal law in environmental protection. This is especially so as legislation is enacted to close perceived loopholes and the contest between prosecutors and defendants becomes ever more closely fought.

Jurisdiction

Environmental crimes are allocated to Class 5 or the summary criminal enforcement jurisdiction of the Land and Environment Court. Prosecution under Class 5 needs to be seen in its broader context as one of a number of strategies pursued through the Court to achieve pollution control. Other strategies seek to achieve compliance through planning instruments and policies, pollution licences and civil enforcement for breaches of pollution laws. This paper begins by outlining the Court's jurisdiction in pollution control generally, in order to provide a context for the discussion which follows on the role of the Court in environmental crime.

The Court was established in 1980 as an integrated superior court of record charged with the exclusive jurisdiction to determine disputes arising under more than 20 "environmental laws". These statutes make provision for the protection of the environment and include planning, waste management, hazardous chemicals, coastal protection, ozone layer protection, marine pollution, biological control of organisms, air and water pollution and noise pollution. The jurisdiction of the Court in pollution control arises in three distinct areas or classes of work—Classes 1, 4 and 5.

In Class 1 the Court is concerned with development appeals and appeals against the grant, refusal or conditions imposed on a wide range of pollution licences, approvals and notices. Pollution licences arise under various statutes, such as the

Clean Waters Act 1970, *Clean Air Act 1961*, *Pollution Control Act 1970*, *Noise Control Act 1975*, *Biological Control Act 1985* and *Environmentally Hazardous Chemicals Act 1985* (s. 17 *Land and Environment Court Act 1979*). These are merit or administrative appeals in the nature of appeals de novo. Their numbers have not been great, but are increasing. It may be reasonably anticipated that appeals against the refusal of, or conditions attached to, pollution control licences will become more frequent in light of policy changes, such as "prosecutable reality". This policy has altered licence levels to reflect an immediately achievable reality. It contrasts with the former practice of the State Pollution Control Commission (SPCC) of setting limits which constituted "targets" often not capable of being achieved or subsequently enforced. Licences now accord with achievable reality and include, where appropriate, three to five-year programs to reduce pollution emissions, with a view to enforcement or prosecution for breaches.

Recently there has been an increase in the utilisation of the Court's mediation service for licence disputes, with apparent success. From a public interest viewpoint this may be of concern. Pollution licences are not merely private arrangements between government regulators and industry, but rather are set in the public interest. However, if the Environment Protection Authority (EPA) is on notice of strong community objection, it is unlikely that such an appeal would proceed to mediation bearing in mind the EPA's role to promote community involvement in environmental decisions (s 6.(1)(b) *Protection of the Environment Administration Act 1991*). Alternatively, the Court would permit objectors to be involved in the mediation process if they so desire.

Class 4 of the Court's jurisdiction is that of civil enforcement and judicial review. In this area the Court has the same jurisdiction as the NSW Supreme Court would have, but for s. 71 of the Land and Environment Court Act—the power to hear and dispose of proceedings to enforce any right, obligation or duty conferred or imposed by a planning or environmental law; to review or command the exercise of a function under such a law; and to make declarations of right in relation to any such right, obligation or duty (s. 20 of the Act).

"Planning and environmental laws" are defined to include the Clean Air Act, Clean Waters Act, Biological Control Act, *Coastal Protection Act 1979*, *Environment Planning and Assessment Act 1979*, Environmentally Hazardous Chemicals *Act*, *Heritage Act 1977*, most of the *Local Government Act 1993*, *National Parks and Wildlife Act 1974*, Noise Control Act, Pollution Control Act and the *Waste Disposal Act 1970*. The jurisdiction in Class 4 also includes a host of other statutes including the *Wilderness Act 1987* and, importantly the *Environmental Offences and Penalties Act 1989* (EOPA).

Lastly, in Class 5 the Court has jurisdiction to hear and dispose summarily of prosecutions under a large range of enactments. The Environmental Offences and Penalties Act is the keystone legislation for criminal liability for environmental damage. This Act brings together offences arising under a number of existing Acts (Clean Air Act, Clean Waters Act, Noise Control Act, Pollution Control Act), and creates new wide-ranging pollution offences. Statutes not encompassed by the EOPA include the Local Government Act, Marine Pollution Act, National Parks and Wildlife Act, Waste Disposal Act and Heritage Act. The principal prosecutor is the NSW Environment Protection Authority. However, other prosecutors include the Maritime Services Board, the Water Board, the Hunter Water Board, the Department of Water Resources, the Soil Conservation Commission and local government councils. Councils have an additional incentive to bring their own prosecutions for, under s. 694

of the Local Government Act, penalties secured from convictions are payable to the council rather than to consolidated revenue.

The EOPA creates a three-tiered system of offences. Tier 1 offences are the most heavily penalised and render corporations liable to a penalty not exceeding $1m or, for individuals, $250000, or a maximum 7 years imprisonment, or both. If proceedings are brought summarily in the Land and Environment Court the maximum penalty which may be imposed is $1m for a corporation and $250 000 and/or 2 years imprisonment for an individual. Only the Supreme Court, on trial by indictment, may impose a sentence of between 2 and 7 years. These Tier 1 offences involve either wilful or negligent actions which cause or are likely to cause harm to the environment. A defence is provided where the commission of the offence was due to causes beyond the defendant's control and the person charged took reasonable precautions and exercised due diligence to prevent the commission of the offence (s. 7(a) (b)).

Tier 2 relates to offences under the Clean Air Act, Clean Waters Act, Noise Control Act, Pollution Control Act, and certain littering offences. The maximum penalties vary but for the principal statutes (not noise or littering) they are $125 000 for a corporation (and up to $60 000 per day for continuing offences) and $60 000 for an individual and half that amount for a daily continuing offence. Generally these offences attract strict liability although the *Proudman v. Dayman* defence—honest and reasonable mistake—appears to be available in most instances. If Tier 2 offences are prosecuted in local courts the maximum penalty is $10 000. Tier 3 provides for penalty notices to be served for a variety of minor pollution offences. The "fine" specified in a penalty notice varies, with a maximum of $600 set.

Amendments to the EOPA made in 1990 also redirect all appeals by the Crown or a defendant from the conviction or dismissal of environmental offences, or penalties imposed by magistrates, from the District Court to the Land and Environment Court. This new Class of appellate jurisdiction—Class 6—has yet to be proclaimed to commence. Just why this is so has never been made clear. It appears that the Attorney-General's Department perceives some administrative problems[1].

Prosecution Statistics

The numbers of prosecutions in Class 5 of the Court's jurisdiction provide an indication of the change in government policy towards polluters. The statistics (which exclude prosecutions in local or magistrate's courts) are:

Year	*Number*	*Year*	*Number*
1980	1	1987	23
1981	12	1988	40
1982	11	1989	193
1983	17	1990	325
1984	15	1991	143
1985	19	1992	37
1986	35	1993	47

1. This has since been proclaimed to commence on 4 July 1994.

Note: The figures are mainly SPCC or EPA prosecutions but also include other prosecutors.

The low number of prosecutions in the early 1980s was a direct reflection of the SPCC policy of the time which viewed prosecution as a last resort. However, in its 1983-1984 *Annual Report*, the SPCC announced a change in policy from one based upon conciliation and education to one emphasising prosecution if sufficient evidence exists "unless there are quite exceptional circumstances". The later rise in prosecutions (in 1989, 1990 and to a lesser extent 1991) was a somewhat belated reflection of this change in policy. The recent downturn in prosecutions warrants some analysis. There are probably a range of factors involved, relating mainly to the EPA rather than other possible prosecutors. These may include:

- the advent of the new EPA and the administrative difficulties this must have involved;

- the development of Prosecution Guidelines as required by s. 16(c) of the Protection of the Environment Administration Act. The first of these guidelines was completed in July 1993. Greater scrutiny of potential prosecutions by the EPA's environmental counsel and its Board may also act as a filter;

- the amendment of the statutory limitation for bringing prosecutions from 6 months to 3 years in Tier 1 offences and 12 months for (most) Tier 2 offences. Consequently, matters are possibly not being prosecuted at the same rate. In addition, it may be that some investigations will be terminated over time with loss of evidence or witnesses;

- the previous practice of the prosecutor (mainly the SPCC) of "spraying" prosecutions had been criticised by the Court as unnecessarily complicating hearings, as well as being subject to the doctrine of double jeopardy. Recent judicial pronouncement in the case of *Environment Protection Authority v. Australian Iron & Steel* (1992) 28 NSWLR 502 makes it clear that where, after an examination of the relevant facts underlying the charges and the terms of the relevant legislation, a court finds that the offences are substantially the same, the rule of double jeopardy precludes prosecution for both offences. As a result prosecutors need to make sure that each available statutory remedy is pursued in a manner that ensures charges based on one pollution event, but derived from different statutes, are not discerned to be the same (Austin 1993, p. 38);

- amendments in July 1991 to the Court's rules in Class 5 require the principal affidavit in support of a prosecution to be filed at the time of the institution of the proceedings. In the past prosecutors would often unreasonably delay compliance with directions made by the Court to file affidavit evidence. This amendment, while beneficial to the efficiency of the Court, may have had the effect of slowing down the rate of prosecutions;

- with the advent of the Protection of the Environment Administration Act the EPA has acquired some of the functions of the former Waste Management

Authority including its previously not insubstantial prosecutorial role. However, since this occurred the EPA has not instituted any waste management prosecutions in the Court;

- prosecutions have not always succeeded and *Latoudis v. Casey* (1990) 170 CLR 534 allows for costs to be awarded against a prosecutor. This means that careful consideration must be given before launching a prosecution; but see *Environment Protection Authority v. Barlow* (unreported, NSW Land and Environment Court, 24 June 1993);

- it may be noted that the significantly high numbers of prosecutions during 1989 to 1991 occurred while Tim Moore was the Minister for the Environment. However, under the Protection of the Environment Administration Act the EPA is specifically exempted from the control and direction of the Minister in relation to any decision to institute or approve the institution of "criminal or related proceedings" (s. 13(2)(c)).

- it would be uncharitable not to mention a possible additional contributing factor—the environmental performance of industry improving in response to changes in regulation and community expectations.

Despite the impact of these factors on the present numbers of prosecutions in the Court it is clear that the EPA will continue to prosecute offenders, as this is specifically mandated in the Protection of the Environment Administration Act (s. 7(2)(e)), although that subsection also includes reference to "other regulatory action".

While the role of the Court regarding environmental crimes is contingent on legislative and policy initiatives, the development of legal principles by the court is influential in the delineation and evaluation of the area. Some of these developments will now be examined.

Mens rea and strict Liability

Tier 1 offences

In the Tier 1 offences of the EOPA, ss. 5(1), 6(1) and 6A(1)(a) prohibit "wilful or negligent disposal of waste . . . in a manner which harms or is likely to harm the environment", without lawful authority. Until recently it was unclear whether mens rea related both to the act of disposal and to harm to the environment. This now appears to be settled by *Environment Protection Authority v. N* (1992) 26 NSWLR 352 in which the Court of Criminal Appeal held the word "wilfully" applied to the act of disposal *and* the likelihood of harm to the environment. Achieving convictions for Tier 1 offences is consequently rendered more difficult for the prosecutor.

There are a number of other developments in this area which may have a similar impact. For example, in *New South Wales Sugar Milling Co-operative v. Environment Protection Authority* (1992) 75 LGRA 320, the Court of Criminal Appeal, in relation to s. 6 of the Act, was of the opinion that "the negligence required to be proved by the prosecutor in such a case, is negligence of the criminal type", that is, gross negligence or recklessness. This may be contrasted with *State Pollution Control Commission v. Kelly* (unreported, NSW Land and Environment Court, 21 June 1991), where Hemmings J held that the negligence required was a failure to exercise such care, skill

and foresight as would be expected of a reasonable person in the particular situation of the person charged. This inconsistency will soon be resolved. A stated case to the Court of Criminal Appeal (*Environment Protection Authority v. Ampol Ltd.*)[2] is currently pending on the question of the relevant standard of negligence under s. 6(1) of the EOPA and whether negligence must be proved for all elements of that offence. It has also been noted that the defence to Tier 1 provided by s. 7, while narrowly drawn and therefore unlikely to extend to the principal offences in ss. 5, 6 and 6A or to assist persons charged under s. 6(2), may play a vital role in relation to "constructive offences" where the fault of one person is sought to be imputed to another that is in ss. 5(1)(b), 5(2),6A(1)(b), 6A(2) (Lipman 1991, p. 328). This could eliminate the risk of vicarious criminal liability for owners or employers for Tier 1 offences, provided they can show "due care" and "diligence" (Lipman 1991, p. 328).

It appears that Tier 1 offences qualify as "real" environmental crimes. Certainly Hunt J in *Environment Protection Authority v. N* decided, upon an examination of s. 5 of the Act and the substantial penalty it involved, that "the legislature clearly intended the offence to be 'truly criminal'". However, Tier 1 prosecutions have been uncommon.

Tier 2 offences

Tier 2 offences under the EOPA are generally regarded as offences of strict liability, as are offences under other Acts such as s. 126 of the *Environmental Planning and Assessment Act 1979* (EPAA). Strict liability offences constitute the bulk of prosecutions before the Land and Environment Court. The defence of an honest and reasonable mistake of fact is available in such prosecutions. In the recent decision of *Australian Iron and Steel v. Environment Protection Authority (No 2)* (1992-1993) 29 NSWLR 497 the Court of Criminal Appeal found that the defence of honest and reasonable mistake of fact did not extend to include "due diligence". According to Abadee J (with whom Carruthers J agreed but Badgery-Parker J preferred not to finally determine the question) "due diligence" as a separate common law defence to strict liability is not available. The Court recognised that to hold otherwise would mean that the prosecution would have the burden of negativing beyond reasonable doubt the "due diligence" of the defendant, a circumstance frequently within the knowledge of the defendant alone. This would have the practical effect of requiring the prosecution to prove something akin to mens rea and would be inconsistent with a strict liability offence. However, the statutory defence of "due diligence" is specifically made available under s. 10 EOPA, which deems directors and persons concerned in the management of a company to be liable for offences committed by the corporation. This defence would apply to prosecutions under all tiers of the EOPA.

This situation may be contrasted with that of Victoria where certain offences created under the *Environment Protection Act 1970* (Vic.) have been held to impose absolute liability (*Allen v. United Carpet Mills* (1989) VR 323). Absolute liability offences require no proof of culpability nor do they permit any defence. There are, however limited statutory defences available under the Act.

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2. *Environment Protection Authority v. Ampol Ltd.* (1993) 81 LGERA 433. However, the Court of Criminal Appeal declined to answer the question and referred the matter back to the Land and Environment Court to find facts.

Honest and Reasonable Mistake

The determination of what constitutes an honest and reasonable mistake requires that the state of mind or knowledge of a defendant be "described by reference to the particular context in which the problem arises", such context deriving from "the purpose of the legislature in creating [the] offence" (*State Rail Authority of NSW v. Hunter Water Board* (1992) 28 NSWLR 721). According to Gleeson CJ, dealing with a breach of the Clean Waters Act, "a mere lack of knowledge that pollution was occurring, or was likely to occur, based upon a general understanding or assumption that everything was in order, would be [in]sufficient to amount to a mistaken belief . . . [the] belief would . . . need to be sufficiently specific to relate it to the elements of the particular offence". While depending on the factual matrix, it would appear that the defence may be fairly narrow in its operation and unlikely to provide much scope for avoiding liability for pollution. There does not appear to be any case in New South Wales where the defence has been successfully raised in the context of environmental law.

Due Diligence

There has been little judicial comment on what must be established to satisfy the defence of due diligence. In *State Pollution Control Commission v. Kelly Pty Ltd* (1991) 5 ACSR 607, Hemmings J held that although the defence does not require perfection of the defendant, it requires conduct that may be objectively viewed as having been directed at the likely risk. Accordingly, precautions must be taken and processes established that are specifically directed at avoiding the contravention, not merely taken for reasons of business efficiency. (Note: factors which may establish due diligence have been developed in Canada, *see McDonald* 1992, p. 27). The development of the principle thus far acts as an encouragement for corporations to institute environmental compliance programs and auditing processes to avoid liability. However, while due diligence is unavailable as a defence to strict liability offences, such processes may be a significant factor in mitigation of penalty (*see*, for example, *Environment Protection Authority v. Pacific Power*, unreported, NSW Land and Environment Court, 26 July 1993).

Vicarious Liability

Vicarious liability has been held by the Court to be imposed by strict liability offences, such as s. 16(1) Clean Waters Act (*Tiger Nominees Pty Ltd v. State Pollution Control Commission* (1992) 75 LGRA 71), thereby extending the net of liability and the possible deterrent effects of such offences.

Penalties

With the exception of the EOPA there are no statutory criteria for the determination by the Court of appropriate penalties. Under s. 9 of the EOPA matters to be taken into consideration include:

- the extent of the harm caused or likely to be caused to the environment;

- the practical measures which may be taken to prevent, control, abate or mitigate the harm;
- the extent to which the defendant had control over the causes which gave rise to the offence and could have reasonably foreseen the harm; and
- whether, in committing the offence, the defendant was complying with orders from an employer or a supervising employee.

Most of these matters are obvious and the Court may also take into account any other relevant factors. Recently initiatives have been taken to achieve more comparable or consistent outcomes for offenders. Both the EPA and the NSW Judicial Commission are currently working on developing databases on sentencing and penalties—the latter to be available for use by the Court.

Special Features and Limitations of the Court's Jurisdiction

While prosecutions under the EOPA are usually brought by the EPA or with its consent, s. 13(2A) provides that any person may bring proceedings if leave is granted by the Court. The Court may not grant leave unless it is satisfied that the EPA has decided not to prosecute, the EPA has been notified, the proceedings are not an abuse of process and the particulars disclose a prima facie case.

Under s. 14(1) of the EOPA the Court may order a person convicted to "prevent, control, abate or mitigate any harm to the environment . . . or to prevent the continuance or recurrence of the offence". This is a useful innovation, as the case of *McGerty v. Buttigieg* (unreported, NSW Land and Environment Court, 19 July 1993) demonstrates. In this case the defendant, the owner of a piggery, was required to submit and later implement an Environmental Management Plan (EMP). It was in light of the measures needed to be implemented under the EMP that the defendant decided to consent to a closing order. It was not surprising that such measures were found to be too costly, as the farm commenced with one pig but expanded to 1000 and was on a wholly inadequate area of land.

The Court may also order an offender to pay the costs and expenses incurred in a clean-up, or compensation to any person who has suffered loss or damage to property by reason of an offence (s. 14(2)—*see*, for example, *Environment Protection Authority v. Capdate Pty Ltd* (1993) 78 LGERA 349). The means for ensuring orders for restoration, prevention and compensation are provided in the balance of Part 4 of EOPA and include the prevention of asset stripping by charges over property.

Orders under s. 14, however, may only be made consequent upon a conviction or a plea of guilty. By their very nature criminal proceedings are subject to delay, and the in-built protections for defendants and the standard of proof beyond reasonable doubt all combine to hinder the protection of the environment, especially with a continuing offence.

By comparison, civil enforcement is undoubtedly much more flexible than criminal proceedings. Applications for declaratory relief or prohibitory or mandatory injunctions to restrain or remedy an actual or threatened breach can be dealt with expeditiously and determined on the balance of probabilities. With civil enforcement—in contrast to the criminal law—the emphasis is on the prevention or cessation of the unlawful activity rather than punishment. If injunctions are disobeyed further

proceedings may be instituted for contempt of the Court's orders. Proven contempt may result in a fine, imprisonment or sequestration. Theoretically, fines for contempt are unlimited and could exceed the maximum penalties for the criminal breach of pollution statutes.

Cripps J in *Farrell v. Dayban* (1990) 69 LGRA 415 urged the use of civil enforcement of pollution laws, noting the success of civil enforcement of environmental and planning laws (at 419-20). Indeed, since the commencement of the Environment Planning and Assessment Act in 1980, and its open-standing provision (s. 123), civil enforcement in the Court has become the norm and was the quiet, unheralded revolution of the 1980s.

To give an example of the potential advantage of civil enforcement, on 8 August 1991 the Sutherland Council filed proceedings for civil enforcement against Westfield. The Council claimed that the respondent was breaching the Clean Waters Act on a *continuing* basis in its construction of a large shopping centre complex. It sought interlocutory and permanent injunctions. On the following Wednesday the matter was called on for hearing and, after some discussions, the respondent proffered undertakings to the Court and final orders were made restraining the breach. This should be contrasted with the case of *Buttigieg*. There the Council had been aware of continuing breaches of the Clean Waters Act by the piggery, which was discharging effluent from its land and thence over neighbouring land to a creek. After considerable delay in taking action it commenced criminal proceedings against Buttigieg, who was in fact unable to pay any substantial fine and consented to closing orders. However, it is pertinent to note that civil enforcement was available from a much earlier point in time and would have been more likely to protect the environment.

The EOPA also contains a civil "open standing" provision. Section 25 provides that the Court may grant leave to bring proceedings to restrain a breach *of any Act* if that breach is causing or likely to cause harm to the environment, the proceedings are not an abuse of process, are in the public interest, and "there is a real or significant likelihood that the requirements for the making of an order . . . will be satisfied". Only one application for leave under s. 25 has been made and granted since the section was amended in December 1991—*Brown v. Environment Protection Authority & North Broken Hill Ltd t/a APPM* (1992) 75 LGERA 397. Both respondents sought to appeal to the New South Wales Court of Appeal against the grant of leave but were refused. At the ultimate hearing in the Land and Environment Court, the granting of leave was sought to be re-agitated but was refused by Pearlman J ((1992) 78 LGERA 119). On the leave application the EPA argued that the statutory requirements of leave had not been satisfied and that it was not in the public interest that the proceedings be brought. Incidentally, in refusing an application for security for costs in the Court of Appeal, Priestley JA found that the litigation was public interest litigation and that s. 25 was deliberately aimed at giving access to the Court "in matters of the present type, of a wider than ordinary kind". Significantly, Mr Brown has been the only s. 25 leave applicant to get his toe wet in the sluice gates!

Sentencing Options

There is a need for a broader range of penalties for the deterrent role of criminal prosecutions to be effective. In Tier 2 offences fines are the only form of sentencing available to the Court. In the case of impecunious defendants this is clearly inadequate. The Court had to grapple with this question on two recent occasions—*Environment*

Protection Authority v. Capdate Pty Ltd & Phillips and *McGerty v. Buttigieg*. In the absence of an alternative punishment such as imprisonment the traditional policy considerations for taking impecuniosity into account are also less relevant. This may be an example of the sometimes poor fit of criminal law principles to statutory environmental offences. In response to my comments in *Capdate* the NSW Minister for the Environment indicated that the Government would legislate to include community service orders as a sentencing option.

Commentators in this area have also suggested that, for corporate offenders, penalties such as equity fines (stock dilution), adverse publicity and probation would serve the aims of the legislation more successfully than monetary fines (Lipman 1991, pp. 334-5). An interesting precedent may be s. 126(3) of the Environmental Planning and Assessment Act where upon a conviction involving destruction of vegetation the Court may, in addition to or in substitution of any pecuniary penalty, direct that a person plant new trees and vegetation, maintain them to mature growth; and provide security for the performance of these obligations. This subsection has been a useful weapon in the Court's armoury in land clearing prosecutions—*see*, for example *Fry v. Paterson* (unreported, NSW Land and Environment Court, 10 October 1990) and *Brown v. Kable* (unreported, NSW Land and Environment Court, 20 October 1989).

Bias against small Operators

Commentators have noted that liability of corporate officers in their individual capacity under s. 10 EOPA is biased against small operators (Fisse 1990, p. 7). These people are more likely to be involved in the day-to-day running of a business and therefore liable at a personal level as well as a corporate one. Certainly this has been the experience of the Court—*see Capdate; State Pollution Control Commission v. Kelly, State Pollution Control Commission v T.J. Bryant* (unreported, NSW Land and Environment Court, 11 June 1991).

Future Initiatives

There is obviously a need for a mixed regulatory and non-regulatory approach to the protection of the environment. Court-based enforcement—civil and criminal—has its place and may complement other non-litigious means. Nonetheless, in the interests of improving environmental compliance and enforcement I would raise a number of propositions should be raised for consideration:

- do not use the criminal law for inconsequential pollution incidents;
- use civil enforcement when continuing harm is occurring or is threatened;
- introduce the option of civil penalties. This would help uphold the integrity of the criminal law, leaving it to address the more extreme cases of "real crime";
- encourage local government to become more active in pollution control;
- where the circumstances warrant, permit specific funds to be ordered for environmental clean-up or enhancement not necessarily connected to the harm caused by the pollution incident;

- introduce aggravated or exemplary damages for appropriate situations where the offence is extreme and the punishment should reflect the public outrage. Pay such damages to a trust fund to be expended in the enhancing the environment;

- allow open-standing for civil suits under all pollution legislation without the need for government consent or the leave of the Court;

- allow scientifically qualified technical assessors to assist and advise judges in civil and criminal enforcement;

- limit appeals from the Land and Environment Court to errors of law or severity of penalty—not facts;

- widen sentencing options to include a full panoply of remedies to seek to redress environmental harm. Novel "punishments" to fit the offender and the offence may be more successful in underlining the seriousness of a matter than a traditional fine which may be seen as a business expense. Examples are public apologies widely advertised or community service by chief executive officers.

The suggestion that appeals from the Land and Environment Court to the NSW Court of Criminal Appeal should be restricted to errors of law and penalty requires some explanation. Presently appeals may be full rehearings and the facts found by a judge of the Land and Environment Court can be put to one side. This situation has led to unintended consequences, as experienced in the prosecution of Huntley Colleries (owned by Elcom) by the former SPCC, which bring the law into disrepute.

In this case, the alleged offences under the Clean Waters Act occurred on April Fools Day 1989. The SPCC prosecuted in 1990 and the matters were contested before me in July 1990. I found the offences proved and in doing so made detailed findings of fact. Penalties were imposed totalling $21 000 for four offences. The defendant appealed to the Court of Criminal Appeal. The Court indicated that it wanted to rehear the matter and conduct an inspection. In its judgment in June 1991 the Court said, "Quite apart from all of the usual and well accepted difficulties involved in having a collegiate court determine contested issues of fact, the estimate of one day which was given for the hearing of this appeal has proved to be totally inadequate". The mind conjures up the scene of three ermine furred red robed appeal judges down a coal mine!

Faced with this dilemma, the Court took advantage of a power it has under the *Criminal Appeal Act 1992* to remit a matter or issue to the trial court for determination. For reasons totally unexplained it ordered the determination of all findings of fact by a judge other than the trial judge. As a result, in mid 1992 the Chief Judge of the Land and Environment Court (Pearlman CJ) listened for 7 days to evidence, in many respects quite different from that presented at the first trial, and published her findings of fact on 30 September 1992, remitting them to the Court of Criminal Appeal. Almost a year later, the appeal awaits a hearing. Apart from the significant public funds expended on the case, it reveals the law as an ass.

It should also be noted that the use of "fiscal initiatives" is currently receiving some attention. One example is a current proposal by the Queensland Department of

Environment and Heritage, in cooperation with industry. It appears that, under the proposal, businesses will develop specific pro-active programs to improve their environmental impact through the utilisation of EMPs. These will take the form of publicly accessible contracts between the government and the firms, and once approved will preclude prosecution for any potential environmental damage caused by actions specified in the plan. However, the EMPs will be legally enforceable. While the legal enforceability of the plans might balance the preclusion from prosecution, they may need rigorous monitoring and enforcement to ensure they are beneficial to the public. Schemes such as these could clearly have a substantial impact on the role of a court in environmental crime, as they effectively oust its criminal jurisdiction.

Conclusion

Notwithstanding some of the foregoing criticisms of criminal enforcement of pollution laws, there is no doubt that they have had a salutary effect on industry causing it to take its environmental responsibilities and obligations seriously. It is, however, important to emphasise a number of matters. The first is the dynamic nature of the development of pollution law enforcement within the wider area of environmental law. This means that we can and ought to think in innovative and lateral ways about how best to protect our environmental assets. The traditional protections properly afforded to defendants when charged with criminal offences should not straitjacket our approach to environmental protection. This is not to say that we should shy away from the application of the criminal law to environmental breaches where it is appropriate.

In considering our future approach to enforcement of environmental law, we need to consider the provision of a greater range of options than presently available or utilised. These can be both inside and outside the court system. It is not just a case of "the punishment fitting the crime" but rather the selection of the best and most appropriate remedy to fit the native of the breach, the particular offender and, most importantly, the environment. In seeking out such remedies it may be that we have to forsake some conventional criminal law procedures and protections, or avoid the criminal law in all but those serious breaches which warrant punishment and deterrence rather than remediation and compensation.

Civil standing under pollution statutes must also be considered. It is time that we were prepared to trust the public and trust the courts. There is no doubt that there should be unqualified open standing provisions to enforce pollution law, just as there is for planning law. Consent of the government or the Environment Protection Authority should not be necessary, nor should leave of the court. Experience has shown that there will no opening of the floodgates. The absence of legal aid almost guarantees that only meritorious or arguable claims will be brought.

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CRIMINAL RESPONSIBILITY IN RELATION TO OFFENCES IN THE GREAT BARRIER REEF MARINE PARK[1]

Darin Honchin

THE *CONCISE OXFORD DICTIONARY* DEFINES A CRIME AS AN "ACT punishable by law". It is further refined in *Osborn's Concise Law Dictionary* to include a "default or conduct prejudicial to the community, the commission of which by law renders the person responsible liable to punishment". The question of who is responsible and to what degree brings us to the question of criminal responsibility. This paper does not intend to thoroughly examine the intricate relationships between the law (both common and statute) and the sociological nature of a person's behaviour. However, it does attempt to identify the goals of particular laws and then reflect upon the type of behaviour expected of persons.

This paper is directly concerned with offences against the *Great Barrier Reef Marine Park Act 1975* (Cwlth) (hereafter referred to as GBRMPA). This Act deals directly with the establishment, control, care and development of the Great Barrier Reef Marine Park. The intention of the Parliament in respect of the object of the Act is quite clear. Section 5(1) of the Act states:

> The object of the Act is to make provision for and in relation to the establishment, control, care and development of a marine park in the Great Barrier Reef Region in accordance with the provisions of this Act, to the extent that those provisions are within the legislative powers of the Parliament and, in particular but not to the exclusion of any other relevant power, its powers with respect to or in relation to -
>
> (a) the Australian coastal sea;

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1. The views expressed in this paper do not necessarily represent those of the Great Barrier Reef Marine Park Authority, the Attorney-General's Department or the Commonwealth Government.

(b) rights (including sovereign rights) and obligations of the Commonwealth in relation to the continental shelf of Australia;

(c) external affairs;

(d) fisheries in Australian waters beyond territorial limits;

(e) places acquired by the Commonwealth for public purposes;

(f) trade and commerce with other countries, including the import or export of animals and plants;

(g) statistics relating to animals and plants; and

(h) matters incidental to the execution of the powers of the Government of the Commonwealth, and this Act shall be administered accordingly.

Activities in the Marine Park are controlled through a framework of both State and federal legislation. For the purposes of this paper only those activities controlled by the GBRMPA are considered. The GBRMPA framework consists of the Act, regulations and zoning plans.

The Act establishes and defines the functions and powers of the three-person Marine Park Authority, a Consultative Committee, the administration of the Act and numerous other provisions necessary for its implementation.

The regulations generally define a number of activities, the relevant species of animals or plants, the administrative processes for obtaining and assessing permits, and a number of stand-alone offences. The offence provisions in the regulations are steadily expanding as new problems are faced by the Marine Park Authority. Practical use of the wide regulation making powers given by the Act (s. 66) are limited, because the regulations cannot be inconsistent with Zoning Plans (s. 66.(1)) and penalty provisions, although statutorily set at $5 000, are limited to $1 000 by government policy.

Zoning Plans broadly describe a series of zones and the activities which are acceptable within them, either "as of right" or with a permit issued from the Marine Park Authority. The Zoning Plans are disallowable instruments and are drawn up by the Authority following the development of a resource inventory for the nominated area and through an extensive two phase public consultation process.

An Overview of the Great Barrier Reef Marine Park Act 1975

Before the introduction of the GBRMPA, there were a number of State Marine Parks and State based controls on the taking of corals in the Great Barrier Reef Region. With the creation of the Commonwealth Marine Park there continues to be a great deal of State based control over certain aspects of the Marine Park, including some of the State Marine Parks which are managed complementary with the Commonwealth Marine Park. The whole of the Great Barrier Reef Marine Park was fully zoned in 1988. It covers about 341 500 km^2 and includes over 2 900 individual reefs. The Marine Park is a multi-use protected area where most activities are permissible, fitting the description of Category VIII of the classification system used by the International Union for the Conservation of Nature and Natural Resources (IUCN) and was included on the World Heritage List as a natural site (Category X) in 1981. Less than

20 per cent of the Park is closed to trawling and only 5 per cent is closed completely to extractive activities such as fishing.

Archaeological evidence suggests that indigenous people have inhabited Australia for about 40 000 years with coastal settlement adjacent to the reef recorded some 4 700 years ago (Nicholson & Cane in press). The Reef was, and still is, important to many Aboriginal groups for sustenance and customary uses.

There are over 600 islands within the boundaries of the Marine Park and more than 300 coral cays. Wildlife abounds with more than 1500 species of fish and 400 species of corals being recorded to date. The most recent study into the value of the Great Barrier Reef indicates that the direct annual value of the three main activities (that is tourism, commercial fishing and recreation fishing/boating) in the Marine Park is about $1m. State and Commonwealth jurisdiction overlap in many areas and in other areas, who has jurisdiction is unclear. Enforcement is a function of the day-to-day management agencies within Queensland (the Queensland Department of Environment & Heritage and the Queensland Boating and Fisheries Patrol), subject to the policies of the Great Barrier Reef Marine Park Authority. Prosecutions are conducted almost exclusively by the office of the Commonwealth Director of Public Prosecutions.

A survey of community awareness of the Marine Park in 1989 showed that 88 per cent of the people living adjacent to the Mackay/Capricorn Section of the Marine Park were aware of the Park (Survey Research Consultancy Unit 1989). A significant portion of the Marine Park management budget is directed towards educational programs for the Great Barrier Reef Marine Park.

Commonwealth Codification of Criminal Responsibility

On 11 February 1987, the then Commonwealth Attorney-General the Honourable Lionel Bowen MP, established a Review Committee whose task it was to review the criminal laws of the Commonwealth. The work of the committee, chaired by the Right Honourable Sir Harry Gibbs, has resulted in a number of amendments to Commonwealth criminal laws. In its Interim Report dated July 1990, the committee considered the principles of criminal responsibility and other matters. The recommendations from this report were presented to the Third International Criminal Law Conference, held in Hobart in September 1990. The Standing Committee of Attorneys-General has established the Criminal Law Officers Committee (CLOC)[2] to advance the concept of a consistent, if not uniform criminal code for Australia. The code is intended to be adopted by all Australian jurisdictions at some time. The CLOC decided at its first formal meeting in May 1991 that priority should be given to addressing the issue of criminal responsibility.

As a result of its work the CLOC issued its Final Report in December 1992, dealing with general principles of criminal responsibility. This report has now been submitted to the Standing Committee of Attorneys-General for their consideration. The Standing Committee of Attorneys-General met in 1993 to discuss the report. The federal Attorney-General's Department has begun a process of reviewing legislation in line with those recommendations.

The CLOC Report recommends that offences should consist of both a physical element and a mental element. For the purposes of this paper only the mental element

2. It should be noted that CLOC has since been renamed as the Model Criminal Code Officers Committee.

will be considered. However, it must be remembered that there are times when the physical and mental elements may be difficult to separate.

The various forms of mental elements listed by the CLOC report are:

- intention;
- knowledge;
- recklessness; and
- negligence.

CLOC has looked closely at the common law and the legislative approaches to criminal responsibility. Under the common law, criminal responsibility is subjective. Thus what a person intended, believed or knew will often determine whether or not they were legally criminally responsible. Under the current codes (such as the Griffith Code in Queensland), the main offences do not require any subjective intent. Criminal responsibility under the code is negated by a range of statutory exculpatory provisions. These provisions include, but are not limited to, accident, voluntariness, mistake of fact, honest belief, compulsion and age.

Under the common law, intent or knowledge in respect of all the elements of an offence is required to make a person criminally responsible (*see He Kaw Teh v. The Queen* (1985) 157 CLR 523 and *Bahri Kural v. The Queen* (1987) 162 CLR 502). Unless such knowledge or intention is stated or implied in a code, only the relevant exculpatory or defence provisions need to be negated to attach criminal responsibility.

CLOC has recommended that unless otherwise stated, the minimum level of fault necessary to attach criminal responsibility will be recklessness (Draft code s. 203.5). A person is reckless with respect to a *circumstance* when he or she is aware of a substantial risk that it exists or will exist and it is, having regard to the circumstances known to him or her, unjustifiable to take the risk. A person is reckless with respect to a *result* when he or she is aware of a substantial risk that it will occur and it is, having regard to the circumstances known to him or her, unjustifiable to take the risk (Draft code s. 203.3). Whether the taking of a risk is justifiable or not is one of fact for a tribunal to determine (Draft code s. 203.3).

CLOC has also recommended the codification of strict liability and absolute liability offences. Criminal liability is strict where it is imposed irrespective of whether a person acts without fault. The concept of strict liability has been clearly acknowledged by our system of justice since at least 1846 (Woodrow (1846), 15 M & W 404; 153 ER 907). The common law concept of mens rea (a guilty mind) left no place for liability without fault. Thus strict liability is a product of legislative ingenuity. Whilst no fault element is necessary, the defence (or excuse) of honest mistake is available (as is any other)(CLOC Draft Code ss. 204 and ss. 205.1).

Absolute liability means that a person may be liable for a breach of the law even though they had no intent and took the utmost of care not to break the law. Absolute liability offences do not enable the use of the defence of honest mistake; however, other defences are still available (CLOC Draft Code ss. 205 & s. 205.1). Courts have been very reluctant to construe offences as absolute liability in the absence of expressed parliamentary intention. Bollen J of the South Australian Supreme Court considered that it was important that the imposition of absolute liability readily "assist the object of the legislation and not merely catch a luckless victim" (*Schmid v. Keith Quinn Motor Co. Pty Ltd* 1987, 29 A Crim R 330 at 339).

When Chapter 2 of the Draft Code was published, it was CLOC's intention that the provisions of the Code in respect of the general principles of criminal responsibility would apply immediately to Commonwealth offence provisions created following the enactment of the Code. The Code provisions would only apply to existing Commonwealth offences created before the enactment of the code from the third anniversary of the commencement of the Code (Draft Code s. 101.2).

It is understood that as the Standing Committee of Attorneys-General is considering the changes on general principles of criminal responsibility, if the principles are adopted, there may be different timetables for different jurisdictions in relation to their adoption.

It is important then that environmental managers consider the application of general principles of criminal responsibility in respect of Commonwealth offences. The application of the general principles to the enforcement, prosecution and implementation of environmental legislation will directly impact upon the day-to-day tasks of many staff. With the Commonwealth legislative agenda showing very few opportunities for other than portfolio amendments in the foreseeable future, any necessary amendments cannot be left to the last minute[3].

Offences in the *Great Barrier Reef Marine Park Act 1975* (Cwlth)

The majority of the offences are located within the Act. Using and entering a zone for a purpose, other than a purpose provided for in a Zoning Plan is the most regularly contravened section (s. 38A). Most offences under the Act are indictable and carry a maximum penalty for an individual of between $1 000 (for failing to comply with a requirement made by an inspector) and $50 000 (for drilling or mining in the Marine Park (s. 38)); discharge of waste into the Park without permission (s. 38J); navigating without a pilot in a compulsory pilotage area (s. 59B); and entering an Australian port after navigating in a compulsory pilotage area without a pilot (ss. 59C and 59D). Where the prosecution and the defendant agree and the court determines it proper to do so, indictable offences may be heard summarily. Where this occurs the maximum penalties are much reduced, ranging from $2000 (ss. 38A-H, 38J & 38K) to $10 000 (ss. 38(6), 38M(2), 49(3) and 59I(2)).

Section 38K of the Act makes an owner and the person in charge of a vessel or aircraft guilty of an offence where the vessel or aircraft is used to commit an offence against s.38 to s.38J inclusive and that person:

- knew or had reasonable grounds to suspect that the vessel or aircraft would be used in committing the offence; and
- did not take reasonable steps to prevent the use of the vessel or aircraft in committing the offence.

The provisions of the *Crimes Act 1914* (Cwlth) relating to aiders, abettors, conspiracy and incitement apply to GBRMPA offences. The offence provisions in the

3. The Commonwealth has begun the process by introducing the Criminal Code Bill 1994 into the Senate on 30 June 1994. The Bill has been referred to the Senate Standing Committee on Legal and Constitutional Affairs. The Committee is due to report back on 5 December 1994.

Act and Regulations are currently under review to ensure that they are appropriate for today's circumstances.

To date, Marine Park offences have been dealt with by Queensland courts but there have been no judicial decisions which have determined whether these matters should be dealt with by way of the common law or by reference to the *Criminal Code Act 1899* (Qld). The difference between the two is basically that the common law imports terms such as mens rea, strict and absolute liability as well as a host of defences. Under the Criminal Code mens rea is not relevant but a person may be relieved of any criminal responsibility by a number of excuse provisions.

Whilst the Director of Public Prosecutions has conducted all prosecutions so far under the common law, it is submitted that the decision of the Queensland Supreme Court in *R v. Drury* [1984] 1 Qd R 356 at 370 per Williams J shows that the correct approach is to decide issues of criminal responsibility in accordance with Chapter V of the Criminal Code. This position is supported by the Gibbs Review Committee (1990) and Sweeney and Williams (1989). When the Commonwealth Code comes into effect, the question of which laws determine criminal responsibility will no longer be relevant.

Liability and Culpability

The belief that a person is free to choose underlines how crucial it is that a person's intent, knowledge, foresight or awareness forms the basis of their moral or criminal responsibility. A person may be reckless, for example, if they go fishing with no thought whatsoever as to where they can fish, what they can take and how it may be taken. Certainly, it would not be incredible to expect that most people are aware that there are laws regulating fishing and that a reasonable person would avail themselves of information about those laws before commencing that activity.

The practical implications for enforcement in respect of the mental element required will vary. Intent with respect to conduct, circumstances or results will require a detailed investigation, especially when interviewing suspects. A failure to obtain the necessary evidence in an interview may severely hamper a prosecution. Knowledge of a circumstance or result when a person is aware that it exists or will exist in the ordinary course of events, will require close attention to be paid by the investigating officer in the course of an interview. Acknowledgment by a suspect of the relevant circumstances may be sufficient in some cases, depending upon the specific offence. Recklessness will also require detailed evidence because the test is a subjective one.

As a result there is a need to ensure that adequate training is given to investigative staff if the above-mentioned fault elements are contained in offence provisions. However, it is clear that well structured interviewing of a suspect is essential to secure a conviction.

The legislative creation of absolute and strict liability offences will also cause difficulties for managers. It would be easy to try and opt for the simplest approach making all offences ones of absolute liability, but as a matter of policy is this really necessary and will it work? The trend of recent years has been to seek ever increasing penalties for offences. The Great Barrier Reef Marine Park Authority has been no exception to this. It is unlikely, however, that the Senate Standing Committee on Regulations and Ordinances, the Senate Standing Committee for the Scrutiny of Bills, or the Attorney-General's Department would countenance the use of absolute liability offences along with the imposition of any substantial penalties.

Managers must be willing to look a little deeper into the problems they are encountering and the range of solutions available to them. One possible option is the reversal of the onus of proof in relation to the defence of honest and reasonable mistake. Again, this is a matter for scrutiny by the bodies mentioned above and the Attorney-General's Department is clear about the circumstances in which the reversal of the onus of proof may be considered. Managers should remember that the prosecution must prove all elements of an offence beyond reasonable doubt, while the standard of proof for a defendant is merely on the balance of probabilities.

Which level of criminal liability is ultimately a question of policy. The High Court has recognised that strict liability offences are often concerned with the "regulation of a particular activity involving potential danger to public health, safety or morals, in which citizens have choice whether they participate or not" (*Cameron v. Holt* (1980) 28 ALR 490 at 495 per Mason J). Typically these are referred to as "welfare" offences. Absolute liability on the other hand, has been the scorn of some who describe it as punishment "not for doing wrong in any meaningful sense, but as a symbolic warning to others to get it right" and as an example of the "merciless expedience" of the law (Fairall 1987).

The imposition of strict or absolute liability is intended not merely to deter a person from engaging in prohibited activities, but to encourage or compel them to take preventative measures to avoid the possibility of the illegal act occurring. From a manager's point of view this proactive element also serves an educative function. The more preventive measures a person takes to avoid breaking the law, the less a manager will feel that a person is truly blameworthy. The difficult task is to match the amount of preventive action with the correct level of responsibility. A question still remains as to whether managers have achieved their ultimate aim.

In the case of the Great Barrier Reef Marine Park, the aim of managers is to provide for the protection, understanding, enjoyment and wise use of the Great Barrier Reef through the development of the Great Barrier Reef Marine Park. There comes a point where the need for a high degree of moral culpability must give way to the need to protect the environment.

Along with the preventive measures a management agency undertakes—such as education, signage, public participation and an enforcement presence—the traditional objectives of punishment, retribution, deterrence, prevention of repetition and rehabilitation have an important and often overlooked role. Restrictions on activities in the Marine Park are designed to achieve the Marine Park Authority's goal. Transgressions involving the taking of animals and plants, regardless of moral culpability, will impact upon the Authority's ability to achieve that goal and ultimately on the sustainability of extractive activities in the Marine Park. It is not the desire of the Authority to pursue a "luckless victim", but it is the Authority's intention to proactively encourage and promote a level of responsible behaviour.

The Marine Park Authority is concerned about a recent decision in which a magistrate indicated that the passengers on a vessel, who were engaged in illegal fishing, were not criminally responsible and that only the master of the vessel was liable (*Land v. Tipping*, unreported, Ayr Magistrate's Court, 14 May 1993). In this case the magistrate also held that the master of the vessels had no case to answer because the prosecution failed to negate an honest and reasonable mistake of fact. Unfortunately, this decision was not appealed although subsequent legal advice suggested that grounds for appeal existed. The decision in *Land v. Tipping* has done little to promote responsible behaviour in the Marine Park.

Enforcement and Penalties

From 1980 until 1989 only 20 persons had been prosecuted for offences under the GBRMPA. Education has always been and will always remain the Marine Park Authority's primary tool for encouraging long-term compliance with Marine Park legislation, and changing people's attitudes in relation to the sustainability of the activities they wish to conduct in the Park. However, in 1988 the Marine Park Authority slightly altered its priorities in respect of enforcement. A number of incidents drew into focus the fact that the long held emphasis on education had unwittingly undermined the ability of field staff to actually enforce the legislation when required. A lack of training, encouragement, policy direction and procedures had made enforcement very difficult. There was also a lack of coordination between the various agencies in which inspectors had been appointed.

A change of focus in 1988 created new positions within both the Great Barrier Reef Marine Park Authority and the principal day-to-day management agency, the Queensland Department of Environment and Heritage. These positions have helped to ensure appropriate training for all Marine Park inspectors; introduced procedures designed to facilitate prosecution action; and through the use of an Enforcement Coordinating Sub-Committee (comprised of enforcement staff of the Great Barrier Reef Marine Park Authority, the Queensland Department of Environment and Heritage and the Queensland Boating and Fisheries Patrol), focussed and coordinated enforcement action. Regular enforcement workshops are conducted involving all enforcement agencies, including Queensland Water Police and Australian Federal Police to identify trends, update knowledge of the legislation and foster a closer working relationship between all agencies.

With all this background work being undertaken, the focus recently has been on the legislative provisions. Translating legislative provisions and policy into successful court actions has not been as easy as some may have wished. As a response to the change of focus by the Marine Park Authority there were 21 prosecutions in 1990-91. This figure has been steadily increasing each year with 37 prosecutions in 1991-92 and 44 in 1992-93.

However, the Marine Park Authority is concerned about the cost of these actions to management. Consequently, much work has been done to identify offences which could be effectively dealt with by way of infringement notices. The system of infringement notices currently being developed by the Great Barrier Reef Marine Park Authority is expected to be introduced in approximately 12 months.

The primary reasons for the introduction of infringement notices into the scheme of Marine Park management are:

- the removal of the stigma of a criminal charge and court proceedings for essentially minor or technical breaches of the law;

- the costs of detecting, investigating and prosecuting minor offences and the relatively low fines imposed by the courts; and

- the clear delineation between serious and minor offences so that limited management resources can be appropriately focused.

As a result of the review of offence provisions in the Great Barrier Marine Park Authority, the following offence categories have been suggested:

> **Indictable offences which may be dealt with summarily**. These will include offences where large scale habitat or environmental damage has/will or may occur, or where the natural resources of the park have been severely depleted. Maximum penalty of $50 000 for an individual. It is likely that some fault element will be required.
>
> **Summary offences**. These will include offences where significant environmental damage has or may occur, where financial rewards or gain from an offence may exist, or where significant management principles are disregarded. Maximum penalties: between $1 000 and $20 000 for an individual. Strict liability would be preferred but criminal negligence or recklessness may be more appropriate.
>
> **Summary offences which may be dealt with by way of an infringement notice**. These will include offences which are of a technical nature or where substantial habitat damage is not likely to occur. Tickets would involve penalties between $50 and $200. Summary penalties would range between $200 and $1000. Absolute liability or strict liability with a reversal in the onus of proof may be appropriate.

Ultimately the deterrent nature and the amount of the penalty will significantly determine the level of criminal responsibility which ought to be applicable. The higher the penalty, the greater the need will be to prove some mental fault element in the person's conduct, the circumstances or the person's intention.

Whilst there is opposition to the idea that increased penalties and greater enforcement action will have a definite deterrent effect, I would argue that it does. In crimes of passion or where significant monetary gains are concerned there is sufficient evidence to suggest that even the threat of the death penalty has not deterred breaches of the law (for example in relation to drug offences in some South East Asian countries). However, offences in the Marine Park and in the field of environment management are quite different.

Mostly the offenders are either unaware of the laws, did not expect to be caught or do not believe in the need for the law. In all three cases the use of fines as a deterrent and increased enforcement would have a positive impact. Education of the public with respect to environmental laws and penalties as well as the creation of an expectation that offenders will be caught, are essential parts of any enforcement program.

An experiment conducted in Canada in 1986 showed that an expectation of an increased risk of punishment and an increase in enforcement in relation to the use of seat belts in motor vehicles increased compliance from a pre-test level of 44.6 per cent to 74.4 per cent for drivers with a 42.3 per cent increase in compliance for back seat passengers (Watson 1986). However, it must be acknowledged that there are very significant factors which must be taken into account in any overall enforcement strategy. The impediments to successful prosecution action, discussed by Chappell and Norberry (1990) must also be acknowledged and addressed. These impediments include:

- government resolve to undertake enforcement action;
- resource allocation by government;
- staffing, attitudes and policies of regulatory agencies;
- the prosecution process; and
- sentencing decisions.

In the words of Chappell and Norberry (1990, p.116):

> The potential for nullification must also be recognised and addressed so that sanctioning strategies are not undermined by lack of government or regulatory agency commitment, the prosecutorial or the judicial process.

Conclusion: Balancing Fault and the Environment

The question of a person's degree of fault before they should be guilty of breaking the law is not easy to answer. Protection of the environment must be weighed against the consequences for persons who break the law, the effect on public confidence and the deterrent value. The success of prosecutions where fault elements are required will be dependent upon the quality of investigative staff and the construction of the offence provisions, the former being an important consideration in the cost of management.

Education is as important to the protection of the environment as it ever has been. The current focus by the Great Barrier Reef Marine Park Authority on enforcement has not diminished that importance. It is through a restructuring of offence provisions, the introduction of infringement notices and the refinement of prosecution procedures that the Marine Park Authority will attempt to match levels of fault with various offences and penalties.

The work of the CLOC has given managers a variety of tools to use in the task of implementing environmental laws. They should be explored and used to their fullest extent.

What is clear under the Draft Code is that it is the responsibility of the policy makers, the drafters and the legislature to determine the level of criminal responsibility appropriate in the case of every offence. Those people involved in environmental management must have an understanding of the way in which offence provisions will be interpreted if they are to have any success in managing the environment. Often, prosecution is used as a last resort and there are many reasons for this both political and practical. This is unfortunate and will not assist an agency in its role of protecting, preserving and managing the environment.

The CLOC Report recommendations will, if taken aboard, have direct implications for management agencies in the areas of investigative staff training, legislative amendments and drafting as well as the day-to-day implementation of environmental legislation. The field of criminal law, like environmental law is ever changing and it is incumbent upon managers to keep up with those changes.

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CORPORATE CRIMINAL LIABILITY

Matthew Goode

The Common Law: Vicarious Liability and the Development of Primary Liability

UNLESS THE TERMS OF THE STATUTE INVOLVED SPECIFICALLY PROVIDE TO the contrary, the criminal responsibility of a company or corporation, as distinct from its officers or employees, falls to be determined by common law principles. Under original common law, a company could not be convicted for any criminal offence. The common criminal law also took the position that, in general, there could be no vicarious criminal responsibility; that is, a person could not be deemed to be guilty of a criminal offence committed by another. But in the nineteenth century, general statutory exceptions to the vicarious responsibility principle led also to statutory exceptions to the principle against the criminal responsibility of corporations, and to common law exceptions where the corporation had failed to carry out a statutory duty creating a common law nuisance. For a variety of reasons, not least confusion about the principles governing primary corporate criminal liability, the principles of the common criminal law have never truly shaken free from these foundations (Welsh 1946; Yarosky 1964; Leigh 1969; Fisse 1967).

A principal hurdle to the imposition of primary, as opposed to vicarious, corporate criminal liability at common law was that common law offences insisted on proof of criminal fault, and the courts could not see a clear way of saying that, for example, a company, as opposed to any human being associated with the company, "intended" something, or "knew" something (*Kellow* [1912] VLR 162). That was not a problem with vicarious liability, because it did not rest on fault (Great Britain Law Commission 1972). The hurdle was overcome by the opinion of Viscount Haldane in *Lennard's Carrying Co Ltd v. Asiatic Petroleum Co Ltd* [1915] AC 705. There he invented a theory of primary corporate criminal liability for offences requiring fault which has become known as the "identification theory" or the "alter ego" theory of responsibility. This is what he said: (at 713)

> . . . a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation; the very ego and centre of the personality of the corporation.

The essence of what is said here is that a company may be convicted directly of the commission of a crime requiring proof of fault by attributing to the company the fault of an officer, agent or employee of the company who stands in such a relation to that company that he or she may be regarded *as being* the company for that purpose. (*DPP v. Kent and Sussex Contractors* [1944] KB 146; *ICR Haulage Ltd* [1944] KB 551; *Moore v. I. Bresler* [1944] 2 All ER 515). A famous statement of this doctrine is as follows:

> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such (*HL Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd*. [1957] 1QB 159 at 172).

Under the identification theory the person who acts is not acting for the company. He or she is acting as the company. This development de-emphasised the necessity for the development of vicarious liability—under which the person who acts does act for the company, but whose acts are attributed to the company. Since criminal responsibility is attributed to the company in this manner, whether or not the company was at fault in any way or not, vicarious liability was seen as unjust, and lacking in defensible penal rationale, and so was allowed to wither a great deal (Hanna 1989). In general terms, vicarious liability disappeared from the common law and was used only in the context of statutory liability (Fisse 1967).

Nevertheless, corporate vicarious liability remains alive and well in the modern statute book. Section 42 of the South Australian *Marine Environment Protection Act 1990* provides:

> For the purposes of this Act, an act or omission of an employee or agent is to be taken to be the act or omission of the employer or principal unless it is proved that the employee or agent was not acting in the course of his or her employment or agency.

Further, s. 43 goes on to provide that, once the company has been found guilty of the offence, then "each member of the governing body and the manager of the body corporate are guilty of an offence . . . ".

Another example is to be found in s. 85 of the Commonwealth *Proceeds of Crime Act 1987* which states that for the state of mind of a body corporate:

> it is sufficient to show that a director, servant or agent of the body corporate . . . by whom the conduct was engaged in within the scope of his or her actual or apparent authority, had that state of mind.

The justice, in the sense of traditional criminal law doctrine requiring proof of criminal fault as a prerequisite for conviction of a serious crime, of these forms of statutory liability is seriously open to question.

The Scope of Primary Corporate Criminal Liability at Common Law

The identification or "alter ego" theory of corporate criminal liability suffers from two related and fundamental sins. The first is that the basis or rationale for imposing corporate criminal liability in this way is far from clear. The second, and perhaps resulting problem, is that it is far from clear exactly which officers, agents or employees of the company act *as* the company. The result is that the common law basis of attribution of primary criminal responsibility to a company is seriously flawed. This section is devoted to exploring the nature and scope of these deficiencies.

The leading authority in this area in Anglo-Australian law is the decision of the House of Lords in *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153. Tesco Supermarkets was a large chain of stores which was charged with an offence against the Trade Descriptions Act by offering goods for sale to consumers at a price at which they could not really be bought. The prosecution concerned the advertisement of soap powder at a reduced price. A shop assistant had mistakenly placed normally priced soap powder on the shelf. The manager had failed to ensure that the powder was available at the advertised price. There was a defence of due diligence which could be pleaded by the company, unless the manager's lack of due diligence could be attributed to the company. So the question was whether the manager of the store was "identified" with the company via the common law doctrine.

The House of Lords held that the manager was not a person of sufficiently important stature within the corporate structure to be identified as the company for this purpose, and since there had been due diligence at the level of top management, the company could use the defence. In so holding, however, the House of Lords was less than unanimous about why that was so and what was the test for identification. Fisse has summarised the decision as follows:

> The *Tesco* principle limits the responsibility of a company to the conduct and fault of the board of directors, the managing director, or another person to whom a function of the board has been fully delegated. The leading judgments in *Tesco* suggest that the principle does not extend to managers exercising substantial managerial functions provided that the board of directors has been sufficiently astute to have retained a formal right of veto or intervention. If so, the principle greatly restricts the scope of corporate criminal liability, and opens up obvious opportunities for corporate evasion. Not surprisingly, the principle has often been watered down to cover middle managers in the absence of any finding that they have been delegated an unfettered power by the board. This dilution of the *Tesco* principle *is* readily understandable but no clear criteria have emerged for deciding whether a representative of the company has the requisite corporate manna. The reason is not difficult to understand. In a corporate world of diffuse organisational responsibilities many employees have an input in management and the people at the top of an organisational hierarchy are often remote from day-to-day sources of

> operational power. This invites the conclusion that there is little future in trying to define the personal identity of a company (Fisse 1990a, p. 601).

While the High Court has yet to rule definitively on the matter, Australian courts have shown a marked tendency to apply *Tesco*—or what they believe to be *Tesco*—where there are no statutory rules to the contrary. It is to a degree otherwise in Canada. In the leading decision of *Canadian Dredge & Dock* (1985) 10 CCC (3d)1, the Supreme Court of Canada did maintain the significance of the identification theory and vicarious liability as the primary means of attributing corporate criminal liability, but clearly took the view that *Tesco* placed the limit too high when restricting the nature of the employees who may be held to act as the company. A basis for doing so was that corporate decentralisation of decision making was necessarily more prevalent in a country the size of Canada.

Why the Common Law requires Reform

The identification theory in general and the *Tesco* interpretation of it in particular, are fundamentally flawed and should be replaced by statutory provisions. The literature on the area is very large indeed and the reasons for this conclusion are complex and do not readily respond well to attempts to summarise. Nevertheless, there are two central reasons for that conclusion (containing sub-reasons as well), and they are as follows.

First, the identification theory can, on occasion, pose legal and conceptual difficulties of Byzantine complexity (Goode 1975).

Second, the theory no longer reflects (if it ever did) the way in which corporate decision-making occurs. In many, if not most large companies, corporate policy is diffused throughout the management structure. It is simply not the case that good corporate management works in the top-down way assumed by the identification model. This may be particularly the case with the desirable decentralisation of such important matters as occupational health and safety practices. Worse, *Tesco* locates responsibility at an unrealistically high level which conduces to evasion of criminal responsibility by devolution of policy management in sensitive areas (Fisse 1971; Wells 1989). If *Tesco* is abandoned, the problem then is whether to set an arbitrary limit as to who may act as the company, or have no limit at all and either give up all attempts at corporate criminal responsibility or suffer the injustices of vicarious liability. Neither choice is acceptable or palatable.

Third, it is now clear from studies of corporate criminality that unacceptable behaviour (notably criminally negligent behaviour) may result from the failures of the organisation as an organisation, rather than from the fault of one or more individuals (at whatever level of the company): "collective responsibility becomes lost in the crevices between the responsibilities of individuals" (Field & Jorg 1991). The other side of this coin is that, just because one or more individuals is at fault, does not necessarily mean that the company is at fault and should be punished. Hence the desire in reform efforts in this area to require that the company have a defence of due diligence even though fault can be identified with the company or to limit the identification theory to cases in which the "controlling" employee acts for the benefit of the company.

For these reasons, the Gibbs Committee, having surveyed the wide and inconsistent variety of specific Commonwealth statutory provisions designed to overcome the short-comings of the common law, concluded:

> . . . the common law, largely because of the emergence of large corporations in modern times, does not make appropriate provision for the criminal liability of corporations. Further, the change required in the law to accommodate this development is of such dimensions that legislative action, rather than reliance on evolution of the common law, is required (Gibbs 1990, p. 305).

Homicide and Corporate Criminal Liability

The things that we do ought to reflect as accurately as possible the reasons why we do them, and corporate criminal liability is no exception. In considering the desirable scope of reforms to corporate criminal liability, it is necessary, given the immense variety and wealth of views on the subject, to take a step back and examine why it is that it might be argued that imposing criminal liability on a company, as distinct from the individuals which comprise it, is a defensible measure of criminal and social policy. A specific example of the operation of corporate criminal liability which exposes the policy questions and the issues in an interesting way, is the question of the possible liability of a company for unlawful homicide—murder or manslaughter.

Although the *Tesco* principle (and its forebears) would allow homicidal fault to be attributed to a company, the common law position until very recently was generally that a company or corporation, as distinct from an individual working within it, could not be guilty of unlawful homicide. It was held that a company could not be guilty of murder because, again until very recently, the mandatory penalty for murder was either death or life imprisonment and neither penalty applied to a company (*Murray Wright Ltd* [1970] NZLR 476). But recently, the general trend has been to replace mandatory life penalties with discretionary life penalties. It was also held that the definition of manslaughter and murder at common law (and in statutes which repeated or picked up the common law) referred only to the killing of one human being by another, thus disqualifying a company. It is, however, common practice for Acts Interpretation Acts in Australian jurisdictions to state that "person" includes a company and s. 4 of the South Australian Act so provides.

Despite this, scandalous instances of corporate misbehaviour which have caused deaths have compelled a common law reassessment of this position (Swigert & Farrell 1981; Cullen, Maaksted & Cavendar 1987; Field & Jorg 1991) and it is now widely accepted that a company can be found guilty of homicide if an appropriate penalty is available (Clark 1979; Spurgeon & Fagan 1981; Coment 1984; Stone 1985; Edelman 1987; Wells 1988; Corns 1991). The question remains, however, whether the company *should* be liable for conviction for unlawful homicide.

Rethinking the fundamental question whether and why a company should be held criminally responsible for homicide—or indeed, any other crime—requires attention to be paid to the fundamental bases for the imposition of the criminal sanction—deterrence, retribution, rehabilitation and so on—and thence to the nature of the criminal penalties that may be visited on the corporation as well as community attitudes to the corporate behaviour involved. These are important and complex questions about which much has been written, and it is not possible to do more than touch the surface and draw tentative conclusions here.

The debate about the utility of corporate criminal responsibility in general and corporate liability for homicide in particular has been sharpened recently in the United Kingdom partly in response to the sinking of the ferry *Herald of Free Enterprise*. In

Australia, the debate has surfaced, less dramatically, in relation to the enforcement of occupational health and safety laws. It is an undeniable fact that too many workers die each year in the workplace as a result of unsafe work practices and conditions. It is also undeniable that, although it is now legally possible to prosecute corporate employers for manslaughter, that course is not taken.

There are arguments made that it is inappropriate to use manslaughter in the appropriate case because workplace safety is governed by specific schemes of legislation and offences (Wells 1989; Corns 1991; VLRC 1991). It has also been argued that to invoke the general criminal law of manslaughter via corporate criminal responsibility will marginalise less serious occupational health and safety laws:

> By prising out a few cases for treatment under separate criminal auspices, the criminal status of what is left is rendered even more ambiguous than it is already becoming under the impact of the continuing historical and structural processes which we have outlined. The objective, which we share, is better achieved by recognising occupational health and safety offences as much more unequivocally criminal, and by creating occupational health and safety offences specific to the enormity of the criminality involved when employer negligence leads to death at the workplace (Carson & Johnstone 1990).

The Victorian Law Reform Commission has rejected this argument, arguing that the current law of manslaughter is clearly applicable, and that "[t]o create a special new offence to cover workplace deaths implies that these sorts of deaths are somehow different from other cases of negligent manslaughter" (VLRC 1991, p. 21). But the debate remains a real one, and equally applicable to other classes of offence, including environmental offences. It raises real questions about the aims and efficacy of corporate criminal responsibility, about what is and what is not a "real crime", and why. Rethinking those questions without the shackles of the common law accommodation of principle might lead to a better idea.

Rethinking Corporate Criminal Responsibility

A great deal has been written about the aims and efficacy of corporate criminal responsibility. There is a continuing debate between those who believe that corporate criminal responsibility is necessary and desirable in addition to the criminal responsibility of the individual actors in terms of the aims and objectives of the criminal law, on the one hand, and those who believe that individual criminal responsibility is all that is required on the other (collected in Fisse & Braithwaite 1988). A middle course is taken by those who argue that corporate criminal responsibility should be available only where individual criminal responsibility is ineffective or where no individual can be said fairly to be responsible for the crime (Mitchell 1977; Lim 1990).

Analysis of the traditional aims of the criminal law: deterrence, prevention, incapacitation, retribution, rehabilitation and restitution show that all have a role to play in corporate, as opposed to individual, criminal responsibility, especially when the organisational aspects of corporate crime are teased out and explored (examples are Fisse 1978; Braithwaite & Geis 1982; Note 1987). Fisse and Braithwaite concluded:

> . . . Individualism persistently fails to capture the corporate significance of corporate operations over which the law seeks to exercise control. . . . The logic and practical imperatives of deterrence do not preclude corporate criminal

> responsibility, but, on the contrary, impel it. Given the difficulties and expense of convicting individuals for crimes within complex organisations, a policy of individualism almost certainly would reduce the number of convictions for corporate crime and thereby worsen the inequality between crime in the streets and crime in the suites. And retributive theories of punishment are more compatible with corporate criminal liability than the Individualist's intuitions about retribution would have one believe (Fisse & Braithwaite 1988, p. 510).

The Law Reform Commission of Canada noted:

> In a society moving increasingly toward group action it may become impractical, in terms of allocation of resources, to deal with systems through their components. In many cases it would appear more sensible to transfer to the corporation the responsibility of policing itself, forcing it to take steps to ensure that the harm does not materialize through the conduct of people within the organization. Rather than having the state monitor the activities of each person within the corporation, which is costly and raises practical enforcement difficulties, it may be more efficient to force the corporation to do this, especially if sanctions imposed on the corporation can be translated into effective action at the individual level (LRC 1976, p. 31).

It is therefore not surprising that the South Australian Criminal Law and Penal Methods Reform Committee, the Law Commission's Draft Code for England and Wales, the Law Reform Commission of Canada's Draft Code for Canada, the American Law Institute Model Penal Code and the Draft Statute of the Review of Commonwealth Criminal Law all provide for corporate criminal responsibility. There are two central but interlocking themes at work in this: the first is movement in the social idea of what is a "true crime"; the second is the central notion describing that with which corporate criminal crime is really concerned. Each theme will be explored in a little more detail.

In arguing that, far from leading to the marginalisation of occupational health and safety offences, prosecution of companies for manslaughter by criminal negligence in the appropriate case will enhance the criminality of health and safety breaches, Corns identifies some of the factors which have led to the idea that these are not "real" crimes:

> . . . virtually all prosecutions are conducted in the Magistrates Courts. Cases are presented by non-police, civil inspectors rather than crime victims are the principal witnesses, limited sentences are imposed (fines and bonds) and very few cases are appealed against. As a consequence, the higher courts have had limited opportunity to develop case law relating to corporate liability for indictable offences and in particular, principles for sentencing corporations (Corns 1991).

But public perceptions can and do change. The key factor appears in an American study of corporate homicide:

> Traditionally, the illegal activities of corporations and those of conventional criminals have been defined as involving very different consequences. Corporate misbehaviour has been viewed as entailing a diffuse, impersonal cost to society. The harms produced by price-fixing, false advertising, or mislabelling, for example, have been perceived as increased financial burdens on the consumer.
>
> This differs dramatically from the imagery of personal threat or injury suffered at the hands of the robber, rapist or murderer. These social definitions of harm

> provide important distinctions between air and water pollution, on the one hand, and assault and battery, on the other; or false advertising and theft, or unsafe product liability and homicide. Before the activities of corporations can be recognised as instances of conventional crime, the social harms produced by these activities must be recognized as conventional harms (Swigert & Farrell 1980, pp. 179-80).

There is evidence of this shift in attitudes. Some, as has been remarked, is taking place in the area of occupational health and safety. Another significant area is in relation to environmental offences. A series of disasters, costing human life, attributable to some degree to corporate criminal negligence has precipitated change in social definitions of deviance in the United Kingdom (Wells 1988). As always, scandal drives change—and environmental vandalism, particularly on a large scale, is becoming more and more seen as a gross social harm worthy of being treated as a "real" criminal offence—and not just when, as in Chernobyl and Bhopal, large numbers of people are killed or injured.

French elaborated on the concept of corporate "collective" responsibility (as opposed to "aggregate" [of individuals] responsibility) as follows:

> Conglomerate collectivities can be justifiably held blameworthy and hence differ significantly from aggregated collectivities. This accounts for the fact that excuses are often put forth for such collectivities . . . while when aggregates are blamed the excuses are put forth in the name of individuals. Hence when we say that a conglomerate collectivity is blameworthy we are saying that other courses of collective action were within the province of the collectivity and that had the collectivity acted in those ways the untoward event would not likely have occurred and that no exculpatory excuse is supportable as regards the collectivity. This is not to say that an individual member or even all individual members of the collectivity cannot support excuses. In fact, that is never really at issue (French 1975, p. 166).

Models for Reform

In this complex and rapidly changing area of criminal law and policy, proposals that have been developed most recently are of primary importance. In Australia, the task was recently attempted in the Third Interim Report of the Gibbs Committee (Gibbs 1990). It is those proposals which have formed the focus of recent Australian discussions on reform of corporate criminal responsibility and from those proposals that discussion must proceed. These proposals took the concrete form of a section of a draft codification of the Commonwealth criminal law.

The detailed proposals contain a number of technicalities which will not be discussed here. It is to be hoped that a certain amount of generalisation can be forgiven. The core of the Gibbs recommendations is as follows. The proposed code would begin with the usual and unexceptionable method of attributing conduct (or actus reus) of an offence to a company vicariously where the employee acted within the scope of his or her employment. As ever, the problematic area of the proposals lies in the area of fault.

The Gibbs Committee decided to recommend two alternative forms of corporate criminal responsibility. One is contained in proposed s. 4BA(3). The other is contained in proposed s. 4BA(4). In the absence of a legislative direction to the contrary, the one

in subsection (3) is to prevail. The default provision itself has two distinct alternatives. The first is an extension of the *Tesco* principle. The second is a modified form of vicarious liability, leavened by a requirement of organisational fault. *Tesco* is extended by substantially widening the definition of the corporate officers that may attract the primary liability of the company. The key is the definition of "controlling officer". That is defined as follows:

> "controlling officer", in relation to a body corporate, means a person who has authority to determine, or actual control over:
>
> (a) the general conduct, of the affairs or activities of the body corporate; or
>
> (b) the conduct of the part of the business of the body corporate in which a particular act is done.

The second alternative route to liability imposes vicarious liability in relation to the conduct and state of mind of any employee if it can be proven that the company did not take "measures that, in the circumstances, were appropriate to prevent, or reduce, the likelihood of, the commission of the offence". It is the failure to take those measures which mean that responsibility attaches to a kind of organisational fault.

Section 4BA(4) contains the alternative basis of liability which may be explicitly invoked by the legislature. It is exactly the same as the vicarious liability arm of the previous subsection except that subsection (5) places the onus on the accused company to prove that it had taken the appropriate measures.

These proposals were highly original in that they tried hard to introduce the idea of *corporate, as* opposed to individual or human, fault, into the liability question. But this was the subject of sustained criticism by Professor Fisse (Fisse 1990b, 1991a, 1991b). Fisse took the view generally that, insofar as the proposals relied upon the *Tesco* basis of liability in any form, rather than upon organisational blameworthiness, they were unduly ill-defined, conservative and subject to the criticisms that may be made of that basis of responsibility and that insofar as the proposals employed a concept of organisational blameworthiness, they were insufficiently well thought through. Fisse suggested that a more appropriate model would be based on s. 65(2) of the Commonwealth *Ozone Protection Act 1989*, which would attribute the conduct of any employee at whatever level of the company to the company, and which would attribute fault to the company in any one of the following ways:

(a) by having a policy that expressly or impliedly authorises or permits the commission of the offence or an offence of the same type;

(b) by failing to take reasonable precautions or to exercise due diligence to prevent the Commission of the offence or an offence of the same type;

(c) by having a policy of failing to comply with a reactive duty to take preventive measures in response to having committed the external elements of the offence; or

(d) by failing to take reasonable precautions or to exercise due diligence to comply with a reactive duty to take preventive measures in response to having committed the external elements of the offence (Fisse 1991a, pp. 173-4).

The Review Committee recommendations and Fisse's proposals have been considered in detail by the Criminal Law Officer's Committee, a committee consisting of officers of the Commonwealth and all State and Territory Governments, with a brief to develop a Draft Criminal Code for Australia. It produced a Discussion Paper in 1992, and a Final Report in late 1992, early 1993 (CLOC 1992a; CLOC 1992b). The status of these proposals is that they are a report to the Standing Committee of Attorneys-General, who will consider their reaction to them later this year. The Committee has made proposals for a concept of corporate criminal responsibility which, while more radical than that of the Gibbs Committee, do not, perhaps, move so far as Fisse would have liked.

The Code provisions begin with the deceptively simple proposition that the Code —that is, the proposed Criminal Code—will apply with necessary modifications, to bodies corporate in the same way that it does to individuals. All that follows is really explication or commentary on that proposition. As before, the Code takes the position that the physical conduct of a crime can be attributed to a company vicariously through that of its agents and so on acting within the scope of their actual or apparent authority. The tricky thing is, as always, criminal fault.

The Code is based on the proposition that, for individuals, there are four kinds of subjective fault only: intention, recklessness, knowledge and criminal (as opposed to civil) negligence. The fault element that prevails unless the legislature says otherwise, is recklessness. The legislature can also create offences which contain elements of strict or absolute responsibility. But what holds good for individuals may not hold good for companies. The standards are and should be different. After experimenting with a separate idea of corporate recklessness (CLOC 1992a), the Committee decided that this was at once too hard and too subtle. The distinction that mattered was the one between advertent fault (intention, recklessness and knowledge) and inadvertent fault (negligence).

The Committee determined that the corporate equivalent to subjective fault in an individual was the idea that the company "expressly, tacitly or impliedly authorised or permitted the commission of the offence". It then determined that that could be shown in a number of ways. These are not exclusive ways. One obvious way is that the board of directors did it. Another way is that a high manager of the company had the fault, but the company can escape if it proves due diligence. The most controversial way, though, is the full "corporatisation" of the idea of corporate fault via the notion of "corporate culture" (*see also* Bucy 1991). The Code says that the company will be taken to have authorised or permitted the commission of the offence if it had a corporate culture which "directed, encouraged, tolerated or led to" the commission of the offence or "failed to maintain a corporate culture that required compliance with the relevant provision". It goes on to say that this can be shown in a number of ways including by, in effect, previous authorisation, or by the employee holding a reasonable expectation that the company would have authorised the commission of the offence.

There has been a similar attempt to "corporatise" the idea of negligence. The committee accepted and the draft reflects the idea that a company can be criminally negligent even though none of the individuals which compose it is criminally negligent. This was found to be the case, for example, with respect to Air New Zealand about the Mt Erebus disaster. The Code goes on to make it clear that a company can be found to have been at fault in this sense by inadequate corporate systems of management or control, or by failure to provide adequate systems for the conveying of relevant information to the people within the structure that should have that information.

It is interesting to note that the idea of a truly corporate idea of fault and the Committee's approach in particular, has attracted the favourable attention of the NSW Independent Commission Against Corruption (ICAC 1992).

Conclusion

The New South Wales *Environmental Offences and Penalties Act 1989* was an attempt by Governmnent to put in place a code of environmental criminal and quasi criminal regulation. It was the subject of major amendments one year after it had been enacted. Analysts in the literature were very critical of it (Farrier 1990; Franklin 1990; Chappell & Norberry 1990; Lipman 1991). These criticisms ranged from the general to the very specific. For example, a specific criticism was that the legislation produced unjust results:

> The *Hunt* case seems a particularly good example. No lasting harm was done to the environment, and the defendant was supporting a wife and child on a modest weekly salary of $430. The Land and Environment Court imposed a fine of $10 000, but the defendant also had to pay the costs of the SPCC which amounted to $11 648.62, quite apart from his own costs. This seems to exalt political and community expectations over social justice (Lipman 1991, p. 334).

More general criticisms were that the legislation failed to deal with the vexed issue of a principled approach to corporate criminal liability, because it relied on *Tesco* (too narrow) and strict vicarious liability (too broad); that the issue of criminal fault in relation to the range of criminal offences was poorly dealt with; that the legislation, in relying exclusively on a fine as a sanction, ignored the evidence about the need for a range of sanctions to achieve the goals of deterrence and prevention; and that over-reliance on the criminal sanction obscured the real problems of effective enforcement and sanction nullification.

Whatever the extent to which this chorus of criticism is justified, we should learn from the New South Wales experience. This paper suggests the codification of environmental offences is an important goal of good criminal and social policy, but that the issue of corporate criminal liability needs to be addressed in an innovative way that does criminal justice to the corporate form and that, if we are to have serious criminal offences protecting environmental values, then they should require proof of equally serious corporate criminal fault.

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PROSECUTING THE CROWN FOR ENVIRONMENTAL OFFENCES

Andrew Beatty

> In the exertion . . . of those prerogatives, which the law has given him, the King is irresistible and absolute (Blackstone, *Commentaries on the Laws of England*, Volume 1, p. 251).
>
> There is, I think, the strongest presumption against attaching to a statutory provision a meaning which would amount to an attempt to impose upon the Crown a liability of a criminal nature. It is opposed to all our conceptions constitutional, legal and historical (*Cain v. Doyle* (1946) 72 CLR 409 at 424 per Dixon J).
>
> It follows from what has been said above that considerations of principle preclude recognition of an inflexible rule that a statute is not to be construed as binding the Crown or Crown instrumentalities or agents unless it manifests a legislative intent so to do either by express words or by "necessary implication" in the limited and stringent sense explained above (*Bropho v. Western Australia* (1990) 171 CLR 1 at 22 per Mason CJ, Deane, Dawson, Toohey, Gaudron & McHugh JJ).

The Attack on Crown Immunity

THE FORTRESS OF LEGAL IMMUNITY INHABITED BY THE CROWN HAS BEEN besieged of late and, in some parts, breached. What some may find surprising about this fact is not that the siege should have succeeded but that it has taken so long given that the activities of the State have for many years pervaded virtually all aspects of commercial, industrial and developmental endeavour.

Although its decision in *Bropho v. Western Australia* has been labelled an act of "pure legislation" (Starke 1990) in finding that the State of Western Australia was subject to the *Aboriginal Heritage Act 1972* (WA) in relation to the proposed development of the Swan Brewery site, the High Court recast the law on the Crown's susceptibility to legislation. The decision has given rise to two tests:

- A statute applies to and will bind the Crown if its provisions, including its subject matter and disclosed purpose and policy, when construed in the context of permissible extrinsic aids, disclose an intention to bind the Crown.

In order for the Crown to be bound it is not necessary that the intention should be "manifest" from the terms of the statute or that its purpose would be wholly frustrated if the Crown were not bound.

- It may be necessary, in construing a legislative provision enacted before the publication of this decision to take account of the fact that the tests formerly applied were seen to be of general application at the time of enactment. If, however, a legislative intent that the Crown be bound is apparent notwithstanding that those tests are not satisfied, that legislative intent must prevail.

Whilst *Bropho* may not have been the only catalyst for the increase in prosecutions of Crown agencies for environmental crimes (*see* Appendices I and II), it might fairly be said to represent the sort of change in thinking which has informed those prosecutions.

Perhaps coincidentally, until *Bropho*, there does not appear to have been any prosecution of a Crown agency in New South Wales for an environmental crime. What makes this fact all the more remarkable is that, for over a generation, the Crown had been made specifically susceptible to two of the most important pollution Acts—the *Clean Air Act 1961* and the *Clean Waters Act 1970*. Indeed, virtually every other New South Wales Act which makes provision for the prosecution of environmental crimes specifically binds the Crown (*see* Appendix III). As from 8 October 1992, each of the Acts listed in Appendix III were amended so as to broaden the extent of coverage against the Crown. This broadening may, incidentally, affect the Commonwealth's susceptibility to State environmental laws especially following the decision of the High Court in *Botany MC v. Federal Airports Corporation* (1992) 175 CLR 453.

The Crown: a different Sort of Environmental Criminal

Some may react with disbelief to the suggestion that one government agency should investigate and prosecute another. This response is not normally provoked by any deep seated concern for the legal impregnability of the Crown. Rather, it springs from the feeling that all taxpayers have when they sense that the government is wasting money. The current editor of the *Australian Law Journal*, Mr Justice Young (1993), has recently given form to this feeling in "Suing yourself for profit".

From another perspective, however, there are compelling arguments against the proposition that the Crown should be treated differently from other polluters:

- For the Crown to be treated differently (or much differently) from other defendants is likely to erode public confidence in our environmental protection regimes and, possibly, the rule of law generally. The maxim that justice must not only be done but be seen to be done must mean that those guilty of a crime cannot go unpunished (or be punished differently), merely because they are of a different legal complexion.

- A number of Crown agencies are amongst the most notorious polluters—the Sydney Water Board is said to be a prime example. For politicians to be taken seriously when talking about their concerns for the environment, they cannot exempt the worst repeat offenders from laws designed to protect the environment.

- All of the other desirable benefits of the system of environmental criminal justice such as, for example, education and pollution reduction, will be lost if the law is not applied without fear or favour.

Having set out these arguments, opponents of the proposition that a Crown agency should be treated no differently before the environmental criminal law rely not only on specific, and largely economic, arguments but also on the types of arguments advanced by those who think that fines and incarceration are not the best or only means to an otherwise desirable end:

- By prosecuting the Crown, taxpayers are financing an absurd accounting exercise where the only real winners are likely to be private lawyers—in other words, it is a case of robbing Peter, the Crown agent, to pay Paul, the private QC. Not only is the fine which might be secured on a successful prosecution a "phantom" victory for one part of the state over another, the "hidden" costs can be enormous —including, executive and managerial time, Crown solicitors, law courts, judges, transcript services.

- In some cases, the fact that an environmental crime has been committed (particularly in cases of strict liability offences) might fairly be said to have been occasioned by cuts in, or the lack of, government funds: to punish a Crown agency which accidentally spills oil into its own waterway because insufficient funds were available to repair a bund hardly seems like a productive use of tax dollars.

- The prospect of a prosecution (even a successful one) having a real deterrent effect seems remote in relation to certain Crown agencies—what incentive is there for that agency to change its ways if the fines that it is forced to pay have no real impact on its budget or its ability to pay its workers or stay in business? However, it is interesting to note a recent statement from the Director-General of the New South Wales EPA was that, "The prosecution's impact is not the money. The prosecution's impact is that the Water Board is on the front page of the newspaper and has been prosecuted. I can assure you that bureaucrats hate being prosecuted" (*Sydney Morning Herald*, 30 August 1993, p. 13).

- In cases of government run monopolies, the fact that a fine has been imposed is less likely to bring about a change in attitudes or work practices than in the case of a private corporation concerned about its public image in the market place, particularly when its competitors are promoting themselves as "green".

- Even in those cases where the accounts of the Crown agency do bear a real relationship to reality and where a large fine will really hurt, the state is only punishing itself because the defendant agency will have less money next year to provide services to the public. This argument was run, without success, before Bignold J in *Environment Protection Authority v. Water Board* (unreported, NSW Land and Environment Court, 19 July 1993).

This paper is not the appropriate forum to debate the utility of the traditional forms of punishment for environmental crimes (fines and threats of imprisonment). Nonetheless, having set out the arguments of those who are not convinced that the Crown should be treated in the same way as other environmental criminals, two observations are offered:

- As his Honour Mr Justice Stein recently observed (*Environment Protection Authority v. Capdate Pty Ltd* (1993) 78 LGERA 349), the Land and Environment Court is presently unable to impose community service orders or other more "creative" forms of punishment. If these options were available it is possible that some of the problems inherent in the use of big sticks (fines) and even bigger sticks (gaol terms) might be overcome—not only would those responsible for pollution suffer the opprobrium and dishonour which this type of penalty carries with it, their being required to clean up their own mess (and possibly that of others) would actually do some good for the environment.

- Linking the annual budgetary allocations of Crown agencies (or salary reviews of their executives) to their environmental performance is likely to have a greater impact than applying traditional criminal sanctions.

What does the Future Hold?

For many years, despite being specifically bound by the provisions of a number of pollution Acts, the Crown and its agencies enjoyed de facto immunity. Vestiges of the forces which permitted this can still be seen in the provisions in some Acts relating to appeals by "public authorities" against decisions concerning the granting or refusal of applications for licences and approvals. Thus, for example, s. 17N of the *Pollution Control Act 1970* provides:

> (1) Where a dispute arises between the Authority [that is the EPA] and a public authority [that is a public authority constituted by or under any Act other than this Act—including a government department and an officer or employee of a government department or of a statutory body representing the Crown on whom any powers, authorities, duties or functions are conferred or imposed by or under any Act other than this Act] or a person acting on behalf of the Crown with respect to any matter or thing against which an appeal lies under

> this Division, the Authority or that authority or person may refer the dispute to the Premier for settlement.
>
> (2) The decision of the Premier on a dispute referred to the Premier by the Authority, a public authority or a person acting on behalf of the Crown in accordance with subsection (1) shall be given effect to by the Authority and that authority or person.
>
> (3) Where a dispute is settled by the Premier under this section, the public authority which or person who was a party to the dispute is not entitled to appeal under this Part against the matter or thing to which the dispute related.

There is a similar provision in s. 72 of the *Noise Control Act 1975*.

The New South Wales Premier recently released a Memorandum (no. 91/9) entitled "Litigation between Government Departments and Authorities". This memorandum was issued at about the same time that the sections referred to above dealing with the reference of disputes to the Premier were enacted. The publication of the memorandum also coincided with the first prosecutions of Crown agencies for environmental crimes.

The New South Wales EPA has, over the last few months, sought and considered submissions on its draft Prosecution Guidelines. When exhibited, the Guidelines provided, in part, that:

> The EPA recognises that the consultative steps set out in the Premier's Memorandum no. 91/9—"Litigation between Government Departments and Authorities"—may facilitate remedial action and may expedite any court hearing . . .

The final form of the Guidelines have now been made publicly available. The excerpt quoted above from the exhibition draft now reads:

> Because the EPA is not subject to Ministerial control and direction in respect of prosecutions it would be inappropriate for the EPA to follow the Premier's Memorandum no. 91/9 . . . as to Ministerial involvement in the decision making process. However, the EPA recognises that the consultative steps otherwise set out in the Memorandum may facilitate remedial action and may expedite any court hearing . . .

Another aspect of the susceptibility of Crown agencies to prosecution for environmental offences is that, in New South Wales at least, "any person" may apply to the Land and Environment Court for leave to bring proceedings against, amongst others, Crown agencies, where their acts or omissions constitute a breach (or threatened or apprehended breach) of any Act where that breach "is causing or is likely to cause harm to the environment" (s. 25 *Environmental Offences and Penalties Act 1989*).

The first named defendant in the only case brought to date under s. 25 was the NSW Environment Protection Authority: *Brown v. Environment Protection Authority & Anor* (1992) 75 LGRA 397 per Stein J; (1992) 78 LGERA 119 per Pearlman CJ.

Even though the tests which the Court must apply before granting leave are more stringent than under s. 25, s. 13 of the same Act permits "any person" to seek the leave of the Court to bring a private, criminal prosecution.

The liberal locus standi philosophy in New South Wales has at least the potential to overcome any politically motivated foot dragging in the prosecution of Crown agencies for environmental crimes or other offences.

Conclusion

The fact that "the King can do wrong" is becoming more widely understood by our politicians and judges. In the context of offences against the environment, the Crown has, in some jurisdictions at least, been subject to prosecution for many years. The fact that the floodgates have not yet opened completely probably has as much to do with the philosophy of prosecuting agencies as with political and other considerations.

There are some respectable arguments to be made that Crown agencies should be treated differently than other defendants to charges of environmental crime. Then again, there are some respectable arguments that "ordinary" environmental criminals probably should be treated differently as well if real environmental protection is to be achieved.

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APPENDIX I

Pollution Prosecutions of Crown Agencies in the New South Wales Land and Environment Court

Case	*Act/Section*	*Maximum Penalty*	*Actual Penalty*
[1. Judgment 2. Penalty]			
SPCC v. Electricity Commission 1. 11/10/91 2. 6/12/91	ss. 16, 20(2) Clean Waters Act	$40 000	$10 000 [Confirmed on Appeal by NSW Court of Criminal Appeal: 7/10/92]
SPCC v. State Transit Authority of NSW 1. 26/10/91	s. 16(1) Clean Waters Act	$40 000	$15 000
SPCC v. Water Board 1. 4/2/92	s. 16 Clean Waters Act	$40 000	$15 000 + costs of $7979
Hunter Water Board v. State Rail Authority 1. 12/2/92 2. 23/3/92	s. 16(1) Clean Waters Act	$40 000	$15 000 + $904.79 clean-up costs
Environment Protection Authority v. Water Board 1. 25/3/93	s. 14(2) Clean Air Act	$40 000; $20 000 daily penalty	$25 000 + $1 000 for each of 2 days
Environment Protection Authority v. Electricity Commission of NSW 1. 26/7/93	s. 16(1) Clean Waters Act	$125 000	$25 000

APPENDIX II

Prosecutions commenced in the New South Wales Land and Environment Court

Year	*Number of Prosecutions Commenced*	*Year*	*Number of Prosecutions Commenced*
1980	1	1987	23
1981	12	1988	40
1982	11	1989	193
1983	17	1990	325
1984	15	1991	143*
1985	19	1992	37*
1986	35	1993	22*

(Source: Land & Environment Court of NSW)

*The sharp decline in the number of prosecutions since 1991 appears to be principally due to an amendment to the Environmental Offences and Penalties Act, with effect from May 1991, which extended the period within which prosecutions for the commission of all but the most trivial pollution offences must be commenced from two months to three years after the alleged offence. It is expected that a large number of prosecutions will be commenced within the next nine months with respect to offences alleged to have occurred during the previous three years. Additionally, it is understood that disruption and administrative changes occasioned by the replacement of the SPCC by the EPA as the environmental regulatory authority on 1 March 1992 has led to a delay in the commencement of prosecutions for offences which have been or are being investigated.

APPENDIX III

Some NSW Acts which bind the Crown

- *Clean Air Act 1961*
  s. 2A This Act binds the Crown in right of NSW and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

- *Clean Waters Act 1970*
  s. 3 This Act binds the Crown in right of NSW and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

- *Pollution Control Act 1970*
  s. 3 This Act binds the Crown in right of NSW and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

- *Noise Control Act 1975*
  s. 5 This Act binds the Crown in right of NSW and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

- *Dangerous Goods Act 1975*
  s. 5A This Act binds the Crown in right of NSW, and in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

- *Environmental Planning & Assessment Act 1979*
  s. 6 This Act binds the Crown, not only in right of NSW but also, so far as the legislative power of Parliaments permits, the Crown in all its other capacities.

- *Environmentally Hazardous Chemicals Act 1985*
  s. 4 This Act binds the Crown in right of NSW and in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

- *Marine Pollution Act 1987*
  s. 4(1) This Act binds the Crown in right of NSW and so far as the legislative power of Parliament permits, the Crown in all its other capacities.

(2) Nothing in this Act renders the Commonwealth or a State or Territory of the Commonwealth liable to be prosecuted for an offence.

(3) Subsection (2) does not affect any liability of any servant or agent of the Commonwealth or of a State or Territory of the Commonwealth to be prosecuted for an offence.

- *Environmental Offences and Penalties Act 1989*

  s. 23 This Act binds the Crown in right of NSW and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

- *Protection of Environment Administration 1991*

  s. 32 This Act binds the Crown in right of NSW and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

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

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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.

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PROSECUTION GUIDELINES: A COMMENTARY

Dorelle Pinch

Statutory Obligation

ON 24 AUGUST 1993 THE CHAIRMAN OF THE ENVIRONMENT PROTECTION Authority (EPA) Board, Professor John Niland, launched the Prosecution Guidelines of the EPA. With the publication of the Guidelines the Board fulfilled its statutory obligation under s. 16(c) of the *Protection of the Environment Administration Act 1991* to develop and publish prosecution guidelines. This is part of the overall scheme for the conduct of prosecutions set out in the Protection of the Environment Administration Act which effectively removes the institution of criminal and related proceedings from the control and direction of the Minister for the Environment and gives the Board specific statutory responsibilities. The Board itself must consider and approve the institution of proceedings for the most serious environmental offences that is those under Tier 1 of the *Environmental Offences and Penalties Act 1989*. In reaching their decision members of the Board will use the principles set out in the Guidelines. Similarly, decisions taken by the Director-General of the EPA in relation to less serious offences will also be taken in accordance with the Guidelines.

Background

The purpose of publishing Prosecution Guidelines is:

- to increase community understanding of how the EPA makes decisions about prosecutions;
- to explain under what circumstances prosecutions are taken;
- to indicate how appropriate charges and defendants are selected; and
- to encourage organisations to focus on their environmental responsibilities.

A draft of the Guidelines was circulated for public comment for a period of four months at the end of 1992. Some fifty responses were received from industry groups, environmental groups, members of the legal profession, local councils and other government authorities. That input was considered by the Board prior to finalisation of the document.

The practice of disseminating Guidelines is not unique to the NSW EPA. The Commonwealth Director of Public Prosecutions published such a document in 1984 and the NSW Director of Public Prosecutions in 1989. The EPA Guidelines reflect the general principles set out in those documents relating to the exercise of discretion in the prosecution process. The EPA Guidelines, however, also address specific issues that are raised because of the particular provisions of the environmental legislation administered by the EPA.

In launching the Guidelines, Professor Niland indicated that the prosecutions policy set out in the Guidelines must be understood in light of the overall corporate goals and objectives of the EPA. Regulation and enforcement are not the only ways to achieve those goals and the desired outcome of environmental improvement. However, effective enforcement of environmental laws provides the framework in which those other initiatives, such as the use of economic incentives, can be developed.

Legislative Framework

The EPA administers a wide range of environmental legislation. The Acts currently administered by the EPA are:

Protection of the Environment Administration Act 1991
Clean Air Act 1961
Clean Waters Act 1970
Dangerous Goods Act 1975
Environmental Education Trust Act 1990
Environmental Offences and Penalties Act 1989
Environmental Research Trust Act 1990
Environmental Restoration and Rehabilitation Trust Act 1990
Environmentally Hazardous Chemicals Act 1985
Noise Control Act 1975
Ozone Protection Act 1989
Pollution Control Act 1970
Radiation Control Act 1990
Recreation Vehicles Act 1983
Unhealthy Building Land Act 1990
Waste Disposal Act 1970

Breaches of these statutes are classified as criminal offences. Unlike the model in the United States where only the most serious breaches are classified as criminal offences, criminal breaches in NSW vary considerably in type and magnitude. They range from what can be classified as administrative infringements, that is failing to submit a report, to contraventions which cause serious harm to the environment.

Range of Options

The range of options available to the EPA in dealing with contraventions of the legislation it administers are:

(a) verbal acknowledgment, persuasion and advice;

(b) formal warning letter;

(c) the issue of a notice to perform certain specified works, for example the installation of equipment;

(d) the issue of a notice to clean up or remediate a site;

(e) the institution by the EPA of clean up or remediation measures and the ability to recover costs from an appropriate defendant;

(f) the alteration of licence conditions;

(g) the imposition of pollution reduction programs;

(h) the issue of penalty notices;

(i) convening/participating in alternative dispute resolution such as mediation;

(j) the institution of Court proceedings to obtain an injunction;

(k) the institution of prosecution proceedings in Court;

(l) the suspension or revocation of a licence/certificate of registration.

It should be noted that options (f), (g), and (l) above are available only in circumstances where the defendant is required to hold a licence or certificate of registration under one of the environmental statutes.

Specific recognition has been given by Parliament to the fact that the EPA will deal with some breaches by means other than the institution of prosecution proceedings. Under s. 13.(2A) of the Environmental Offences and Penalties Act members of the community who would otherwise be able to institute prosecution proceedings with leave of the Court are not able to do so in situations where the breach has already been dealt with by the EPA using other "relevant action".

"Relevant action" as defined in s. 13(2B) Environmental Offences and Penalties Act includes "action under any Act to require the defendant to prevent, control, abate or mitigate any harm to the environment caused by the alleged offence against this Act or to prevent the continuance or recurrence of that alleged offence".

Strategic Response

The policy position adopted in the Guidelines is that each case will be assessed on its merits to determine whether prosecution is the appropriate strategic response. The Guidelines then set out those factors which alone or in conjunction will be considered in making that determination.

Those factors are:

(a) the seriousness or, conversely, the triviality of the alleged offence or that it is of a "technical" nature only;

(b) the harm or potential harm to the environment caused by the offence;

(c) any mitigating or aggravating circumstances;

(d) the degree of culpability of the alleged offender in relation to the offence;

(e) the availability and efficacy of any alternatives to prosecution;

(f) whether the offender has been dealt with previously by non-prosecutorial means;

(g) whether the breach is a continuing or second offence;

(h) whether the issue of Court orders are necessary to prevent a recurrence of the offence;

(i) the prevalence of the alleged offence and the need for deterrence, both specific and general;

(j) the length of time since the alleged offence;

(k) the age, physical or mental health or special infirmity of the alleged offenders or witnesses;

(l) whether there are counter-productive features of the prosecution;

(m) the length and expense of a Court hearing;

(n) the likely outcome in the event of a conviction having regard to the sentencing options available to the court;

(o) any precedent which may be set by not instituting proceedings;

(p) whether the consequences of any conviction would be unduly harsh or oppressive; and

(q) whether proceedings are to be instituted against others arising out of the same incident.

In addition to those factors there are specific considerations relating to disclosure, cooperation and compliance which are set out fully in a separate section of the Guidelines.

In emphasising the policy of strategic response the EPA has given itself the flexibility for dealing with each case on its merits and in its own context. In indicating the types of factors which will be assessed in the decision making process the EPA has also set up the framework for consistent decision making. In opting for a policy of strategic response the EPA has moved away from the more rigid approach of one of its predecessor organisations, the State Pollution Control Commission, which at various

times in its history used prosecution as either a last resort measure or a first response to statutory breaches.

Application of the Policy

If one looks at the factors listed above which are taken into account in reaching a decision as to whether prosecution is the appropriate strategic option it is apparent that there are three basic forms of enquiry, albeit sometimes overlapping. Those lines of enquiry are:

- the severity of the offence;
- the desired environmental outcome;
- any specific features of the case.

It will generally be an assessment of the severity of the offence which will generate the appropriate range of options for dealing with it. For example, in cases of serious environmental harm the range of options would probably be limited to undertaking clean up operations in conjunction with commencing prosecution action.

At the other end of the spectrum the failure to submit a report on time could generate an initial range of options such as:

- a verbal warning;
- a formal warning letter;
- the issue of a penalty notice;
- prosecution proceedings.

Which option is finally selected in such a case would then depend on additional factors such as:

- the importance to the EPA of obtaining this report on time;
- whether because of the late submission of the report any environmental consequences resulted;
- how late the report was;
- the previous record of the person concerned in submitting other reports.

The Benefits/Limitations of Prosection

The background against which decisions are made to prosecute are the provisions contained in the Environmental Offences and Penalties Act. The obvious outcome of any prosecution is obtaining a penalty which will act as a specific deterrent to the defendant. Additionally, environmental prosecutions normally receive wide media coverage and so perhaps in this area even more so than in the traditional spheres of criminal law the outcome of any proceedings will be known to other potential polluters and so can act as a viable general deterrent.

The Court can impose orders under s. 14(1) of the Environmental Offences and Penalties Act which compel the defendant to take remedial action by way of clean up

or to undertake measures to prevent the recurrence of the offence. It would appear from recent decisions that NSW Courts will take a broad interpretation of their powers pursuant to s. 14(1). In *Environment Protection Authority v. Laminex* Wagga Wagga Local Court required the defendant to prepare environmental management plans and submit them to the EPA for approval prior to implementation. The orders, therefore, can be used as a means to assist the identification of measures required to overcome environmental problems as well as enforcing the implementation of those means which have already been identified.

In the recent case of *McGerty v. Buttigieg* (unreported, NSW Land and Environment Court, 19 July 1993, Stein J)—a prosecution by Fairfield City Council of a piggery owner—the summons initially sought an order under s. 14(1) that the defendant submit an environmental management plan to the Council and fully implement the plan within three months of its approval by the Council. The defendant, however, decided to close the piggery rather than upgrade the premises. Hence, the order made by Stein J under s. 14(1) required the defendant to remove all pigs from the property by 31 December 1993 and thereafter not to use the land for the keeping of pigs.

The cases of *Laminex* and *McGerty* indicate that institution of prosecution proceedings can have a direct impact on environmental outcomes in particular cases.

The provisions of s. 14(2) of the Environmental Offences and Penalties Act enable a Court to order payment to a public authority for any costs and expenses incurred in relation to the offence and, additionally, enable the Court to make orders compensating any person (including a public authority) for any loss or damage to property or expenses incurred in mitigating or attempting to mitigate the effects of such loss or damage. Orders under s. 14(2) Environmental Offences and Penalties Act are made at the time of imposing sentence. However, similar provisions exist in s. 15 of the Act where costs and expenses or loss or damage flowing from the offence are incurred after the date of sentence.

The comprehensive scheme set out in s. 14 and s. 15 has the effect of avoiding a multiplicity of legal actions.

One of the limitations of prosecution action, however, is that the focus of any action is on the particular defendant or defendants before the Court. There are situations which are essentially neighbourhood disputes between one or two industry operators and local residents. Prosecution of particular breaches may not achieve the sort of understanding and ongoing solution which is needed in order to address the problem in its entirety. In such circumstances the EPA is prepared to act as a mediator to facilitate the parties coming to a resolution which is mutually acceptable while ensuring that the appropriate environmental standards are met.

Evidentiary Considerations

The Guidelines set out that the basic prerequisite for instituting any prosecution proceedings is that there must be evidence of a prima facie case. In addition, any lines of defence which are open to the defendant on the evidence before the EPA will be considered. This policy on evidence follows similar positions taken by the Directors of Public Prosecutions at both Commonwealth and NSW level. Obviously, it is contrary to the public interest to commence cases in which, on the prosecutor's own assessment, there is not a reasonable chance of success.

It is clear that the EPA can consider only those lines of defence of which it is aware. A defendant may, of course, elect to maintain a right to silence and disclose the material which will form the basis of a defence for the first time before the Court. In the recent decision of *EPA v. Barlow* (unreported, NSW Land and Environment Court, 24 June 1993, Stein J) the Court found the EPA had established a prima facie case but dismissed the case after hearing evidence from the defence. However, Stein J refused to award costs to the defendant, indicating that the EPA had acted quite properly in bringing the proceedings and that had the lines of defence been disclosed to the EPA at an earlier stage then this may have effected the decision to prosecute. This interpretation of how the EPA will assess a case is borne out in the Guidelines.

Selecting the Appropriate Defendant

The environmental legislation administered by the EPA extends liability to a wide range of persons who may be involved in some way with environmental breaches. The Guidelines indicate that, having selected prosecution as the appropriate option, the EPA will not necessarily proceed against all those who may be potentially liable under the legislation. The general principle is that proceedings will be instituted against those who are primarily responsible for the offence, taking into account the likely effectiveness of Court orders against the proposed defendant. This general principle is then considered in the particular contexts of corporate liability, employees liability, the liability of directors and managers of corporations and lender liability. Some of the more salient points considered are:

- where offences are committed by employees, agents or officers of a corporation in the course of their employment, proceedings will usually be instituted against the corporation;

- employees who, in good faith, follow their corporation's environmental management procedures in the course of their employment will not normally be prosecuted for any offence occasioned by following those procedures;

- the EPA will not adopt a "scatter gun" approach to prosecuting the managers and directors of corporations simply because a corporation has been convicted of an offence. As a general policy the EPA will institute such proceedings only where there is evidence linking a director or manager with the corporation's illegal activity. In indicating that the linkage need not be positive (intentional) in character but could as readily be of a negligent nature, the Guidelines emphasise that directors and managers cannot afford simply to turn a blind eye to their corporation's activities;

- the EPA will not institute proceedings against lending institutions simply because they hold the legal indicia of ownership or occupancy of particular premises or if they are engaging in normal commercial loan transactions. Again, it is the actual involvement with the criminal offence which is the determining factor.

The EPA has reiterated its commitment to the concept of a level playing field for private and public sector organisations by inserting in the Guidelines a particular section on the prosecution of public authorities.

Until 1990 Government policy in NSW forbade the prosecution of one government entity by another. The possibility of bringing action against other government authorities was extended with the formation of the EPA and the concomitant removal of prosecution decisions from ministerial control and direction. Since 1990 the EPA, and its predecessor the State Pollution Control Commission, has taken prosecution action against the Water Board, Pacific Power, the State Transit Authority, the State Rail Authority, the Road and the Transport Authority and the Forestry Commission.

Selecting the Appropriate Charges

The general principle set out in Guidelines is that the charge or charges laid must reflect adequately the nature and extent of the criminal conduct disclosed by the evidence with the aim of providing the appropriate framework within which the Court can impose a penalty.

The EPA will depart from the policy of its predecessor, the State Pollution Control Commission, in respect of the laying of multiple charges. The policy of the SPCC was to lay as many charges as could possibly be laid based on the available evidence. Recent decisions of the Court of Criminal Appeal and the Supreme Court in *EPA v. Australian Iron and Steel* (unreported, NSW Court of Criminal Appeal, October 1992) and *EPA v. Tallow Products* (unreported, NSW Supreme Court, 26 November 1992, Abadee J) respectively have held that in certain instances the laying of multiple charges infringes the prohibition against double jeopardy.

It is not the case, however, that the EPA will lay only one charge in respect of a pollution incident. An obvious exception to this rule is the practice of laying "backup charges" where the allegation of a more serious offence (for example in which intention has to be proved) will be backed up with a charge for a lesser matter (for example a strict liability offence). The penalty for the latter will of course be subsumed in the former. There will also be instances where two or three different infringements contribute to the one pollution incident. In such circumstances it would be in accordance with the general principle for selecting charges to lay as many charges as is necessary to apprise the Court of the overall gravity of the incident.

The Guidelines note that if superfluous charges are not laid initially then the scope for charge-bargaining is restricted. The guidelines emphasise that a charge-bargaining proposal will not be entertained by the EPA unless:

(a) the remaining charge reflects adequately the nature of the criminal conduct of the defendant;

(b) those charges provide the basis for an appropriate sentence in all the circumstances of the case;

(c) there is evidence to support the charges to proceed.

Disclosure, Cooperation and Compliance

Because of the importance the EPA places on these factors, a specific section of the Guidelines has been devoted to them. At the time that the Guidelines were published the general message emanating from legal practitioners in NSW to their clients was that to cooperate with EPA in the course of an investigation was tantamount to putting a noose over one's head. At the launch of the Guidelines, the Director-General addressed this issue by indicating it was the commission of the offence itself which rendered the polluter liable to prosecution. Any cooperation with the EPA from then on could only benefit the potential defendant.

The Guidelines indicate that an offender's willingness to make available to the EPA all relevant information (including the complete results of any internal or external investigation and the identity of all potential witnesses) is to be encouraged and hence is a factor which will be considered along with all of the other relevant factors in deciding whether to bring a prosecution. Even where a prosecution does proceed the Court will take cooperation with the EPA into account to discount penalty. This approach was most recently seen in the decision of Pearlman CJ in *EPA v. Australian Iron and Steel* (unreported, NSW Land and Environment Court, 26 August 1992, Pearlman CJ).

The Guidelines indicate that the introduction and implementation of compliance programs will also be taken into account by the EPA when they have a direct impact on the offence. In other instances the fact that compliance programs are in place will be a mitigating factor before the Court which the EPA will support.

Conclusion

This commentary was designed to address those aspects of the Guidelines which, in the course of their development have generated the most discussion and interest. Those sections which have not been addressed here, for example penalty notices, are of equal importance with those which have but are relatively straightforward and require little clarification. Leaving some aspects untouched will hopefully encourage readers to reference the Guidelines themselves.

ENFORCING LAWS IN A REMOTE LOCATION¾ ANTARCTICA

Wendy Fletcher

THE AUSTRALIAN ANTARCTIC TERRITORY IS REMOTE, THERE IS NO permanent population and it is isolated for much of the year, yet there is a comprehensive environment protection regime in place, which amongst other things, prohibits mining, provides for the protection of fauna and flora and requires prior environmental impact assessment of all activities. Many of the environmental laws flow from international agreements.

Enforcement of these laws is difficult because none of the essential infrastructure for law enforcement exists in the Antarctic. Another difficulty is the issue of sovereignty and the enforcement of Australian laws against foreign nationals in the Australian Antarctic Territory. These, and the increasing number of visitors to the area, make environmental education very important. While education is the principal mechanism by which compliance is achieved, a number of other mechanisms, such as the cancellation of permits and public scrutiny of activities, can be also be used.

The communities at Australia's Antarctic stations are small, typically about thirty during the winter, although numbers swell during the summer months when many more activities take place. Scientific field trips are undertaken, the stations are resupplied for the winter months and major maintenance work is carried out. The communities at the stations consist of groups of highly motivated and well qualified people who have been chosen carefully to work in the harsh conditions and in extended physical isolation, generally for a period of twelve months. Authority is vested in the station leader. He or she has responsibility for the running of the station and has a role in ensuring that laws are complied with. These laws are wide ranging but the focus of Antarctic specific laws is the protection of the environment.

The Law

The legal regime in the Australian Antarctic Territory is relatively complex. The *Australian Antarctic Territory Act 1954* (Cwlth) provides the basis for laws of the Territory. This Act provides for the following laws to apply:

- Commonwealth laws expressed to extend to the Territory;

- Ordinances made for the Territory under the *Australian Antarctic Territory Act 1954;*
- the laws, other than the criminal laws, in force from time to time in the Australian Capital Territory, so far as they are applicable and not inconsistent with an Ordinance in force in the Territory; and
- the criminal laws in force from time to time in the Jervis Bay Territory and not inconsistent with an Ordinance in force in the Territory.

The complexity of the regime was commented on by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its report *Australian Law in Antarctica* (Australia 1992).

Environmental Laws

Laws made expressly for the Australian Antarctic Territory focus on the protection of the environment. Many of these laws flow from international obligations arising from Australia's participation in the Antarctic Treaty System and are consequently Commonwealth laws enacted specifically for the Antarctic to enable Australia to ratify the international agreements.

Recently, Australia has been instrumental in negotiating a comprehensive environmental protection regime for the Antarctic—The Protocol on Environmental Protection to the Antarctic Treaty. This Protocol (the Madrid Protocol) designates Antarctica as a natural reserve, devoted to peace and science. Most of the obligations arising from this Protocol have now been implemented in Australian law and any that are outstanding should be in place early next year. The obligations flowing from the Protocol range from the need for prior environmental assessment of activities, to a prohibition on mining and the regulation of the disposal of waste. Australia is also a party to the Convention on the Conservation of Antarctic Marine Living Resources, the Convention for the Conservation of Antarctic Seals and the Convention for the Prevention of Pollution from Ships (MARPOL). The following Acts implement these agreements.

Antarctic Treaty (Environment Protection) Act 1980 (Cwlth). The key legislation is the *Antarctic Treaty (Environment Protection) Act.* Under this legislation the carrying out of a range of activities which are potentially harmful to the environment are prohibited, although provision is made for some of these activities to be undertaken if a permit is obtained.

The Act provides for prior assessment of activities to identify the impact that they are likely to have on the Antarctic environment and to regulate those activities that are likely to have an adverse impact on the environment. Activities are authorised with conditions that ensure the activity is carried on in a manner that is consistent with environmental principles.

The Act also prohibits certain things which are harmful to the environment from being taken to the Antarctic for example, non-sterile soil, live birds, and polystyrene packaging chips.

The following regulations have been made under the Act:

Antarctic Seals Conservation Regulations (1986)
These regulations provide for protection of seals in Antarctic waters and implements Australia's obligations under the Convention for the Conservation of Antarctic Seals.

Antarctic Treaty (Environment Protection) (Environmental Impact Assessment) Regulations (1993)
These regulations detail procedures in relation to the environmental assessment process as provided for in the Act.

Regulations dealing with waste management are currently being drafted.

Antarctic Mining Prohibition Act 1991 (Cwlth). This Act provides for the prohibition of mining in the Antarctic with exception being made for scientific research.

Antarctic Marine Living Resources Conservation Act 1981 (Cwlth). This Act implements Australia's international obligations arising under the Convention on the Conservation of Antarctic Marine Living Resources and prohibits the harvesting and carrying out of research into marine living resources without a permit.

Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (Cwlth). This Act, which implements MARPOL and designates the Antarctic area as a special area for certain purposes relating to the protection of the sea, also takes into account the obligations arising from Annex IV (the Marine Pollution Annex) of the Protocol on Environmental Protection to the Antarctic Treaty.

Difficulties in Law Enforcement in the Antarctic

All of this adds up to a significant degree of protection and control over what can and cannot be done and how it can be done in the Antarctic. However, there are two major difficulties in enforcing environmental laws in the Antarctic—lack of the necessary infrastructure in the Territory, and the fact that Australia's claim to the Australian Antarctic Territory is recognised by only four countries.

Lack of infrastructure

In many instances criminal sanctions are imposed for non compliance with environmental laws. However, there is little in the way of the necessary infrastructure to enforce these laws in the Antarctic. There are for instance, no police, police stations, magistrates or courts, and there is no mail during the winter months and no means of personal service.

Station leaders at the three continental stations, Casey, Davis and Mawson, are appointed as inspectors under the *Antarctic Treaty (Environment Protection) Act 1980* (Cwlth). This appointment gives them powers of search and arrest but as there is no proper authority before whom they can be brought, there being no infrastructure, this is not very useful. However, this would not prevent a summons being issued on return to Australia. The Antarctic Marine Living Resources Conservation Act has similar provisions.

Criminal Procedure Ordinances which are currently being drafted will largely overcome these problems. Station leaders are to be made special constables and will be given powers that will enable them to carry out functions normally carried out by police officers. Through electronic communication with a magistrate in the Australian Capital Territory, charges will be able to be laid. The charges will then be heard on

return to Australia. This solves some of the difficulties of not having the necessary infrastructure in the Territory. However, remembering that the community is small, about thirty or so people, this does not address the problem of having to live with a person who has had a summons issued against them as a result of information given to a magistrate by the leader, or who has been arrested and detained pending charges being heard on return to Australia. Enforcement action may be counterproductive in the particular environment, as the functioning of a small community requires harmonious relations.

Sovereignty

A further difficulty arises at the international level. Under international law Australia is entitled to apply its law to both Australians and other persons within its Territory, as well as controlling the activities of Australians anywhere, although it cannot take enforcement action against its nationals while in the territory of another state.

Australia claims 42 per cent of the Antarctic continent but this claim is recognised by only four countries. The Antarctic Treaty accommodates this stating that nothing in the Treaty will be interpreted as a renunciation of a claim and that no new claim will be entertained. The Treaty system is based on mutual restraint being shown by claimant states (which claim jurisdiction over foreign nationals in their claimed territory), states which maintain that they have the basis of a claim but have not asserted a claim, and non-claimant states (which deny the existence of jurisdictional rights based on territorial sovereignty in Antarctica). In any dispute with regard to the exercise of jurisdiction in Antarctica, the Treaty provides that the parties should consult together with a view to reaching a mutually acceptable solution. In practice, parties act in a way which is designed to minimise the possibility of disputes occurring.

Australia, however, reserves the right to enforce its laws against foreign nationals in its Territory and its laws are expressed to apply to foreign nationals with minor exceptions.

The Treaty also provides that certain personnel remain under the jurisdiction of their own country, regardless of where they are in Antarctica, while they are exercising certain specified functions. This only excludes a small number of persons from Australian law. In general, foreign nationals participating in Australian expeditions are required to comply with all relevant laws, and their research activities are subject to the same permit requirements as Australian scientists. The extent to which Australian laws should be further enforced against foreign nationals, for example, at foreign bases, raises complex and sensitive issues of sovereignty and jurisdiction. However, the Antarctic environmental legislation does recognise authorisations issued by other Treaty parties to their nationals, to carry out activities in the Australian Antarctic Territory. This exception does not apply to non-Treaty countries.

Compliance

As with other situations, environmental education is the most successful method of ensuring compliance with the law. Because of the particular difficulties associated with ensuring compliance with these laws in the Antarctic this becomes all the more important.

There are, broadly, two classes of persons who visit the Australian Antarctic Territory:

- expeditioners who go as part of Australian National Antarctic Research Expeditions (ANARE). These by far account for the largest number of persons in the Antarctic. ANARE expeditions are organised by the Antarctic Division, an agency of the Commonwealth Environment Department; and
- tourists who visit as part of a commercial venture.

Environmental Education of Expeditioners

The environmental education of expeditioners is achieved in a number of ways. These include formal and structured training involving presentation of lectures on specific subjects and dissemination of suitable publications. However, also advocated is the use of less obvious educative methods, such as putting in place an appropriate environmental culture throughout the organisation, and ensuring that the language adopted in operational manuals and practices covered in technical training is consistent with environmental protection objectives. These indirect methods play an important role in achieving positive environmental attitudes and are therefore essential to the effectiveness of the rest of the environmental education process.

To a large extent, the achievement of an "environmental culture in Antarctica" depends on the quality of staff selected for Antarctic service. Accordingly, all applicants for positions with ANARE must satisfy a common selection criterion which requires candidates to "demonstrate concern and respect for the environment". All successful applicants for positions in Antarctica must also sign the ANARE Code of Personal Behaviour which, among other things, specifies compliance with environmental requirements. Attention is drawn in the Code to preservation and conservation of animals and plants, historic sites and monuments, protected areas and minimising impact on the environment.

Formal training for winter and summer staff takes place through lectures on environmental protection procedures on a number of occasions in the period prior to the arrival in Antarctica of expedition staff.

There are two main environmental education lectures for Antarctic personnel. The first is presented at the Antarctic Division headquarters in the opening days of the compulsory training program for winter and summer staff, including scientists and tradespersons. This session embraces the general environmental procedures that apply to all activities in Antarctica as well as the political, legal and historical background to the procedures. Legal requirements, such as permits, are also included.

The second session is presented during the week-long residential training program. For winter personnel this session is conducted in different groups according to which station the expeditioner will be visiting, and thus is directed at teaching the specific environmental procedures that apply to a particular station. The subject matter includes, for example, specific waste management practices at each station, protected areas in the region, procedures relating to station management plans, and other regional environmental issues.

Station leaders and station environment officers (there is one of each at each station) have an important educative role once expeditioners are in Antarctica. For example, regular station environment meetings are held, at which information is exchanged on topical environmental issues. The outcomes of these meetings are transmitted to head office and station leaders have an obligation to include environmental issues in their monthly report. Likewise, station environment officers must produce regular reports. In addition, there are frequent communications from

head office, including administrative circulars and instructions relayed directly to stations.

From time to time the Antarctic Division prepares special guidelines that apply to particular activities. For example, the Antarctic Environment Committee has approved guidelines on *how to behave at penguin colonies*, covering different species and breeding times. *The Environmental Guidelines for Antarctic Helicopter Operations* relate to the use of helicopters in all Antarctic operations, especially near protected or sensitive areas.

The Antarctic Division has also developed environmental educative materials for the use of both expeditioners and tourists. A *Heard Island Minimum Impact Code* and codes of behaviour for non-government visitors to the Antarctic continent have been provided to tour operators and private expeditioners. Guidelines for visitors for activities at Cape Denison Historic Site, which includes Mawson's hut, appear on the map for that area which is provided to all visitors.

Maps produced by the Antarctic Division contain environmental information that includes the location of bird and seal colonies and the provisions of any relevant management plans. These maps, intended for use in the field by expedition personnel and for planning activities at head office, are publicly available.

The Antarctic Division reviews the content and structure of the expeditioner training program each year and the program is modified as required.

Tourism and Environmental Education

Recent national and international attention on Antarctica has focused on environmental protection and tourism. Non-government activity has been relatively low until lately, and so far protective measures have primarily been aimed at government activities. However, growing tourism now contributes more visitors to Antarctica than government expeditions, creating further problems. The Antarctic Treaty parties are currently addressing issues such as the presence of nationals of a number of different countries, some of whom are not members of the Treaty, and problems of jurisdiction over vessels which are not registered in a Treaty party country.

Australia and other Treaty parties have placed strong emphasis on educating visitors to Antarctica, rather than relying on the enforcement of management measures alone. In common with other parties, Australian resources in Antarctica are limited in their extent and geographic distribution, and are almost entirely devoted to the conduct of national Antarctic scientific programs. Given the additional difficulty of travelling in Antarctica and the disruption to scientific programs that would occur with diverting resources to enforcement, it is easy to see why so much emphasis is placed on education.

Australia advises the organisers of all non-government activities in Antarctica of their responsibilities and obligations under Australian law and the Antarctic Treaty system, which comprises the Antarctic Treaty and other associated measures including recommendations agreed to at Treaty Consultative Meetings and the more recent Protocol on Environmental Protection to the Antarctic Treaty. The information provided covers:

- operational aspects—such as the need to avoid undue disruption to national Antarctic programs, communications, advice on equipment, and conditions for visiting Australian or other Antarctic stations;
- safety aspects—including the need for self-sufficiency and insurance; and

- environmental matters—such as waste disposal, environmental impact assessment of the proposed activities, guidelines for visitors to protected areas and measures for the conservation of flora and fauna.

Additional information, such as which permits are required to undertake certain activities or visit protected areas, is tailored to the proposed itinerary or activities. Where possible, all information is provided well before the activity commences and there are usually several contacts between activity organisers and Australian authorities.

As a result of the increasing levels of tourists and non-government activities the efficient delivery of high quality information is required. The Australian Antarctic Division is presently examining ways to improve existing procedures. Other management strategies are likely to be needed in the future and could include the use of official shipboard observers, now regularly employed by other Treaty parties in Antarctic areas with higher levels of tourist activity, to ensure that tourism is conducted appropriately and to better educate participants.

Tourism, so far, has a good track record. People visiting the Antarctic are aware of its special value and this is usually reinforced with talks given by specialists on board the cruise ships.

Other

Education plays a large role in ensuring compliance with environmental laws. However, other measures, both legislative and administrative, are also important. The ability to cancel permits in certain circumstances, or the possibility of being rejected as an expeditioner on future occasions also help ensure compliance. Public scrutiny of ANARE activities by non-government organisations is another means of ensuring compliance and not only do these organisations carry out voyages to observe government activities but often a non-government organisation representative joins an ANARE voyage.

Summary

Enforcement of environmental laws in Antarctica is difficult but so far compliance is relatively high. Environmental education is the key tool for ensuring compliance. Part of the educational strategy is to instil in Antarctic visitors the notion that visiting Antarctica is a rare privilege, carrying with it an important obligation to protect the environment.

Reference

Australia. House of Representatives Standing Committee on Legal and Constitutional Affairs 1992, *Australian Law in Antarctica,* AGPS, Canberra.

POSTSCRIPT

Tourism

At the 18th Antarctic Treaty Consultative Meeting in April 1994, parties agreed to a recommendation that provides for the circulation of guidelines for both those visiting the Antarctic and those organising and conducting tourism in the Antarctic. The guidelines are to ensure that tourist activities do not have adverse impacts on the Antarctic environment, or on its scientific and aesthetic values.

This paper refers to legislation which was then being drafted. This has now been finalised.

Antarctic Treaty (Environment Protection) Waste Management) Regulations 1994
These regulations relate to the management and disposal of waste. In particular, persons must consider waste minimisation and recycling in planning activities in the Antarctic. Certain wastes which are potentially harmful to the environment must also be removed as proper facilities do not exist for the disposal of such waste.

Criminal Procedures Ordinance (1993)
As stated in the paper, one of the major difficulties in enforcing laws in the Antarctic is the lack of enforcement infrastructure in the Territory. This has been partially overcome by certain designated officials being given authority to deal with persons who have or who are committing criminal offences. It is now possible to apply for and grant search and arrest warrants, charge suspects, and process bail applications by means of telecommunications with a magistrate of the Australian Capital Territory. While a person can now be held in custody in the Territory, it will still be necessary for the charges to be heard in Australia. Provision has been made for the removal of such persons to Australia to enable this to be carried out.

However, while this enables the law to be enforced, the preferable course of action is to prevent violation of such laws and educational programs continue to be developed, particularly in relation to environmental laws.

THE INTERGOVERNMENTAL AGREEMENT ON THE ENVIRONMENT AND PROPOSALS FOR UNIFORM OFFENCES AND PENALTIES

R. J. Fowler

A NEW GENERATION OF ENVIRONMENTAL LAWS IS EMERGING IN Australia as a result of recent and current reviews by the Commonwealth Government and State Governments of the measures which have been put in place over the past twenty years. Whilst a wide range of objectives are being pursued by governments in their reviews of existing environmental legislation, one matter which is invariably addressed is the creation of new and more serious environmental offences and the prescription of more substantial penalties for those offences. Something of a precedent was established in this respect by the New South Wales *Environmental Offences and Penalties Act 1989* (EOPA), which has produced a considerable body of case law on the nature and scope of environmental crimes (Farrier 1990; Farrier 1992).

At the same time as these various reviews have been pursued, and perhaps in the light of them, there has been a parallel initiative by governments to achieve a greater degree of harmonisation of Australian environmental law. In May 1992 the governments of the Commonwealth, the States and Territories and the Australian Local Government Association signed an Intergovernmental Agreement on the Environment which provides, amongst other things, for the establishment of a national Environmental Protection Authority (NEPA). The NEPA is to be a ministerial council chaired by the Commonwealth and having the authority to set national environment protection measures. Clause 18 of the fourth schedule of the Intergovernmental Agreement on the Environment calls for the development of "a uniform hierarchy of offences and related penalty structures".

The various initiatives presently under way in Australia with respect to environmental law reform provide an opportunity to bring a greater degree of consistency on the subject of environmental crime than exists at present, whilst also developing some innovative measures in this area. Chappell and Norberry (1990) have made a similar observation:

> If national, uniform pollution laws are, indeed, a possibility, then we are presented with a valuable opportunity to consider innovative approaches, and review sanctioning strategies, standing rules, and troublesome legal concepts—such as corporate mens rea—so that effective sanctioning strategies can be devised.

This paper will outline the broad features of the scheme envisaged by the Intergovernmental Agreement on the Environment for the establishment of a national Environmental Protection Authority, and will look specifically at the proposals for a hierarchy of uniform offences and penalties. It will then identify a number of significant issues which will need to be addressed in order for such a system to be made to work. Finally, and in light of the various difficulties identified, the paper canvasses an alternative approach to that envisaged by the Intergovernmental Agreement on the Environment, namely the establishment of a federal Environmental Protection Agency and related federal environment protection legislation.

The Intergovernmental Agreement on the Environment (IGAE)

The genesis of the IGAE was a proposal by the former Prime Minister, Mr Bob Hawke, in the lead up to the 1990 federal election, that the Commonwealth would establish an Environment Protection Agency. At the time this proposal was advanced, the former Premier of New South Wales, Mr Nick Greiner, had expressed strong support for the view the States should defer to the Commonwealth Government on environmental strategies which would contribute to the minimisation of global and national environmental problems. In a related initiative, the former New South Wales Environment Minister, Mr Tim Moore, in a speech delivered to the National Environmental Law Association in August 1990, urged the development of national environmental law enforcement measures as well as national standards. In this speech he indicated that a process to enact common environmental enforcement legislation in all States and Territories had been initiated by the New South Wales and South Australian Governments through the Australian and New Zealand Environment Council (ANZEC) and that the intention was to secure appropriate legislation by the first half of 1992 (Moore 1990).

There was at least some inference to be drawn from these various pronouncements that a leadership role might be expected of the Commonwealth Government in relation to the proposal to establish a national EPA and to develop national standards, and possibly with respect also to the development of a national system of offences and penalties. However, the entire thrust of these proposals was changed when, following the 1990 election, Prime Minister Hawke determined to embark upon what was called the "closer partnership" initiative with the States. The intention behind this initiative was to develop new understandings between the Commonwealth Government and the State Governments in relation to their respective interests and responsibilities, including in the area of environment protection. At a Special Premiers Conference held in Brisbane on 30-31 September 1990, one of the matters which was agreed upon was that an Intergovernmental Agreement on the Environment should be developed and concluded.

Following this resolution, a protracted series of meetings of Commonwealth, State and Territory officials took place over the ensuing twelve months, during which time a large number of drafts of the proposed Agreement were developed and progressively refined. None of these discussions were subject to any public consultation or input,

although various versions of the draft Agreement still managed to fall into the hands of interest groups during this period. The final form of the Agreement was to be submitted to a meeting of the Council of Australian Governments (COAG) to be held in Perth in late 1991. However, this meeting collapsed and instead the State Premiers met without the Commonwealth in Adelaide in November 1991 and endorsed an early version of the IGAE, which was then submitted to the Prime Minister for consideration by the Commonwealth.

Following some revision of the Agreement at the urging of the Commonwealth, it was finally endorsed by all parties in May 1992. Possibly the most significant component of the IGAE is Schedule 4 which provides for the establishment of the Ministerial Council to be known as the National Environmental Protection Authority (NEPA). Clause 5 of this schedule empowers the Authority to set national environmental protection measures in the form of standards, goals, guidelines or protocols in relation to the following areas:

- ambient air quality;
- ambient marine estuarine and fresh water quality;
- noise (but only if variation in measures would have an adverse affect on national markets for goods and services);
- guidelines for the assessment of site contamination;
- environmental impacts of hazardous wastes; and
- re-use and recycling of used materials.

Clause 23 of Schedule 4 of the IGAE states that a Working Group on Environmental Policy (hereafter referred to as the Working Group) will prepare draft legislation relating to the implementation of NEPA for consideration of First Ministers by 1 May 1993. The Schedule envisages that once the draft legislation has been agreed by First Ministers, the Commonwealth and the States will submit it to their parliaments and secure its passage.

The deliberations of the Working Group were delayed by the 1993 federal election and efforts are continuing to develop drafts of the relevant Commonwealth and State legislation. There are many complex legal and political issues to be addressed if the proposed scheme is to be brought to fruition, including the fact that the Commonwealth has no existing comprehensive environment protection legislation to which national measures could be related and through which way they would be administered and enforced. There is also considerable confusion and uncertainty in the public mind at present concerning the respective roles of NEPA, the Commonwealth's own EPA (CEPA) and ANZEC.

In view of the quite substantial challenges presented to the Working Group in developing legislation to implement NEPA, the proposal in cl. 18 of the Schedule 4 of the IGAE for a uniform hierarchy of offences and related penalty structures has had to be held in an abeyance as the broader proposals have taken more immediate priority.

Nevertheless some attempt is being made on a less formal basis by several States to move towards a common approach to the prescription of environmental offences and penalties. Presently reviews of environmental legislation are under way in South Australia, Queensland and Tasmania. In each instance, work has been done to develop a relatively common approach to the prescription of different levels of offences and

similar penalties although clear distinctions are likely to remain in the wording of specific offences. It is understood that discussions and exchanges of notes between officers in environmental authorities in each of these States have led to the recognition that it would not be a simple matter to achieve a system of common offences and penalties. Some of the issues which will need to be addressed in this regard will be outlined in the following section.

Issues to be Addressed in Developing a Common System of Environmental Offences and Penalties

Other contributors to these proceedings will provide expert assessments of the key issues which need to be addressed in each jurisdiction within Australia in prescribing environmental offences and associated penalties. It is not proposed therefore to provide any detailed review of those issues in this section of the paper, but rather, simply to identify what the author perceives to be some of the more significant problems that require attention, and which may be addressed through a common approach. No doubt other matters will be quite properly identified by others, which will serve simply to reinforce the basic point that the task is a complex and challenging one.

Classification of offences

A three-tier structure for the prescription of environmental offences, particularly with respect to pollution, appears to be emerging as the common approach in most environmental legislation. New South Wales and Victoria already have adopted such a structure.

Under the three-tier structure, the most serious offences require proof of mens rea and carry substantial penalties (a maximum fine of $1m for corporations and $250 000 and/or imprisonment for individuals). Tier 2 offences cover a very wide range of activities which may involve penalties of up to $250 000 for corporations and $120 000 or imprisonment for an individual. Tier 3 offences are usually relatively minor and often may be enforced by penalty notices.

In order for the three-tiered approach to be adopted on a common basis, fundamental differences in the definition of specific offences which presently exist from one State to another will have to be resolved. With respect to Tier 1 offences, both New South Wales and Victoria contemplate that wilful or negligent behaviour must be involved, whereas in South Australia, only intentional or reckless behaviour will suffice to qualify as a Tier 1 offence. In New South Wales, the mens rea requirement has been held to apply to both the act of disposal of waste and the awareness that such disposal will harm the environment: *see Environment Protection Authority v. N* (1992) 26 NSWLR 352. The same result is likely to be achieved in South Australia under the Environment Protection Act 1993, s. 79 of which requires it to be established that the defendant had "knowledge that serious environmental harm will or might result" from his or her action. There clearly is an issue to be resolved as to whether to impose this most serious form of criminal liability on the basis of negligence or to require proof of intention or recklessness. The latter seems more commensurate with the severity of the penalties involved.

A related issue is whether to locate these most serious criminal offences within specialist environmental legislation or in a criminal code. Criminal lawyers seem to find

incongruous the presence of such serious offences in environmental legislation and have urged their relocation in the relevant State criminal code (Goode 1992). On the other hand those involved with environmental law, including criminal lawyers such as Professor David Farrier from the University of Wollongong, have taken the contrary view. Farrier defends the current approach on the following grounds:

> It makes much more sense nowadays to talk about the law of crime or criminal laws rather than the criminal law.
>
> To talk of criminal laws is to shift the emphasis away from the elements which offences in this broad area of the law have in common and to emphasize the growing divergences as policymakers and legislators attempt to mould the law to suit the contours of specific social problems. This approach is not one that academic criminal lawyers will welcome, but there is an increasing sense of inevitability about it (Farrier 1992, pp. 79-80).

Even if such inevitably does exist, and new approaches to the prescription of environmental legislation are developed, the need for consistency of approach, particularly with respect to the prescription of fault elements and burden of proof rules, will be essential to the development of a uniform or common system of environmental offences and penalties.

At the very least, it will clearly be necessary to establish a more consistent approach to Tier 2 offences, which presently involve strict liability in New South Wales and South Australia but have been held to involve absolute liability in Victoria and Western Australia. Also, where strict liability offences are prescribed, it will be desirable to move away from reliance on the common law defence of honest and reasonable mistake by providing for the more appropriate defence of due diligence. This is due to recent findings that the common law defence of honest and reasonable mistake do not include the defence of due diligence (*see Australian Iron & Steel v. EPA* (1992) 77 LGRA 373 at 380-1).

Corporate criminal responsibility

Considerable enquiry is presently under way in Australia concerning the appropriate principles to be developed for attributing the conduct of an employee to a company (Goode 1992). This is an area of particular difficulty for environmental law. For example, the approach under EOPA to corporate criminal liability has attracted significant criticism, particularly with respect to the imposition of strict vicarious liability (Farrier 1990; Franklin 1990; Fisse 1990). Clearly there is a need for a more consistent approach in environmental legislation to this quite fundamental matter.

Directors and officials

It is increasingly common to find provisions in environmental legislation which impose criminal liability on directors and officials where an offence has been committed by a company with which they are involved. In most cases a statutory defence of due diligence is also provided, although the precise circumstances required to be established in order to plead the defence successfully vary from one jurisdiction to another. There is again some variation in the relevant provision in each jurisdiction creating a need once more for greater consistency of approach.

Nullification of offences and penalties

It is important that the threat of relevant sanctions for environmental harm is not undermined by an inadequate commitment by government or an environmental agency to prosecution, or through judicial reluctance to impose substantial penalties. In this regard it may be that a New South Wales initiative recently to publish guidelines for the bringing of a prosecution in relation to environmental offences will provide some assistance (Poulos & Walker 1993). Appropriate guidelines on this matter could be adopted as part of a common system of offences and penalties. In a similar vein, regard might be had to the experience of the United States with the development of sentencing and penalty guidelines in relation to environmental offences by the US Justice Department.

Conclusions

The preceding section has identified a number of quite fundamental issues that will need to be addressed in order for a system of common offences and penalties with respect to environmental matters to be developed in Australia. It remains to be seen whether such a system could be devised under the aegis of the IGAE. As was noted earlier, discussion of this matter has been delayed by the preoccupation with the establishment of the National EPA under Schedule 4 of the IGAE. There are very significant legal and political obstacles to be overcome in this regard, before addressing the more specific issues relating to common offences and penalties.

Schedule 4 contemplates that complementary legislation will be adopted by the Commonwealth, States and Territories whereby NEPA will be established and invested with the power to set ambient national standards on the basis, if need be, of a majority vote of its members. Standards adopted by NEPA will be tabled in the Commonwealth Parliament in a manner similar to the procedure which is followed in relation to the adoption of Commonwealth regulations. If the relevant standards are not disallowed, they will take effect pursuant to the scheme of complementary legislation, as if they were a law of each State, and will amend any relevant existing State law to the extent necessary for them to operate.

There are clearly some complex legal issues to be addressed in developing this legislative scheme, though precedents exist in areas such as the recent Corporations Law. However, there is also a political question mark hanging over the proposed scheme, insofar as there have been changes of government in a number of States since the IGAE was signed in May 1992. In particular, the Western Australian Government has indicated that it will not support the scheme by introducing the appropriate legislation. The delays in producing the relevant legislation may reflect the difficulties which have been experienced in settling the relevant terms and the uncertainties that are still attached to the whole concept.

Assuming that NEPA does proceed, it still does not follow that it will provide an appropriate vehicle for the development of a system of uniform environmental offences and penalties. It is clear from the fourth schedule of the IGAE that NEPA's powers are confined to the prescription of ambient environmental standards and other policy guidelines of a non-regulatory nature. The most that NEPA would appear to be able to achieve under its present charter in this area would be to agree a set of draft model offence provisions and penalties which each State would then have to incorporate within its own environmental legislation.

In a report prepared for the Australian Conservation Foundation and Greenpeace Australia by the author in 1990-1991, it was argued that the Commonwealth has the constitutional capacity to adopt comprehensive environmental legislation along the same lines as has occurred in the United States at the federal level (Fowler 1991). The paper proposed that a federal rather than a national EPA be established and that it be given the task of developing detailed standards (both of an ambient and discharge nature), and related policy measures. The paper also envisaged that the federal EPA could delegate responsibility for administration of federal environmental protection law and relevant standards to State environmental authorities, along similar lines to the approach which has been developed in the United States.

If the approach envisaged in the IGAE cannot be achieved in practice, the Commonwealth will be faced with a clear choice—either to accede to the current scheme of things, whereby States continue to forge their own distinct arrangements for environment protection, or alternatively, to assume a leadership role in order to provide some overall sense of direction and consistency to emerging environmental laws in Australia. On this score, it is worth noting that the Commonwealth Environment Minister was reported, as long ago as 18 February 1991, as supporting the latter option if the States did not cooperate in establishing NEPA. A report on that date in the *Sydney Morning Herald*, (18 February 1991, p. 2) provides as follows:

> In an effort to silence the criticism that she is pushing a soft option, Ms Kelly has warned that a unilateral assumption of power by the Federal government would occur if certain States proved intransigent towards an upgraded cooperative approach.

The author remains convinced that it is only through the latter means that any real advances will made in achieving some commonality of approach in Australian environmental law.

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RECENT DEVELOPMENTS IN ENVIRONMENTAL CRIMINAL LAW IN NEW SOUTH WALES

Josephine Kelly

IN RECENT YEARS IN NEW SOUTH WALES THERE HAS BEEN A TREMENDOUS increase in case law interpreting the provisions imposing criminal liability under the various environmental law statutes. The principal pollution control statutes have been in existence for 20 years or more, for example, the *Clean Waters Act 1970*, the *Noise Control Act 1975*, the *Clean Air Act 1961*. However, it was only under the Greiner Liberal/Country Party Coalition Government, and Tim Moore, who was the Minister responsible for the State Pollution Control Commission from the late 1980s to the early 1990s, that a political decision was made to prosecute for breaches of the legislation.

The figures for registrations of all cases in the criminal jurisdiction (Class 5) of the Land and Environment Court dramatically indicate the result:

Year	*Registrations Class 5*
1980	1
1981	12
1982	11
1983	17
1984	15
1985	19
1986	35
1987	23
1988	40
1989	193
1990	325
1991	143
1992	37
1993	47

As well as an increase in the numbers of prosecutions commenced in the Court in the years 1989, 1990 and 1991, at about the same time, the Judges of the Court began imposing higher fines than previously and more defendants began defending cases rather than pleading guilty. The attitudes of litigants and people with a potential criminal liability for a pollution offence "hardened" with the introduction of the *Environmental Offences and Penalties Act 1989* which for certain offences, imposes maximum penalties of $1m in the case of corporations and $250 000 or seven years imprisonment, or both in the case of individuals, who may include the director of a corporation.

The principles of the substantive law which have been considered by the Court of Criminal Appeal recently include vicarious liability of employers, the status of mens rea in various offences, the availability of the "due diligence" defence, the privilege of a corporation against self-incrimination, double jeopardy and extraterritoriality.

Vicarious Liability of Employers

In *Tiger Nominees Pty Limited v. State Pollution Control Commission* (1992) 25 NSWLR 715, the Court of Criminal Appeal held that s. 16(1) of the Clean Waters Act imposes vicarious criminal liability. A master may be vicariously responsible for the conduct of an employee who pollutes waters.

Chief Justice Gleeson (with whom Mahoney JA and Campbell J agreed), had regard in particular to the principles of vicarious liability applicable in the law of tort, as well as to the provisions of s. 16. His Honour said at page 720D:

> The *Clean Waters Act 1970* is described in its long title as: "An Act to make provision with respect to the prevention or the reduction of pollution of certain waters; and for purposes connected therewith". Section 16(1) makes it an offence to "pollute any waters". The operative verb "pollute" as defined in s. 5, has a meaning consistent with the imposition of vicarious criminal responsibility. Likewise, such a conclusion is consistent with the long title of the Act and the purpose of the legislation.
>
> Having regard to the language employed in the Act the object of the legislature was to prohibit "pollution" of the waters. To convict a servant/principal is one step towards achieving that object, and is provided for in the Act. However, in my view the effective fulfilment of the statutory purpose requires that employers be regarded as potentially vicariously responsible for acts of their employees.

His Honour also confirmed that s. 16(1) creates an offence of strict liability.

Mens Rea

Environmental Offences and Penalties Act

Until a recent decision of the Court of Criminal Appeal, there had been divergent views among the Judges in the Land and Environment Court about the meaning of various of the elements of certain offences under the *Environmental Offences and Penalties Act 1989*. Particular elements of offences under ss. 5, 6 and 6A of that Act are in similar terms. For present purposes it is necessary only to set out s. 5(1) of the Act as it was considered by the Court of Criminal Appeal:

> A person who "wilfully . . . disposes of waste in a manner which harms or is likely to harm the environment" is guilty of an offence.

The difference in opinion was this: did "wilfully" apply to the act of disposing of waste in a manner which harms or is likely to harm the environment, or did it describe only the act of disposing of waste?

In *Environment Protection Authority v. N* (1992) 26 NSWLR 352; 76 LGRA 114, the Court of Criminal Appeal determined:

> . . . the prosecution must establish that the defendant wilfully disposed of waste in a manner which harmed or was likely to harm the environment either intending or with an awareness of such consequences or likely consequences of his action (Hunt CJ who gave the leading judgment, at 359F).

In coming to this conclusion, His Honour considered the principles stated by the High Court in *He Kaw Teh v. The Queen* (1985) 157 CLR 523. In that case, the High Court reaffirmed the strength of the common law presumption that the defendant's knowledge of the wrongfulness of his or her act is an essential element of every offence, although the presumption is liable to be displaced by either the words or subject matter of the statute creating the offence and both must be considered.

In *He Kaw Teh*, the Court approved the common law principle stated by Jordan CJ in *R v. Turnbull* (1943) 44 SR (NSW) 108, 61 WN (NSW) 70, at 109; 70-1:

> . . . it is also necessary at common law for the prosecution to prove that [the accused or the defendant] knew that he was doing the criminal act which is charged against him, that is, that he knew that all the facts constituting the ingredients necessary to make the act criminal were involved in what he was doing.

In the case of *N*, Mr Justice Hunt listed and then considered the three matters the High Court in *He Kaw Teh* determined must be taken into account to decide whether the common law presumption has been displaced:

- the words of the statute itself;
- the subject matter with which the statute deals;
- whether strict liability will assist in overcoming the mischief at which the statute is directed.

His Honour determined that the word "dispose" already imports the notion of "intention". To give "wilful" any work to do and to comply with the principle stated by Jordan CJ in *R v. Turnbull* (at 109; 71) that the accused must be shown to have known of the facts constituting the offence, "wilful" must also apply to the additional ingredient of the offence. Therefore the prosecution must prove the defendant either intended or was aware that his act would harm or be likely to harm the environment.

His Honour then considered the subject matter of the statute (at 357A):

> It may fairly be assumed that the destruction of the environment is an enormous social problem which requires strict measures to be taken to prevent the continuation of that destruction.

His Honour cited the maximum penalty of $1m for a corporation and of $150 000 (now increased to $250 000) or imprisonment for seven years or both for an individual when the matter is tried on indictment in the Supreme Court. He went on (at 357B):

> . . . it appears to me unlikely that the legislature could have intended that such a grave penalty should befall a person who was intending only quite lawfully to dispose of waste, who had no intention thereby to cause any harm to the environment and who was unaware that his manner of disposal was likely to cause such harm.

The prosecution argued that to overcome the mischief to which the statute was aimed, an interpretation of the section was to be preferred which would deter people. That is, the severe penalties which might be imposed would cause them to think about the consequences of their act which otherwise they may not. His Honour did not accept that argument saying that clear language is necessary for such a crime to be created and further, the other matters set out above showed that the common law presumption had not been displaced.

Although the provision considered in *N* has been amended, as noted by His Honour, the same words have been used (although in a slightly different context) and therefore the same or a similar problem may arise.

Negligence

At the moment there is a stated case waiting to be heard by the Court of Criminal Appeal which will determine the meaning of "negligent" in s. 5(1) of the *Environmental Offences and Penalties Act 1989 (Environment Protection Authority v. Ampol Ltd & Anor)*[1].

Relevantly, that section provides:

> If a person, without lawful authority, wilfully or negligently disposes of waste in a manner which harms or is likely to harm the environment he is guilty of an offence.

The question for determination is what is the degree of negligence required. Does "negligent" mean the degree of negligence required to support a conviction for manslaughter or does a lesser degree of negligence apply and if so, what is the test to determine that degree of "negligence"?

Defence of "Due Diligence"

As a defence under s. 16(1) of the Clean Waters Act

This question was addressed in *Australian Iron & Steel Pty Ltd v. Environment Protection Authority* (unreported, Court of Criminal Appeal, 17 December 1992). Abadee J who gave the leading decision held that in cases of strict liability in the absence of a statutory defence of due diligence, due diligence is neither a separate defence nor an extension of the defence of honest and reasonable mistake of fact:

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1. The decision was handed down on 24 December 1993 and is reported at (1993) 81 LGERA 433. The Court did not answer the questions as posed in the stated case.

> Were it otherwise the onus would be on the prosecutor to show beyond reasonable doubt a want of due care or a failure to take due diligence, on the part of the accused which for reasons given by Lord Diplock (in *Tesco Limited v. Nattrass* (1972) AC 153) would be a difficult task to prove.

His Honour held the reasoning of Dickson J in *R v. The City of Sault Ste Marie* (1978) 85 DLR (3d) 161 (SC) should not be followed. In that case the Supreme Court of Canada sought to embellish the doctrine of honest and reasonable mistake, "concluding that the defence would be established if the accused reasonably believed in a mistaken set of facts which if true would render the act innocent" or "if he took all reasonable steps to avoid the particular event". The accused would then bear the burden of proof to establish the defence on the balance of probabilities.

Abadee J held such a defence was not consistent with the approach of the High Court in *He Kaw Teh* or with what Dixon J said in *Proudman v. Dayman* (1941) 67 CLR 536 at 540. "It is not in accordance with the law in this country" (at 24). His Honour also held that to the extent that *Allen v. United Carpet Mills Pty Limited* (1989) VR 323 supports the view that an offence of strict liability "'imports' a defence of due diligence", that such decision does not accord with Australian authority (at 27).

Privilege of a Corporation against Self-incrimination

This topic and the case of *Caltex Refining Co Pty Ltd v. State Pollution Control Commission* is mentioned in passing. The decision of the High Court was handed down on 24 December 1993. (Assistant Professor Janet McDonald from Bond University addresses this most important case in her chapter in this volume.)

Double Jeopardy¾ Autrefois Convict/Acquit

Often, until recently, when prosecutions for pollution offences were commenced, many charges were laid arising from the one incident. For example, a defendant may have had a licence to discharge water containing a specified level of pollutants, as defined in the Clean Waters Act 1970. Where pollution of waters was caused by the failure of pollution control equipment which resulted in a discharge of water containing a higher level of pollutants than permitted by the licence, the defendant could be charged with polluting waters, breach of a licence condition and failure to operate equipment in a proper and efficient manner.

Where multiple charges have been laid, the Land and Environment Court has generally imposed a substantial fine in respect of what could be described as the principal offence or offences, and lesser fines in respect of the other offences which had arisen from the same incident.

However, it has only been within the last couple of years that the principle of double jeopardy has been invoked by defendants in that Court charged with various offences arising from the one incident.

The formulation of this doctrine arose in *Wemyss v. Hopkins* (1875) LR 10; QB 378 where it was held that where the facts which give rise to two offences are *the same*, a party may only be convicted for one of the offences.

In New South Wales there have been two decisions of the Court of Appeal and Court of Criminal Appeal in relation to pollution control statutes, which have considered the principle of double jeopardy.

In *Australian Oil Refining Pty Ltd v. Cooper* (1987) 11 NSWLR 277, 64 LGRA 322, Hunt J (with whom Finlay and Allen JJ agreed) held that the common law does not recognise as an injustice, the existence of two separate offences for the one act. There is no reason why the same act may not be prohibited by two separate statutes and involve an offence under each of them.

The subject incident was the discharge of a considerable quantity of oil from a pipeline into the waters of Botany Bay. The Court had to consider the relationship between the offence created by s. 16 of the Clean Waters Act 1970 and that created by s. 6 of the *Prevention of Oil Pollution of Navigable Waters Act 1960.*

Section 16 relevantly provided: "A person shall not pollute any waters or cause or permit any waters to be polluted". The penalty was for $40 000 and a further penalty not exceeding $20 000 per day for a continuing offence. The prosecutor was an officer of the State Pollution Control Commission.

Section 6 provided, relevantly: "If any discharge of oil . . . into any waters within the jurisdiction occurs . . . from a place on land . . . then subject to the provisions of this Act . . . the occupier of that place . . . shall be guilty of an offence against this Act and shall be liable to a penalty not exceeding $100 000.

His Honour found the offences were different. There were different bases for liability (it was a defence to a s. 16 offence that it was not caused knowingly, wilfully or negligently), different penalties were imposed and different prosecuting authorities were appointed by each Act.

His Honour also commented that where a defendant had been convicted under one of the statutes and then charged under the second statute, the court hearing the second charge "would no doubt take the fact of that conviction into account when deciding whether a second conviction should be recorded, and, if it is recorded, the extent to which any further punishment should be imposed" (at 283).

The Court of Criminal Appeal has dealt with the doctrine recently in *Environment Protection Authority v. Australian Iron & Steel Pty Ltd* (1992) 28 NSWLR 502. Chief Justice Gleeson, with whom Carruthers and Smart JJ agreed, held that the doctrine of double jeopardy applied in relation to two or more statutory offences.

His Honour stated the following well-recognised and related propositions: a person cannot be punished twice for the same offence; where one offence is an element of a more serious offence (or, to put it another way, where the second offence charged is merely an aggravated form of the first offence) a person cannot be convicted of both.

However, although a person may not be put in jeopardy twice for the *same offence*, he can be put in jeopardy twice for the *same conduct*. His Honour said at 507G:

> Where an Act of Parliament makes a certain type of conduct an offence, and imposes a penalty, the offence will usually be characterised in terms of a certain quality or attribute that may be attached to primary facts. Different statutes may fasten upon different qualities or attributes of the same set of primary facts to create separate offences. To assert that a person may not be convicted of multiple offences for the same facts invites a request for a more precise definition of the relevant facts.

Later, at 508E, His Honour continued:

> Where two or more different statutory prohibitions apply to the same set of primary facts, this will often be because each prohibition fastens upon some

> different aspect of those facts and makes it the gist or gravamen of the offence. It may be that one particular feature of the facts is immaterial for the purpose of one prohibition and material for another.

His Honour gave examples of conduct where more than one offence might arise. For example, the scheme of the customs legislation and regulations "is such that a transaction or dealing designed to evade customs duty is highly likely to expose the offender to multiple penalties" (at 508F). Persons who enter into and carry out a conspiracy may be charged with both the crime of conspiracy and with the substantive offences arising from that conduct. His Honour did, however, question whether that would be an appropriate exercise of the prosecuting authorities' discretion.

The three offences considered by the Court were pollution of waters (s. 16(1) of the Clean Waters Act) and the breach of a general and a special condition of a licence (s. 17D(9) of the *State Pollution Control Commission Act 1970*). The defendant's conduct giving rise to each of the offences was the same.

From analysing the legislative history of the relevant provisions (the provisions of s. 17D(9) originally resided in s. 16) His Honour concluded that contravening s. 16(1) and the conditions of a licence "were seen as simply being the obverse sides . . . of the same coin" (at 509F). The two pieces of legislation remained cognate and the concept of contravening a condition of a licence remained "intimately bound up with the concept of polluting waters . . . otherwise than as permitted by a licence" (at 510A).

His Honour considered two ways of looking at that result. One was to say that the offence against s. 16 of the Clean Waters Act is in substance the same as the offence against s. 17D of the State Pollution Control Commission Act. The second way is to say that the s. 17D offence is an aggravated form of a contravention of s. 16, which falls clearly within the established scope of the rule against double jeopardy. In the result, the doctrine of double jeopardy applied in respect of the two charges under s. 17D(9).

Clearly, there will often be difficulty in defining the relevant set of facts to determine whether or not offences are the same. His Honour recognised this (at 508C, 509D) but was able to determine the case without having to undertake that exercise.

Following that decision, Mr Justice Abadee of the Supreme Court of New South Wales decided the case of *State Pollution Control Commission v. Tallow Products Pty Ltd (*1992) 29 NSWLR 515, which was a stated case from a magistrate.

In that case, the charges arose from the same course of conduct. The defendant had been convicted of an offence under the *Local Government Act 1919*, Ordinance 39 cl. 10 for causing or suffering certain liquid waste to be discharged into a drain in the Municipality of Botany. The State Pollution Control Commission then laid a charge for a breaches of s. 16(1) and s. 16(2) of the Clean Waters Act, for polluting waters.

His Honour held that the summonses did not focus on the same aspects of the primary facts. A defence of autrefois convict did not apply.

Both these decisions have held that the more expansive view which has arisen in South Australia (for example *R v. O'Loughlin; Ex parte Ralphs* (1971) 1 SASR 219) does not apply in New South Wales. The South Australian view is that a person should not be convicted again for an act or omission for which he or she has previously been punished.

Extraterritoriality

A case of interest to states bordering New South Wales, is *Brownlie v. State Pollution Control Commission* (1992) 27 NSWLR 78 where the Court of Criminal Appeal held that the pollution of waters in New South Wales (an offence pursuant to s. 16(1) of the Clean Waters Act) caused by conduct in Queensland, was an offence under that section.

Briefly, the appellant grew cotton in Queensland near Mungindi which straddles the border of New South Wales and Queensland. The Barwon River flows through Mungindi and the border between the States lies in the middle of the river. Unfortunately for the appellant, it rained after he had sprayed part of his land with an insecticide, endosulfan. Endosulfan is toxic to aquatic animals and has a low water solubility. The result was thousands of dead fish in the Barwon River.

The Chief Justice gave the leading judgment (Carruthers J and Lee AJ concurring). At page 87 His Honour said:

> In my view the answer to the arguments advanced on behalf of the appellant lies in the consideration that the offences created by s. 16(1) and s. 16(3) of the *Clean Waters Act* of New South Wales are result offences, and that the purpose of the legislation is to prevent the occurrence in New South Wales of certain consequences, that is to say, pollution of New South Wales. That being so, there is no difficulty about the conclusion, as a matter of interpretation and power, that the New South Wales legislation applies to acts or omissions outside New South Wales, provided, of course, they have, or are likely to have, the relevant consequence within New South Wales.

Conclusion

The volume of pollution prosecutions being commenced in the criminal jurisdiction of the Land and Environment Court has declined and will probably not return to the levels of 1989 to 1992 (for the reasons for this *see* chapter in this volume by Mr Justice Stein). Nevertheless, the awareness and concern of corporations and others about potential criminal liability for pollution offences will ensure that cases will continue to be hard-fought. The body of case law in this very interesting area will grow accordingly.

POLLUTION FROM SHIPS: A GLOBAL PERSPECTIVE

Paul Nelson

BECAUSE OF THE INTERNATIONAL NATURE OF THE SHIPPING INDUSTRY, IT has long been recognised that action to improve maritime safety and prevent marine pollution is more effective if carried out at an international level rather than by individual countries acting unilaterally.

There are three principal objectives of the global approach: uniformity of law, certainty of law, and justice between interested parties.

Uniformity of law is desirable because it simplifies the law for interested parties in all countries, including the legal practitioners and the courts. Uniformity of law is also useful in eliminating or minimising the practice of "forum shopping" by which claimants and defendants seek to bring disputes into particular jurisdictions solely because they believe that the laws in such jurisdictions will be more favourable to their cause.

Certainty of law is regularly assisted by use of devices such as international conventions or treaties. These agreements, by establishing a uniform norm, help to avoid the conflict of different national laws. This, in turn, enables interested parties to identify more easily and clearly what their rights and obligations are likely to be, regardless of where a ship is going or where a claim or issue will be decided.

An international convention/treaty can also promote justice by establishing, in a clear and fair way, rights and obligations for all parties with an interest in the subject matter, including shippers, ship owners, ship operators, charterers, mortgagees and suppliers of services for shipping.

Early Initiatives

The first international initiative to control ship-sourced marine pollution was the convening of a conference in Washington, USA in 1926. Although recommendations were made at this conference to limit the discharge of oil at sea, no international agreement could be reached until after the Second World War. The British Government convened a conference in London in 1954 at which some 40 nations, including Australia, were represented. The result was the International Convention for the Prevention of Pollution of the Sea by Oil, which is commonly known as OILPOL.

OILPOL entered into force internationally on 26 July 1958, and imposes obligations on ship owners and masters to operate their ships so as to minimise the incidence of accidental and operational pollution. OILPOL was adopted on the basis that oil discharges were inevitable and so must be made where they will cause the least harm. The Convention operated in Australia from 29 November 1962 to 14 January 1988, when the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) commenced operation in Australia (*see* below).

In the meantime, the First United Nations Law of the Sea Conference at Geneva in 1958 adopted the Convention on the High Seas (to which Australia is also a party). This Convention contains certain limited provisions regarding the prevention of marine pollution. In particular, Articles 24 and 25 of the 1958 Convention identified the discharge of oil from ships or pipelines and the dumping of radioactive waste as being two sources of marine pollution against which each Contracting State is required to take measures. Since 1958 there has therefore been a clear basic obligation on member States to protect and preserve the marine environment.

Apart from accepting OILPOL in 1962, Australia was not particularly active in the prevention of marine pollution during the 1960s and early 1970s. Australia's main concern was to ensure that it had adequate powers to protect the Great Barrier Reef. To this end, Australia was successful in achieving international agreement in 1971 to amendments to OILPOL which would define "nearest land" for the purposes of the Convention as the outer edge of the Great Barrier Reef. Although this amendment never entered into force with respect to OILPOL, it was incorporated in MARPOL 73/78 and is in operation today.

It was not until the early 1980s, when a number of "Protection of the Sea" Acts were passed, that Australia was able to bring its domestic requirements into line with modern international law dealing with pollution from ships. In recent times Australian delegations to international conferences have been in the forefront of the development of new approaches to the control of marine pollution.

International Maritime Organization

A conference held by the United Nations in 1948 adopted a convention establishing what is now named the International Maritime Organization (IMO) in London as the first international body devoted exclusively to maritime safety and environmental matters.

Since 1959, the IMO has promoted the adoption of some thirty conventions and protocols, and adopted well in excess of 700 codes and recommendations concerning maritime safety, the prevention of pollution and related matters.

Australia has been a member of IMO since its inception, currently serves on the governing Council and provides chair or deputy chair persons for a number of committees, sub-committees and working groups. In addition, Australia sends delegations comprising representatives of Governments and industry to a wide range of IMO Committee and Working Group meetings on a regular basis. As a member of IMO, Australia has been active in developing and is a party to many IMO conventions. The regime for the control of ship-sourced pollution in Australia is based largely on a number of these conventions.

The Nature of Oil Spills

To date Australia has been fortunate in that it has recorded very few medium to large oil spills and only two major oil spill incidents (that is of over 1 000 tonnes) since 1970 (the Oceanic Grandeur and the Kirki). It is therefore difficult to make an assessment of the likely nature of a spill in Australian waters and it is necessary to draw on international oil spill data to provide an indication of the nature of oil spills.

The International Petroleum Industry Environmental Conservation Association (IPIECA), the petroleum industry's principal channel of communication with the United Nations Environment Program (UNEP), in a 1991 report identified vessel operations and tanker accidents as contributing 45 per cent of the uncontrolled release of petroleum into the marine environment. International data indicate that worldwide, in the period between 1974 and 1989, there were 774 accidents involving oil spills greater than 7 tonnes. This equates to an average of about 50 incidents per annum.

The majority of spills occur in ports at the time of loading, discharging or bunkering. Responsibility for spills of this type is generally attributable to equipment failure, the human factor or the conditions prevailing at the time.

The impact of MARPOL in reducing global oil pollution of the marine environment from ships has been significant. The US National Research Council Marine Board has estimated a 60 per cent reduction from 1981 to 1989, from 1.4 million tonnes in 1981 to 580 000 tonnes in 1989.

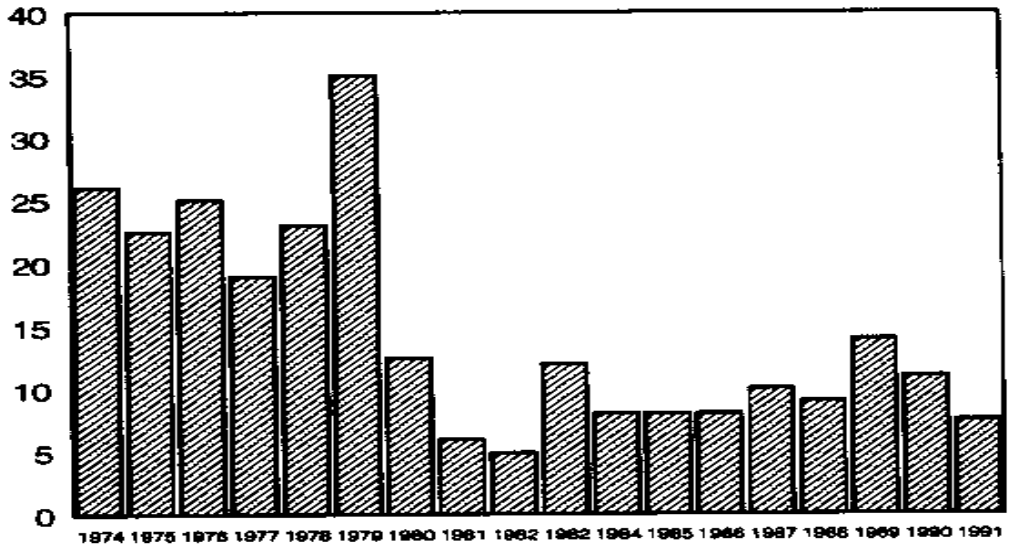
The ship construction requirements of MARPOL have made a significant contribution to the global reduction in oil spills in recent years, with the average number of spills from tankers down to about one-third of the level seen during the 1970s. There were 91 spills greater than 5 000 barrels (3 500 tonnes) in the 10 years ending 1989, compared with 252 in the period 1970-1979 (*see* Figure 1).

As mentioned above, Australia has been fortunate in not having experienced any catastrophic oil spills. Although reports of relatively small oil slicks at sea have been more frequent in the 1980s and early 1990s than in the 1970s, this may well be due to increased awareness and surveillance and more conscientious reporting.

In the 1992-93 financial year, the Australian Maritime Safety Authority received reports from various sources (*see* Figure 2) of 233 marine oil spills.

Figure 1

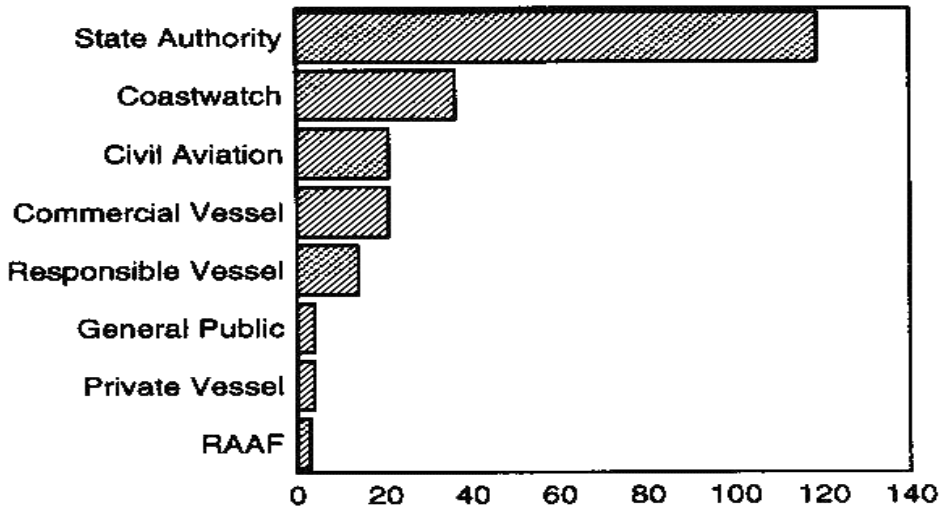
Oil Spills >3500 Tonnes



Source: International Tanker Owners Pollution Federation

Figure 2

Source of Oil Spill Reports - 1992/93



Source: Australian Maritime Safety Authority

Over 54 per cent of these spills occurred within port limits where clean-up action was undertaken by the port authority or relevant oil terminal. In 18 cases, clean-up or response action of some description by AMSA was needed. The remaining reports were generally unconfirmed sightings from vessels or aircraft well offshore and involved small quantities of oil which were left to degrade naturally.

The MARPOL 73/78 Convention

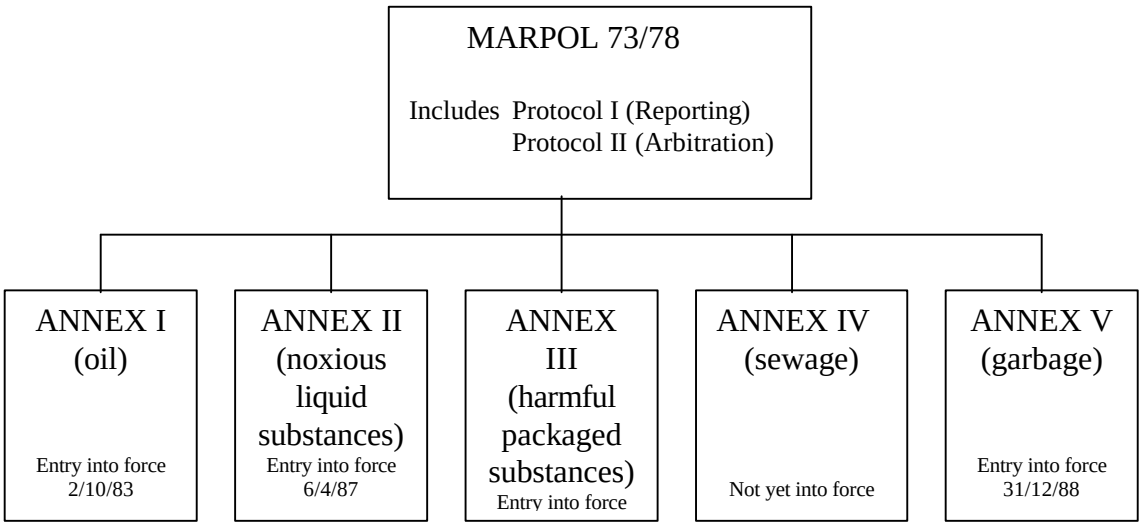
The enormous growth in the maritime transport of oil and the size of tankers, the increasing amount of chemicals being carried by sea and a growing concern for the world's environment as a whole led to the development by IMO of the International Convention for the Prevention of Pollution from Ships 1973/78 (MARPOL 73/78). This Convention entered into force in Australia in January 1988 and is implemented by the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* and the *Navigation Act 1912*. The legislation provides for penalties of up to $200 000 for the master and $1m for the owners of a vessel which discharges in contravention of MARPOL.

MARPOL is the most ambitious international treaty covering maritime pollution ever adopted. It deals not only with oil but with all forms of marine pollution from ships except the disposal of land-generated waste into the sea by dumping (which is covered by another Convention).

The Convention includes five technical Annexes (*see* Figure 3) each dealing with a different type of pollution. As oil discharges are the most prominent type of shipsourced marine pollution, this paper will focus primarily on Annex I.

Figure 3

Structure of MARPOL 73/78



The Convention totally prohibits discharges of dangerous chemicals and plastic and prescribes when, where and how other types of less harmful discharges, such as oil, may be made. The regulations provide, however, that wherever possible all waste is to be retained on board for disposal ashore.

The discharge provisions of the Convention do not apply to accidental discharges resulting from damage to a ship or its equipment provided all reasonable precautions are taken to minimise the discharge. However, this exemption does not apply to damage caused where the master acted either with intent to cause damage or recklessly and with knowledge that damage would probably result.

Under Annexes I, II and IV, all vessels (but for the smallest) are subject to regular and complete surveys to ensure that the structure, equipment, fittings, materials and arrangements fully comply with the Convention.

Enforcement

Parties to MARPOL 73/78 are obliged to ban violations of the Convention and to take action against violators, ensuring that penalties "shall be adequate in severity to discourage violations".

Parties are required to cooperate in the detection of violations. Ships may be inspected by other Parties to see if any discharges have taken place in violation of the Convention. Incidents involving harmful substances must be reported without delay.

Oil tankers—cargo space discharges

Operational discharges of oil from tankers are allowed only when all of the following conditions are met:

- the total quantity of oil which a tanker may discharge in any ballast voyage whilst under way must not exceed 1/15 000 of the total cargo carrying capacity of the vessel;
- the rate at which oil may be discharged must not exceed 30 litres per mile travelled by the ship;
- no discharge of any oil whatsoever must be made from the cargo spaces of a tanker within 50 miles of the nearest land: and
- the tanker has in operation an oil discharge monitoring and control system and a slop tank arrangement.

Depending on the size and age of the ship, MARPOL requirements may also include the fitting of an oil discharge monitoring and control system, oily water separation equipment and filtering system, slop tanks, sludge tanks, piping and pumping arrangements.

Oil tankers—construction

Segregated ballast tanks (that is tanks which carry only ballast water and not oil) are required to be protectively located to meet certain subdivision and damage stability requirements so that, in any loading conditions, they can survive after damage by collision or stranding.

Under a system known as crude oil washing (COW), tanks are washed not with water, but with crude oil—the cargo itself. The solvent action of the crude oil makes the cleaning process far more effective than when water is used and, at the same time, the mixture of oil and water which led to so much operational pollution in the past is virtually ended. The owner is also able to discharge more of the cargo than before, since less of it is left clinging to the tank walls and bottoms.

Under recent amendments, oil tankers of 5 000 cwt and above delivered after July 1996 must be fitted with double bottoms and wing tanks extending the full depth of the ship's side. The regulation allows mid-height deck tankers with double-sided hulls as an alternative to double-hull construction. Other methods of design and construction may also be accepted provided that they ensure the same level of protection against pollution in the event of a collision or stranding and are approved by IMO.

With the exception of ships built with double hulls, existing ships built to MARPOL standards must comply with the new double hull requirements not later than 30 years after the date of delivery. Oil tankers built to pre-MARPOL standards must, not later than 25 years after the date of delivery, have side or bottom protection to cover at least 30 per cent of the cargo area. The Convention also allows for future acceptance of other structural or operational arrangements as alternatives to the protection measures spelt out in the Convention.

All ships—machinery space discharges

The discharge from machinery space bilges is allowed only when all of the following conditions are met:

- the oil content of the effluent must not exceed 15 ppm;
- the ship is proceeding en route;
- the ship has in operation an oil discharge monitoring and control system and oil filtering equipment.

Port State Control

AMSA surveyors conduct a program of port state control inspections of foreign flag ships visiting Australian ports. In addition, Australian flag vessels engaged on interstate and overseas voyages are surveyed for the issue of appropriate statutory certificates by AMSA, or by authorised classification societies on behalf of AMSA.

These inspections and surveys are undertaken to ensure that all ships comply with the relevant provisions of the IMO instruments and codes, including MARPOL 73/78, and with the provisions of the Navigation Act 1912. Should a ship be found not to comply with

appropriate requirements, AMSA will detain the ship until satisfactory repairs are carried out or remedial action taken.

Since MARPOL 73/78 entered into force for Australia in January 1988, compliance with MARPOL requirements at port state control inspections is set out in Table 1.

Table 1

Compliance with MARPOL Requirements, 1988-92

	1988	*1989*	*1990*	*1991*	*1992*
Total number of ships inspected	1 038	836	578	780	2 040
No of MARPOL 73/78 deficiencies	26	22	19	14	18
% compliance	97.4	97.3	96.7	98.2	99.1

Inspectors

MARPOL 73/78 provides that ships may, in any port or offshore terminal of a party, be subject to inspection by authorised officers for the purpose of verifying whether the ship has discharged any substance in violation of the Convention. Australia has appointed 175 inspectors under sub-section 3(1) of the Protection of the Sea (Prevention of Pollution from Ships) Act covering all major Australian ports. Inspectors include all AMSA surveyors and nominated Commonwealth/State departmental officers, harbour masters, pilots or environmental officers. Australian legislation provides that an inspector may:

- go on board the ship with such assistants and equipment as he considers necessary;
- require the master of the ship to take such steps as the inspector directs to facilitate the boarding; inspect and test any machinery or equipment of the ship;

- require the master of the ship to take such steps as the inspector directs to facilitate the inspection or testing of any machinery or equipment of the ship;
- open, or require the master of the ship to cause to be opened, any hold, bunker, tank, compartment or receptacle in or on board the ship and inspect the contents of any hold, bunker, tank, compartment or receptacle in or on board the ship;
- require the master of the ship to produce a record book required by the Act to be carried in the ship or any other books, documents or records relating to the ship or its cargo that are carried in the ship;
- make copies of, or take extracts from, any such books, documents or records;
- require the master of the ship to certify that a true copy of an entry in a record book required by this Act to be carried in the ship made by the inspector is a true copy of such an entry;
- examine, and take samples of, any substances on board the ship;
- and require a person to answer questions.

Penalties are provided for persons who refuse or fail to comply with a requirement made of the person by an inspector (maximum $8000) or making a false or misleading statement (maximum $20000).

With the assistance of the Director of Public Prosecutions, instructions have been issued to inspectors on the correct method of taking oil samples. The instructions cover issues such as conduct of interviews, preparation of evidence and sampling techniques.

Analysts

A significant factor in any prosecution is the matching of oil samples taken from the polluted area with those taken from the accused vessel. Prior to 1968 oil spills were analysed primarily by physical methods such as wax and asphaltene content, pour point, viscosity and API gravity. Considerable work was carried out in the UK and US during the 1970s and today the antiquated petroleum tests have been discarded in favour of capillary gas chromatography, mass spectrometry, fluoresence spectroscopy and biomarkers. For the submission of evidence in court, AMSA has appointed 16 analysts from nine laboratories around Australia.

Insurance for Penalties

As mentioned above, MARPOL 73/78 imposes obligations on the Contracting Parties to establish sanctions against the violation of the relevant discharge provisions. Penalties specified under the law of a Party are to be adequate in severity to discourage violations of the Convention and be equally severe irrespective of where the violations occur. Similar provisions with the aim of effective enforcement of applicable international rules and standards are contained in Article 217(8) of the Law of the Sea Convention.

International efforts to improve by technical and legal measures the deterrence against violations are hampered by the well-established practice of international transport insurers to cover penalties imposed on the basis of due process against owners, masters, or crew members for MARPOL violations.

Germany has recently introduced domestic legislation prohibiting national insurance companies from offering such contracts. Germany has expressed the view at IMO that international insurance activities which cover the risk of individual penal responsibility in the field of marine pollution, thus making any effectiveness of MARPOL-like enforcement measures illusory, should gradually be eliminated by using all appropriate means provided by domestic law and in cooperation with other nations.

This issue is still being considered at IMO.

Jurisdiction

A landmark decision of the High Court in the Seas and Submerged Lands Act case of 1975 (*NSW v. Commonwealth* (1975) 135 CLR 337) affirmed the complete sovereign power and rights of the Commonwealth Parliament over offshore areas of Australia, that is from the low water mark outwards. The result of that was that the Commonwealth Parliament has the power to override all State legislation in the area. Some of the consequences of this decision, which left many of the States' powers in doubt, were reversed by the Offshore Constitutional Settlement (OCS) .

The OCS was enshrined in legislation in 1980 and effectively gives the States and the Northern Territory jurisdiction over the territorial sea and the Commonwealth jurisdiction over the high seas. One feature of the OCS was a recognition by the States that a mechanism was required to enable Australia to become a party to key international maritime conventions without the need for the legislation in every Australian jurisdiction to be in compliance at the time of ratification. The concept of the "savings clause" was introduced whereby Commonwealth law giving effect to the Conventions would apply in all jurisdictions, but would "step back" if and when a State enacted the provisions itself. This gave States time to enact parallel legislation at its own pace or, indeed, choose not to do so at all. Examples of this device can be found in the majority of Commonwealth Protection of the Sea legislation.

In November 1990 Australia's territorial sea was extended from three to twelve nautical miles from the baselines, although State and Northern Territory jurisdiction remains at three nautical miles by virtue of the *Coastal Waters (State Powers) Act 1980* (Cwlth). The greater part of the baseline is the low water line along the coast.

The remainder of the baseline consists of straight lines as follows:

- lines across the mouths of rivers which flow directly into the sea;

- bay-closing lines to enclose certain bays not more than 24 miles wide at their mouths; and

- straight baselines to enclose waters where the coastline is deeply indented and cut into, or where there is a fringe of islands along the coast in its immediate vicinity.

Difficulties with Enforcement

The MARPOL convention distinguishes two enforcement situations. One whereby the discharge rules have been violated within the jurisdiction of the coastal state. This refers to the territorial sea, the internal waters and in certain cases the exclusive economic zone (EEZ) of a coastal state. In these maritime zones the coastal state is authorised to either proceed against such a ship or to send a report to the flag state. In the majority of cases, action is left up to the flag state.

The second situation is the one whereby the coastal state detects the violation and is unable to establish where it was committed or determines it was committed outside jurisdiction (high seas). In this case the coastal state cannot proceed but must inform the flag state of the alleged violation. It is up to the flag state to examine whether the violation has effectively been committed and whether this is an illegal act under its law.

For a coastal state, initiating action against foreign vessels is not easy. A prosecutor will firstly have to determine whether the alleged violation has taken place within the jurisdiction of the country. If witnesses identify a ship discharging forbidden substances it may not be a problem since, in that case, it is relatively simple to determine the location. However, in other cases it may be more difficult. For example, if the master has not maintained the appropriate entries in the ship's oil record book, questions may be raised as to where this offence took place. A master would tend to state that it has taken place on the high seas, and thus subject to the (possibly more clement) jurisdiction of the flag state. A prosecutor would submit that it occurred in the port of call since the oil record book should have been in order at that time.

Once the judge has solved this problem he or she will then need to determine whether the violation of rules has been proven. This is the most difficult part of the task.

MARPOL generally prohibits discharges higher than 15 parts per million. With a significant number of incidents in Australian waters being reported by aircraft (*see* Figure 3), samples can rarely be obtained for laboratory analysis of oil content.

To address this global enforcement problem, in 1991 The Netherlands Ministry of Transport, Public Works and Water Management conducted extensive tests during which oily mixtures with different oil concentrations were discharged into the sea. Observations of these discharges were made from the discharging vessel (visual) and from a coast guard aircraft (visual and with remote sensing equipment). The report of the tests concluded that:

- a discharge of an oily mixture with a concentration of 15 ppm can under no circumstances be observed, either visually or with remote sensing equipment; and

- the lowest concentration of oil present in the discharge of an oily mixture where the first traces were visually observed from the aircraft was 50 ppm.

It remains to be seen how the courts will view this report as evidence.

Future Directions

AMSA has proposed legislation which will, based on the United Nations Law of the Sea Convention (UNCLOS), ensure that a vessel suspected of causing marine pollution can be detained and released after providing security to cover estimated penalties and clean-up costs.

The proposed legislation will comply with the safeguards relating to enforcement action in respect of foreign ships listed in Articles 223-233 of UNCLOS. Several aspects of these safeguards have implications for existing means of enforcement, such as inspections or the institution of legal Proceedings.

It is proposed that the legislation enable AMSA to detain a ship in the following circumstances:

- where a foreign vessel is voluntarily in port or at an off-shore terminal and there are clear grounds for believing that the vessel has breached the pollution provisions of the Act in the EEZ or in the territorial sea;

- where a foreign vessel is in the territorial sea, and there are clear grounds for believing the vessel has breached the pollution provisions of the Act while navigating in the territorial sea;

- where a foreign vessel is in the EEZ or in the territorial sea and there is clear objective evidence that the vessel has breached the pollution provisions of the Act in the EEZ *and* that the (suspected) breach has resulted in a discharge which has caused or threatens to cause major damage to the coastline or related interests, or to any resources of the territorial sea of EEZ.

An offence will be created for the master and owner of a detained ship which leaves Australian waters before it is released from detention.

The legislation will, in accordance with Article 226 of UNCLOS, provide that the Authority shall not detain a ship longer than is essential for purposes of investigation. A provision will provide that a ship that has been detained must be released if:

- security is provided in a form acceptable to the Authority to the maximum amount of penalties that can be imposed under the Act against the owner or master in relation to the discharge *and* any amount that might, in the opinion of AMSA, be recoverable under the cost recovery provisions;

- proceedings are instituted but discontinued;

- proceedings are instituted and concluded without the master or owner being convicted;

- proceedings are concluded and all costs and expenses ordered to be paid and all penalties imposed have been paid;

- the Authority has sought to recover costs and expenses incurred as a debt due and the amount has been paid;

- the Authority believes that the discharge did not occur from the ship; or

- the Authority determines for any other reason that the ship should be released.

It is also proposed to include provisions consistent with UNCLOS to extend the application of the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 to pollution incidents occurring within Australia's soon to be proclaimed EEZ.

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THE ENVIRONMENTAL AUDIT AS A "SANCTION" OR INCENTIVE UNDER THE VICTORIAN *ENVIRONMENT PROTECTION ACT 1970*

Sandra Edmonds

LIKE OTHER ENVIRONMENTAL LEGISLATION IN AUSTRALIA, THE framework of the Victorian *Environment Protection Act 1970* assures the use of environmental audits in various forms. However, this Act is unique in using environmental audits as a sanction in certain circumstances. The rationale for the use of this device was to ensure that certain industries with poor compliance records participate in "environment improvement plans".

But these compliance mechanisms have rarely been adopted on a mandatory basis by the Environment Protection Authority (EPA). Instead, the EPA has encouraged the voluntary use of these audits to improve industrial performance. Moreover, present environmental policy is now moving to the use of both environmental audits and environment improvement plans as incentives in the regulatory framework.

Whether environment improvement plans or environmental audits will be compulsory in future is uncertain given two recent publications by the EPA: *The Enforcement Policy* (July 1993) and a discussion paper, *A Question of Trust: Accredited Licensee Concept* (July 1993). The latter provides a framework for a consultation process to explore the options in setting up a less prescriptive regulatory system which will reward industries with environmentally responsible and responsive management.

Nevertheless, it would still be possible for environment improvement plans to be required when dealing with culpable offenders whose behaviour ignores the interests of the community. However, sanctions other than an environmental audit would then be necessary. Otherwise, similar requirements will be dealing with diametrically opposed conduct, recidivism and responsibility, with more specific attention being paid to environmentally conscious management when assessing the latter in the administrative decision-making process. It would be appropriate for this anomaly to be addressed in conjunction with the progress of the discussion of the accredited licensee concept. Some considerations which might be taken into account will be outlined in this paper.

Defining "Environmental Audits"

The expression "environmental audit" now covers a multiplicity of particular varieties of examination and verification. Up to the late 1980s environmental audits could be classified into two general categories, compliance audits and business-opportunity audits. Some have broken down the analysis of environmental audits to particular classifications reflecting the different specific purposes for which the audit has been conducted (Buckley 1990, pp. 128-33); for example, an audit to systematically check whether actual environmental impacts reflect the predicted impacts in documented environmental impact assessment or a review to ensure against financial risks or liabilities in proposed acquisitions or corporate mergers. Others have referred to the necessity to make a distinction between an initial environmental review, sometimes described as "an internal environmental audit", and the more specific activity involved in an audit which is the systematic examination of environmental performance (Jacobs 1992, p. 5). That such examination of the control systems, assets and liabilities of regulated entities be an independent evaluation is also an essential component in the concept of an audit.

In 1986, the United States Environmental Protection Agency defined an environmental audit as "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements" (Policy Statement 1986, p. 25,006). It is this approach to environmental auditing, that is, as an instrument to be used by corporate management, that seems to have been reflected in the legislative scheme in the Victorian *Environment Protection Act 1970* requiring mandatory environmental audits.

However, the new international emphasis for the 1990s has been on the development of environmental management auditing systems. This has grown out of a "greening of business" in both American and European corporations. The comprehensive application of environmental principles to business practice formed the basis for an initiative sponsored by the European Community on the relationships between the environment and business (Winter & Ewers 1988). The European experience of environmental auditing is now being discussed in a growing area of literature (for example, Elkington 1990 and Clement 1991).

The British Standard BS7750 published in March 1992 is an environmental management systems standard which was developed in part in response to a growing need for effective environmental management. It is designed to enable an organisation to establish a quality management approach as an effective foundation for sound environmental performance. Under that environmental management system, procedures can be established in an organisation to set environmental policy and objectives, achieve compliance with them and through documented records demonstrate that compliance to others.

The European Community has referred to the definition developed by the International Chamber of Commerce in its initial proposal for legislation to establish an Eco-Audit Scheme. That definition refers to an evaluation of performance with the aim of helping to safeguard the environment and indicates that this can best be achieved by both: "(1) facilitating management control of environmental practices; and (2) assessing compliance with company policies which would include meeting regulatory requirements" (1992). The European Community's Eco-Management and Audit Regulation, like the British Standard, reflects the evolution of the basic concept of the environmental audit from a method to address concerns about corporate compliance

and to enable product life-cycle analysis so that now environmental management and performance is itself addressed.

This shift also indicates a move beyond traditional management goals expressed in economic terms to now encompass the ecological dimension (Capra 1992) and some argue that a further paradigm shift in corporate strategy may be possible (Kiernan 1992). Measured against this international trend, the environmental audit framework introduced in 1988-89 in Victoria was more representative of the compliance audit classification. The aspects of environmental management systems mooted in the recent discussion paper reflect the more recent trends.

The Legislative Context of Victorian Environmental Audits

From its foundation, the Victorian *Environment Protection Act 1970* has moved through various stages of extension and refinement. In 1988-89 amendments to the Act were described by the government as a mixture of carrots and sticks to help industry clean up its act environmentally. Various amendments extended the "polluter pays" principle of the legislation, with increased fines, environmental levies on licence fees, service fees relating to enforcement and minimum mandatory penalties in certain limited circumstances.

However, the government and the EPA was also confronted with extensive adverse publicity about poor planning controls which had resulted in a residential development being discovered to have been built on a contaminated site in a Melbourne suburb. This controversy resulted in the amendments to the provision of the Act relating to environmental auditors and certificates of environmental audit. In relation to contaminated land, the first ministerial directive under planning legislation required planning authorities when rezoning land to ensure that it is free from contamination that would make it unsuitable for the anticipated use. This requirement became specifically linked to the statutory scheme in the Act by a second ministerial directive requiring the use of certificates of environmental audit from environmental auditors. These controls were described as providing "a general mechanism by which planning authorities, government agencies and the private sector can be readily and authoritatively assured that land is free from contamination".

Such certificates may also be used to indicate compliance with requirements of clean-up notices as part of mandatory rehabilitation processes for contaminated land. Alternatively, in order to obtain the removal of land listed in the Victorian Contaminated Sites Register a certificate of environmental audit will be required. The auditing involved in this process should incorporate both an assessment of compliance with legislative standards and an evaluation of risks and hazards.

Accordingly, policy and legislative implementation were under some pressure in accommodating these different types of changes to the Act. But, the auditing for contaminated land must be distinguished from a mandatory environmental audit which is widely defined by the Act as:

> a total assessment of the nature and extent of any harm or detriment caused to, or the risk of any possible harm or detriment which may be caused to, any beneficial use made of any segment of the environment by any industrial process or activity, waste, substance (including any chemical substance) or noise.

The expressions "beneficial use", "environment" and "waste" are also widely defined.

This insertion also appears to have been in response to the separate problem of the relative lack of success by the EPA in its enforcement role. Low fines were generally imposed and even the highest penalties were consistently less than 7 per cent of the potential maximum available. Nor has this tendency changed according to the EPA *Annual Reports*, since 1988-89 onwards. While this failure is not confined to Victoria (Farrier 1990), it clearly indicated that options other than the traditional forms of prosecution and punishment needed to be explored.

Obtuse industry attitudes were highlighted by the performance of the petrochemical complex at Altona. One company scored a record number of 199 community complaints in 1989. Another company managed to increase the complaints against it from 72 in 1988, to 105 in 1989. Another refinery had 283 complaints registered against it in the same period.

A mandatory environment improvement plan was imposed on a company in another industry sector, but this company had also been the source of numerous community complaints over a lengthy period of time and also had an extremely poor compliance record.

Given community pressure for solutions to environmental problems, and the failure of traditional methods, the EPA also needed other measures which would maintain its credit with the public. The environment improvement plan was seen as a method which would not only provide for community involvement, but also would serve to indicate a public commitment to environmentally responsible behaviour by the relevant industry (*Annual Report 1989-90*).

The provisions also reflect efforts by the EPA to encourage waste minimisation in industry practice and the clean technology approaches being emphasised by industry on the EPA. The definition of an environmental audit emphasises compliance and risk assessment factors and reflects a view of auditing as a tool to assist management.

The Procedure for Mandatory Environmental Audits

Under s. 31C of the Act, the EPA may require an occupier of premises on which particular industrial undertakings are occurring to conduct an environmental audit (as defined above) and to publish the results. A pre-condition for the exercise of this power is the Governor-in-Council declaring by Order that a particular industry sector is subject to these controls.

Once an industry sector is so declared, the EPA can amend the licence of premises in any schedule category to require as a special licence condition that the occupier of the premises conduct an environmental audit using an environmental auditor (specified under the Act) and to publish the results in the manner required by the EPA. It should be noted, however, that one of the schedule categories referred to is Schedule 3—upon which significant noise emissions are or are likely to be emitted. The licence requirements under the Act do not apply to this schedule category. A fine point perhaps since a premise in a Schedule 3 category is also likely to be in another schedule category which does require licensing. But noise was a problem for local residents and had been a source of continual complaint in relation to all of the examples referred to above.

However, the EPA may exempt occupiers participating in and complying with environment improvement plans from the more rigourous licence conditions involving

environmental audits. This occurs when the occupier agrees to participate in an "environment improvement plan" which must be endorsed by the EPA and include the following matters:

> (a) A requirement that any relevant State environment protection or industrial waste management policy, regulation or licence condition be complied with;
>
> (b) Emission and waste production standards for the industry;
>
> (c) Requirements for monitoring compliance with the environment improvement plan;
>
> (d) Provision for the participation of the community in the evaluation of the performance in meeting objectives under the environment improvement plan;
>
> (e) Provision for upgrading plant and equipment to meet objectives under the environment improvement plan;
>
> (f) Provision for the assessment of new or emerging technology in the industry or in pollution control; and
>
> (g) Provision for contingency or emergency plans.

Apart from the requirement for community participation, the program outlined in these provisions could also be described as a baseline audit, or an initial review, depending upon the terminology used.

Once a plan has been prepared compliance with its conditions can be enforced by use of the pollution abatement notice, with prosecution a possibility in the event of noncompliance. Further, if the occupier breaches the environment improvement plan, the EPA may revoke the exemption and a special condition in the licence requiring an environmental audit to be conducted will apply. It is in this sense that an environmental audit may be described as a sanction, potentially useful for dealing with "problem" industries.

The penalty for making any false statements in the published results of an environmental audit was, at the time, the most severe in the Act, involving a substantial fine or imprisonment or both.

The potential for community participation in evaluation is an important consideration and something missing from the definition of environmental audit. However, that participation falls far short of any rights of enforcement which the EPA has effectively exercised as a monopoly since amendments to the Act in 1984. Also these requirements are directed at big business, small to medium-size firms which are not subject to licensing being left to be dealt with by traditional enforcement methods.

The "Sanction" in Action

The use of these provisions as mandatory requirements has been the exception rather than the rule, since they were enacted. This has been due in part, to the fact that only one industry sector was declared to be subject to these controls in the two years following the amendments. The first order was made in March 1990, and related to the carbon black manufacturing industry. The company referred to above used that carbon black in the manufacture of its products. The company entered into an environment

improvement plan and this action, in addition to a change of management, has changed its performance. In late 1992 a range of other industry sectors were declared namely chemical manufacturing, oil and gas refining, metal manufacturing, rendering, pulp and paper manufacturing, and industrial waste treatment, re-processing and disposal.

The reasons why the petrochemical industry was not declared to be subject to the operation of these controls are unclear since this piece of delegated legislation need not contain the same policy explanation as occur with State Environment Protection Policies or other regulations. One reason may have been the voluntary undertaking by the industry to engage in community consultation. This occurred in two ways: first, a voluntary environment improvement plan was undertaken by Mobil (the first such plan in Victoria even though the industry sector had not been declared). The second, related to the establishment of the Altona Complex Neighbourhood Consultative Group. This group receives reports from Altona companies involved in programs to reduce emissions.

Another factor may well have been the industry's response to the other aspects of the 1988-89 amendments involving the scaling down of capacity and in one case a decision by the chemical firm ICI to close down two of its older factories which involved almost 200 retrenchments. The General Manager was quoted as stating that the whole chemical industry would be having similar problems (*The Australian*, 9 October 1990) in dealing with increased environmental requirements at the same time as a general economic downturn.

More recently, another company has recently chosen to undertake a mandatory environmental audit instead of an environment improvement plan. However, it is possible that following such an audit an environment improvement plan may be required. According to the Victorian Environmental Defenders Office, a number of appeals against a works approval process in relation to the same company have been made by the local community.

The approach by the EPA has, otherwise, moved in the direction of voluntary environment improvement plans and audits. Its literature has emphasised the benefits to industry, individually and as a whole. Two environmental audits which were conducted by the EPA with the cooperation of responsive corporations, described generally as having good compliance records, were conducted, in part, to assist the formulation of EPA audit guidelines and also to indicate benefits of an audit, like waste minimisation. Those audits were not limited to the predominantly risk assessment approach involved in the definition of the Act but extended to operational and management systems.

Based on material in the EPA *Annual Reports,* there has in fact been only one mandatory environment improvement plan. An environmental audit which was required of the Nufarm Ltd site in response to controversy generated by Greenpeace about dioxins and furans is also referred to. However, this audit did not rely upon the powers contained in s. 31C. The only "mandatory" audit under that section is the one referred to.

Further, while the EPA's Enforcement Policy (1993) refers to environment improvement plans and environmental audits as measures to promote compliance, that document does not explain the link between the statutory requirements. Nor do the enforcement measures set out in the flow charts indicate that these are potential options in the enforcement process and mandatory environment improvement plans can be enforced by administrative notices.

EPA Environmental Audit Draft Guidelines

The draft guidelines published in January 1992 are in the process of revision and the following comments should be read in that light. For the auditing of industrial facilities reference is made to an assessment of the adequacy of corporate and facility management structures both in relation to the reporting of environmental requirements and in relation to strategic planning. However, this assessment appears to be limited to locating sites of responsibility for environmental management within the management structure, the functions of personnel involved and the identification of reporting lines. While the draft guidelines do refer to the need to determine whether a corporation has a policy on environmental issues, this is well short of the systematic analysis for eco-management auditing which forms the basis of both the British and European Community requirements.

The main thrust of the draft guidelines for conducting audits relate to the detailed assessment of the particular site, the processes involved and the wastes generated. Also included is the requirement that the various segments of the environment that may be affected by such operations be evaluated and that statutory requirements and policies are being complied with. The draft guidelines anticipate various actions that may be taken by the EPA when problems have been identified in the audit report. These include either licence amendments or pollution abatement notices being issued requiring remedial action and further investigations being undertaken, including the possibility of follow up audits. Interestingly, the draft guidelines also state that the EPA may require that an environment improvement plan be formulated. Theoretically, this could mean that two environment improvement plans are undertaken: the first by choice by the company (instead of an audit), and the second following the completion of a full environmental audit.

The Problems of a Sanction-Based Environmental Audit

The assessment of the environment improvement plan and environmental audit in this paper has been based upon the premise that the insertion of these mechanisms into the Environment Protection Act occurred at an opportune time in the legislative parliamentary timetable. The "polluter pays" package of amendments was the result of an analysis which had time for both attention to detail in drafting and consideration of anticipated outcomes. In contrast, the land contamination amendments had to be prepared by an agency and government beleaguered by public controversy over the issue. It is suggested that these different types of amendments had two separate impacts upon both policy considerations and the drafting of the environment improvement plan/environmental audit requirements. First, additional levies on licence fees were already in place as a result of the polluter pays amendments so that a different option needed to be explored in the event of a failure in the environment improvement plan process. Second, the land contamination amendments set in place a system under which environmental auditors, independent of the EPA, could be used as an additional expert resource pool and hence reduce the burden of oversight by the EPA.

However, shortly following the amendments the EPA found itself in contested legal proceedings relating to the interpretation of clean-up measures (*Environment Protection Authority v. Simsmetal Ltd & Ors* (1991) 1 VR 623). Those proceedings were commenced late in 1989 and the judgment was delivered in May 1990. While the

judgment is specific as to the interpretation of provisions relevant to the validity of notice requirements relating to contaminated land, a clear message was delivered by the Supreme Court that compliance powers would be strictly interpreted and that notices issued by the EPA would be held invalid if uncertain and ambiguous. Further, questions of validity could not be determined by reference to general objectives indicated in the legislation.

The requirements of an improvement plan are clearly stated in the statutory provisions and procedural notices (whose validity might be subject to challenge) are not strictly speaking necessary. However, an environmental audit by licence amendment specifically requires the issue of a notice in writing, which could be subject to challenge for uncertainty and ambiguity.

The second factor is that the process of formulating the draft guidelines would have clearly revealed the complications which could be involved in specifying audit notice requirements.

Apart from encouraging voluntary environment improvement plans and audits, the EPA has now proposed a new policy direction in which these mechanisms will be part of a package to reward environmentally responsible industry.

New Directions: Environmental Audits as Incentives

It is useful to consider the new proposal under discussion in Victoria for an accredited licensee system, and a brief analysis is included here. In order to obtain accreditation, three major pre-requisites will be necessary. That is, the licensee would have to base its application upon three "cornerstones":

- an environmental improvement plan (existing or in progress);
- an environmental audit program; and
- an environmental management system.

In assessing the application, the actual environmental performance of the operator would also be considered by the EPA. There are two advantages of accredited licensees. First, substantial licence fee reductions (potentially in the order of 50 per cent of the base fee and 10 per cent of the component fee). The accommodation of this proposal with the "polluter pays principle" is based upon three considerations:

- the reduced operational involvement by the EPA;
- the expenditures likely to be incurred by licensees in meeting the "cornerstones"; and
- the anticipated reduction in waste discharges from accredited licensees.

While the discussion paper allows for review, whether it is appropriate to base a blanket licence fee reduction on anticipated or potential outcomes is another question. However, to allow for credit based upon actual performance may be less of an incentive for industry and would also require more surveillance by the EPA. Further, the discussion paper notes one industry suggestion (without naming the industry) of a 50 per cent reduction in total fees, and the discussion paper's recommendation leaves the general issue of fee reduction as "one requiring resolution".

The second advantage involves a major change to the current philosophy of the Victorian legislation and relates to the proposal for works approval exemptions for accredited licensees. The works approval system is intended as a design stage assessment so that appropriate environmental controls can be "built in" to new works and hence reduce the need for "end of pipe" solutions. It is also the only stage in the statutory controls in which the community has specific statutory rights to make objections and pursue their claims in appeal proceedings. Since the ongoing operational licence is meant to reflect the benefits of the works approval process, neither community objection nor appeal rights apply to this process.

The thrust of the discussion paper's analysis of how the works approval exemptions will work appear to be based upon addressing industry concerns about uncertainty as to whether or not works approval exemptions would apply. Only works with significant environmental effects would in future be required to undergo the works approval process when this application is made by an accredited licensee. A notification system is proposed with a time limit on the EPA to make a decision as to whether a works approval is required. No provision has been made for the challenge of the EPA's discretion, by the applicant or third parties. While considerable emphasis is placed upon community involvement in either existing or future environment improvement plans and on implementing "community right to know" principles in the operation of the accredited licensee concept, the point is that the community may wish to do more than know, that is, have the power to use that knowledge. The discussion paper is quite specific that in the case of accredited licensees, works approval exemptions will not be subject to appeal by the community. This approach is rationalised with the statement that:

> This places greater responsibility on industry to inform and have dialogue with the community. It places a greater responsibility on communities to participate in such programs and monitor companies' operations (1992, p. 18).

Exactly how far such monitoring could extend would appear to rely on accredited licensees first informing the community of an application for works approval exemption. Should a community have any concerns about that prospect, then under the proposed legislative changes, the option to have such concerns addressed are limited to either the political arena, or the vagaries and expense of judicial review.

Assessing the "Cornerstones" of the Incentives Package

The discussion paper subdivides environmental auditing into a number of discrete activities: a management system audit, a compliance audit, a waste audit, an environment risk audit (assessment) and an impact audit. Exactly what form of audit would be undertaken to comply with this cornerstone will be based upon consultation with individual companies. At a minimum, a compliance audit and an established audit program would be necessary, as well as an environmental management system. While the British Standard BS7750 is referred to as the most comprehensive standard in environmental management, no companies consulted by the joint EPA-Industry Working Group are actively using it.

Here the experience of the European Community would be a valuable reference. The proposal for the Community eco-audit scheme was first made by the European Commission in March 1992. On 22 March 1993, the European Council adopted the

Eco-Management and Audit Scheme Regulation, including some amendments which were proposed by the European Parliament. The Scheme provides for voluntary participation by companies in the industrial sector and aims to promote and improve environmental performance by:

- the establishment and implementation of a systematic approach to environmental protection by companies which would include the establishment of environmental policies, programs and management systems within companies;

- the systematic objective and periodic evaluation by companies of the effectiveness of such systems and their environmental performances;

- having information provided to the public on companies' environmental performance;

- that there be an independent validation both of the systems established by companies and of the information provided to the public;

- that companies fulfilling the requirements of the regulation would be entitled to use a statement of participation, including a European Community logo.

Participation in the Scheme is voluntary, the legislative basis for the Scheme being harmonisation and integration of eco-management and auditing criteria and procedures throughout the European Community. The Community documents emphasise that the competitive dynamics and pressures which the Scheme will generate within the European Community will be sufficient incentives to ensure that, notwithstanding its voluntary nature, companies will participate.

However, one study of environmental audits in Denmark has indicated that the European Community's ambitions may not be able to be realised for small to medium-sized industries (Christensen & Nielsen 1992, p. 15). That study also revealed a flaw in the original Commission proposal to concentrate upon an approach to environmental audits as a management tool without regard to the nature and extent of worker participation. That aspect was dealt with by European Parliament amendments requiring that after the initial environmental review, the widest participation of workers and their representatives in the environmental protection system was to be developed.

The Community regulation requires the European standards body, CEN, to develop an environmental management system standard. However, bodies like CEN are typically made up of "experts" nominated by national standards bodies. The "technical" standards are developed with limited public scrutiny and without public input on the crucial (that is cost and risk v. benefit) decisions inherent in environmental regulatory standards (Smith et al. 1993, p. 303).

Hopefully, the democratic deficits relating to both standard setting and worker participation in environmental management systems will be addressed in the process of consultation with respect to the EPA's proposals.

Re-empowering the Community

The environment improvement plan empowers local communities as stakeholders in the process of resolving environmental problems. However, there are limits to such empowerment, particularly in relation to enforcement. To be empowered, the community must involve itself in monitoring and reporting problems to the EPA. Further, aspects of the accredited licensee concept appear to erode the community's options for involvement extending beyond participatory consultative processes.

Public enforcement rights do not automatically result in the opening of the floodgates of legal action. In both watching the watchdog and helping its enforcement role, the community does have a worthwhile contribution to make (Wilcox 1985).

While broadly defined, the mandatory environmental audit under s. 31C does not necessarily involve a review of management systems. The discussion paper on the accredited licensee concept acknowledges this omission.

The question remains as to what mechanisms will be used to address compliance issues when traditional methods have failed. The advantages of the environment improvement plan are sufficient for it to continue as a "sanction". However, in the event of continued poor performance by the operator in question, a re-empowering of the community to explicitly enforce a program which they should have been involved in developing, is an option to be considered. Given the monopoly of the EPA, such a proposal is unlikely to be accepted by it. While consistency in enforcement policy is an important issue and the expertise of the EPA must be recognised, whether these factors should be weighed against expanded community rights involve issues which would benefit from further consideration.

Conclusion

The traditional methods used to ensure compliance based upon a system of detection, prosecution and punishment do not necessarily lead to improved environmental management and the allocation responsibility for environmental performance. Eco-management and auditing systems attempt to encourage a more environmentally responsible and proactive management culture. If this can be achieved, the premise is that actual environmental performance will also improve. This is a qualitatively different and more complicated approach than traditional enforcement methods but does not necessarily mean that such methods will no longer continue to be necessary. The size of the Australian economy does not provide the same market opportunities to industry which are available in the European Community. Hence, a voluntary eco-management and audit scheme may not provide sufficient benefits to Australian companies to make it a viable alternative. The issue of incentives to encourage such participation is now open for discussion and there will be differing opinions in this regard.

Improvement of management culture in small to medium-size enterprises in Australia should also be considered, but the scheme proposed in Victoria is by its very nature not targeted to this group.

The environment improvement plan has the potential to encourage simplified methods of auditing, the review of management systems, and need not be limited to larger licensed industries. The inclusion of the community, an important factor which needs to be continually stressed, is provided for. In States like New South Wales, the

suggestions made with respect to public enforcement rights could be adopted if a scheme similar to the environment improvement plan is formulated.

ACKNOWLEDGMENTS

During August-December 1992, the writer was a Visiting Fellow with the University of Greenwich in the United Kingdom. Details relating to the European Community in this paper are in large part a result of that experience.

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CONFIDENTIALITY OF ENVIRONMENTAL AUDIT DOCUMENTS[1]

Jan McDonald

THE REGULATORY FRAMEWORK THAT CONTROLS A COMPANY'S environmental activities is increasing in complexity, and the civil and criminal liabilities that may be imposed for breaches of such laws are increasingly burdensome. The focus on corporate accountability for environmental degradation is prompting companies to adopt a proactive approach to environmental management. Central to this new approach is the growing use of internal environmental audits to detect or prevent potential breaches of environmental laws and regulations.

The results of such audits enable a company to identify and remedy operational problems and environmental harm at an early stage. The investigations may, however, reveal a past or existing breach of an environmental statute or permit, which could give rise to civil or criminal liability. Moreover, the very existence of the audit document could itself be incriminating if a breach occurs later, as it may provide evidence that the corporation had knowledge of the circumstances surrounding the later breach.

For companies to continue taking the lead in environmental management, it is therefore imperative that they be confident that audit documents will not reach the hands of government prosecutors, except with the company's permission. Companies may discontinue their practice of self-monitoring if they have no assurance that the results will not be used against them. This paper examines the means by which the confidentiality of voluntary audit documents may be protected under existing common law principles and suggests a statutory alternative that is aimed at encouraging industry-led environmental compliance.

Privilege Against Self-Incrimination

The most obvious way in which a company might seek to protect its documents from compulsory disclosure is to claim the privilege against self-incrimination. The availability of this privilege has now been limited to natural persons by the High Court's decision in *Environment Protection Authority (NSW) v. Caltex Refining Co*

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1. Editor's note: This paper reflects the law as at December 1993.

Pty Ltd, unreported, High Court of Australia, 24 December 1993[2]. The *Caltex* litigation started when the NSW Environment Protection Authority's predecessor (the State Pollution Control Commission) served two notices on Caltex Refining Pty Ltd, requiring it to produce documents relating to an alleged breach of a permit condition. Caltex refused, and sought a direction from the Land and Environment Court that it did not have to comply with the notices. The two notices were identical; one was authorised by s. 29(2)(a) *Clean Waters Act 1970* (NSW), the other issued under the Rules of the Land and Environment Court. The *Land and Environment Court Rules* 1980, Pt 6, r. 2, incorporate the provisions of the Supreme Court Rules 1970 relating to summary prosecutions, which incorporate the rules regarding notices to produce. Supreme Court Rule 16 of Pt 36 provides that where a party to proceedings serves on another party a notice requiring the party to produce any document . . . the party served shall, unless the court otherwise orders, produce the document without the need for any subpoena for production. The court would relieve the party of the obligation to produce where the document is subject to privilege (Supreme Court Rules 1970, Pt 36, r. 13, discussed in *Caltex Refining Co Pty Ltd v. State Pollution Control Commission* (1991) 25 NSWLR 118 at 123-4.)

The notices required Caltex to provide the SPCC with documents relating to alleged breaches of the water pollution discharge permit for Caltex' oil refinery at Kurnell. The sole purpose of the notices was to obtain evidence against Caltex for use in criminal proceedings that had already commenced. The alleged breaches had occurred over a year before the SPCC served Caltex with the notices.

Section 29(2)(a) of the *Clean Waters Act 1970* permits an authorised officer to require:

> the occupier of any premises from which pollutants are being or are usually discharged into any waters to produce to that authorised officer any reports, books, plans, maps or documents relating to the discharge from the premises of pollutants into the waters or relating to any manufacturing, industrial or trade process carried on those premises.

Stein J in the Land and Environment Court held that Caltex was required to comply with the notices (*SPCC v. Caltex Refining Co Pty Ltd* (1991) 72 LGRA 212), but he submitted a number of questions of law to the Court of Criminal Appeal regarding the validity of the notices, and in particular the availability of the privilege against self-incrimination to corporations.

The Decision in the Court of Criminal Appeal

The Court of Criminal Appeal had to decide three questions: (i) was the privilege against self-incrimination available to corporate entities? (ii) had the Clean Waters Act excluded the privilege by necessary implication? and (iii) was the notice issued pursuant to s. 29(2)(a) valid?

The Court of Criminal Appeal held that corporations could avail themselves of the privilege against self-incrimination. It reasoned that (i) a corporation that bears the duties of citizenship should also be entitled to the rights thereof; (ii) the privilege struck a balance between the powers of the State and the rights of individual citizens; and (iii) the privilege helped to maintain the integrity of the accusatorial system of

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2. Editor's note: the case is now reported - (1994) 68 ALJR 127.

criminal justice by requiring the Crown to make out a case before the accused is obliged to answer (*Caltex Refining Co Pty Ltd v. SPCC* (1991) 25 NSWLR 118 at 127, per Gleeson CJ, Mahoney JA and McLelland J).

Although it decided that the privilege extended to corporations, the Court held that the broad wording of s. 29(2) suggested that the privilege against self-incrimination had been excluded by necessary implication. The intent of the section was to enable authorities to ascertain whether an offence had been committed and to respond promptly to emergencies, which meant that the authority had to have access to all relevant monitoring data etc. (*Caltex v. SPCC* at 131-2, citing *Pyneboard Pty Ltd v. Trade Practices Commission* (1982) 152 CLR 333 at 241-342, per Mason ACJ, Wilson J and Dawson J). Moreover, another section of the Clean Waters Act specifically preserved the privilege, but no equivalent saving had been applied to s. 29 (*Caltex v. SPCC* at 131).

The Court of Criminal Appeal went on, however, to hold that even if the privilege against self-incrimination had been excluded, Caltex was not required to comply with the s. 29(2)(a) notice because it had been issued for an improper purpose (*Caltex v. SPCC* at 132). The Court held that the scope of s. 29(2) should be understood in the context of the objects of the clean waters legislation as a whole. Thus, the Court concluded that the provision was designed to empower officers to investigate ongoing activities, not to assist the authority in gathering evidence of a breach that had occurred over a year earlier. To permit s. 29(2) to be used for this purpose, the Court of Criminal Appeal held, would be to extend the evidence-gathering powers of the EPA beyond those conferred in the procedures of the Land and Environment Court and remove the protections conferred on an accused by those procedures (*Caltex v. SPCC* at 130-2).

The Decision of the High Court

Privilege against self-incrimination not available to corporations

On appeal, the High Court reversed the decision of the NSW Court of Criminal Appeal on the question of privilege. The Court reviewed authorities in the United Kingdom[3] New Zealand[4], Canada[5] and the United States[6] and held by a 4:3 majority that corporations were not entitled to the privilege against self-incrimination. In three separate judgments, the majority (Mason CJ; Toohey, Brennan and McHugh JJ) traced the historical foundation for the privilege and examined its modern justification, concluding that the privilege was aimed at protecting individual rights and freedoms,

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3. *In re Westinghouse Uranium Contract* [1978] AC 547, following *Triplex Safety Glass Co v. Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395, but *see* criticisms of the privilege in *British Steel v. Granada Television* [1981] AC 1096 at 1127 and *Istel Ltd v. Tully* [1993] AC 45 at 53.

4. *New Zealand Apple and Pear Marketing Board v. Master and Sons Ltd* [1986] 1 NZLR 191.

5. *Reg. v. Amway Corp* (1989) 56 DLR (4th) 309, although Mason CJ and Toohey J's interpretation of this case differs from Brennan J's. Neither judgment refers to the later decision in *R v. Bata Industries* [No. 1] 70 CCC (3d) 391, which held that the protection afforded by s. 7 of the Canadian Charter of Rights and Freedoms applied to corporations only in situations where the privilege is necessary in order to protect the life, liberty or security of an individual.

6. *Hale v. Henkel* (1906) 201 US 43.

and that such a concern had no application to corporate entities. In taking this view, the majority adopted the position that had been taken by Murphy J in three earlier High Court decisions[7]. In *Pyneboard Pty Ltd v. Trade Practices Commission*, Murphy J identified the privilege against self-incrimination as part of the common law of human rights that was based on a desire to protect personal freedom and human dignity (*Pyneboard Pty Ltd v. Trade Practices Commission* (1982) 152 CLR 333 at 346 per Murphy J). This meant that it could not be used by one person to protect another and could not be claimed by an individual on behalf of a corporate entity.

In *Caltex*, the majority also argued pragmatically that allowing a corporate privilege against self-incrimination would frustrate a legislative intention to control corporate conduct, since proof of corporate crime usually depended upon proof of documents in the corporation's possession or power (Brennan J at 14-15 of his judgment, citing *Wigmore on Evidence* (McNaughton rev. 1961, vol 8, par 2259b). Quoting Wigmore (McNaughton rev. 1961, pp. 360-1), the majority in *Caltex* held that the state-individual balance would be tipped unfairly in favour of corporations were the privilege to be extended to them, because:

> Groups frequently are powerful and their illegal doings frequently are provable only by their records; and . . . economic crimes (as contrasted with common law crimes) are usually not even discoverable without access to business records.

In dissent, Deane, Dawson and Gaudron JJ endorsed the view of the Court of Criminal Appeal that the privilege against self-incrimination was available to corporations. While the privilege had its origins in the Star Chamber's inquisitorial procedures, the minority believed that in modern society it was an extension of the Crown's burden of proving the guilt of the accused beyond reasonable doubt—"an unequivocal rejection of an inquisitorial approach" (at 11-12 & 19-21 of their judgment). In order to maintain an appropriate balance between the people and the State, the minority held that the privilege should be available to corporate entities as well as individuals. The pragmatic desire to ensure that legislative controls on corporate conduct were not frustrated should be irrelevant to the Court’s formulation of the common law position. If there were to be any erosion of common law principles, the minority considered that this was best done by the legislature.

Availability of the privilege against self-exposure

The four Justices who held that the privilege against self-incrimination did not apply to corporations also considered the application of the little-used privilege against self-exposure to a civil penalty. Mason CJ, Toohey and McHugh JJ held that the same considerations apply to the so-called "penalty privilege" as to the privilege against self-incrimination: the focus on individual freedoms precluded its extension to corporate entities (Mason CJ & Toohey J at 42 of their judgment, McHugh at 23 of his judgment). Brennan J, however, held that the fine that could be imposed following a successful prosecution was akin to a civil monetary penalty—the financial burden was the same, regardless of whether the penalty is classified as civil or criminal (at 21 of his

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7. *Rochfort v. Trade Practices Commission* (1982) 153 CLR 134 at 150 per Murphy J; *Pyneboard Pty Ltd v. Trade Practices Commission* (1983) 152 CLR 328 at 346-7 per Murphy J; *Controlled Consultants Pty Ltd v. Commissioner for Corporate Affairs* (1985) 156 CLR 385 at 395 per Murphy J.

judgment)—and the rationale underlying the "penalty-privilege" permitted its extension to corporations.

Brennan J distinguished between the privilege against self-incrimination, which protected individuals' freedom, and the privilege against self-exposure, which was based on the courts' limitation of their own powers to compel a defendant to furnish the evidence needed to establish its liability for a penalty (at 23 of his judgment, citing *Monnins v. Dom' Monnins* (1973) 2 Chan. Rep. 68 [21 ER 618]). The exercise of the Court's powers did not depend on whether the defendant was a corporation or a private individual. In *Pyneboard*, the majority held that a statutory provision requiring a person to provide information could be qualified by the penalty privilege, but Brennan J in *Caltex* took the view that the penalty privilege should be limited to the court-issued notice to produce. This was because the justification for the privilege was limited to the scope of a court's powers. Brennan J noted that the majority in *Pyneboard* had extended the penalty privilege to statutory orders to provide information for the same reason that they had extended the privilege against self-incrimination—as a "bulwark of liberty". Now that the majority had held that a corporation could not claim the privilege against self-incrimination, Brennan J reasoned that the penalty privilege should be similarly limited.

Deane, Dawson and Gaudron JJ did not discuss the penalty privilege specifically. It may be inferred, however, that they would support its extension to corporations for the following reasons:

- they recognised that the privilege against self-incrimination had developed from the equitable principle that the Court of Chancery would not order production of documents "if to do so would have exposed the party against whom discovery was sought to a penalty or forfeiture";
- the case they cited as authority for this principle was the same case that Brennan J cited in support of the penalty privilege; and
- the minority held that the privilege against self-incrimination did extend to corporations.

If this inference is correct, it would appear that a 4:3 majority of the High Court considered that Caltex would have been entitled to claim the privilege against self-exposure to a civil penalty in relation to the notice to produce issued under the Rules of the Land and Environment Court.

The final order from the *Caltex* appeal states that in respect of the notice issued under the Rules of the Land and Environment Court:

> Caltex is entitled to either the privilege against self-incrimination or the privilege against self-exposure to a penalty in respect of the said notice.

This order conflicts with the ratio of the case—that the privilege against self-incrimination does not inure for the benefit of corporations. Still, four justices concluded that Caltex did not have to comply with the notice, and without any comment from the minority on the privilege against self-exposure, it is difficult to rationalise this outcome with the majority's decision on self-incrimination.

Legislative exclusion of the privilege by necessary implication

Having taken the view that corporate entities were entitled to the privilege against self-incrimination, the minority found that, when read in context, there was a clear legislative intention to exclude the privilege in s. 29(2)(a) of the Clean Waters Act. Brennan J also held that s. 29(2)(a) excluded the privilege, although he went on to conclude that the privilege would not have been available to corporations anyway. This legislative intention was based on the express inclusion of the privilege in another section and the creation of an offence for failing to comply with a notice to produce. The minority therefore held that Caltex would have to comply with the statutory notice provided it had been validly issued. The majority's conclusion that the privilege against self-incrimination was not available for corporations meant that it did not have to consider whether the privilege had been excluded by the statute.

Validity of the s. 29(2)(a) notice to produce

The majority that precluded Caltex from claiming the privilege against self-incrimination held that the company should be required to comply with the notice issued under s. 29(2)(a). In its view, that notice was issued for a valid purpose despite being for the sole purpose of gathering adverse evidence. The majority reasoned that when the Court of Criminal Appeal held that the notice was invalid, it had assumed that the privilege against self-incrimination was available to corporations. Mason CJ and Toohey J held that, once it was accepted that a corporation could not claim the privilege in response to a court-issued notice to produce, so that the documents would have to be supplied pursuant to that notice, there was no reason to limit the scope of the s. 29(2)(a) notice to purely investigative proceedings: why should the EPA's powers to compel production be more limited under statute than pursuant to the Rules of Court? Mason CJ and Toohey J also held that a broad interpretation of the EPA's powers under s. 29(2)(a) was more consistent with the purpose that the provision sought to achieve, that is, effective pollution control (*see* 48 of their judgment).

The Caltex case confirms that corporations cannot avail themselves of the privilege against self-incrimination and indicates the Court's preparedness to interpret statutory powers of production very broadly. To this extent, the decision highlights the need for alternative forms of protection for environmental audits.

Legal Professional Privilege

Legal professional privilege attaches to communications made confidentially between a lawyer and client either (a) for the sole purpose of obtaining legal advice; or (b) for use in existing or anticipated litigation (*Grant v. Downs* (1976 135 CLR 674 at 682). For the reasons outlined briefly in this part, the belief that preparation of an environmental audit by a lawyer will entitle the report to legal professional privilege is probably ill-founded—companies undertaking environmental audits through lawyers should not assume that they will be protected.

- Privilege attaches to communications not facts

  Legal professional privilege attaches to communications, not the facts or information contained in those communications. This principle has resulted in parties involved in the preparation of a document being compelled to give oral

testimony regarding its contents, even though production of the document itself cannot be compelled (*see*, for example, *Freer v. Freer* [1956] SASR 163).

- Communications must be between lawyer and client

  Few environmental audit reports are prepared by the lawyer consulting solely with upper-level management who represent "the company" and who are therefore the client for the purposes of legal professional privilege. Typically, independent consultants are engaged or lawyers consult with company employees in order to compile necessary material. Will privilege attach to these communications, or are independent contractors and low level employees not "the client"? In relation to employees, the issue has not been litigated in Australia, but courts in the United States have adopted a case-by-case analysis of the question, focussing attention on whether the employee's communication was made at the direction of her superiors in order for the corporation to receive legal advice (*Upjohn Co v. United States* 449 US 383, 386-7 (1981)).

  Confidential communications between environmental consultants and the lawyer will be privileged if the consultant is held to be an agent of the client corporation (*Nickmar Pty Ltd v. Preservatrice Skandia Insurance Ltd* [1985] 3 NSWLR 44 at 52-5). Proof of the agency relationship will not always be easy because the environmental consultant will not ordinarily be empowered to affect the client's legal position ". . . by the making of contracts or the disposition of property" (Fridman 1985, quoted in Mann (1991), p. 180). Simply describing the consultant as agent of the client in the contract of employment will usually not suffice—courts are concerned with the substance of the relationship rather than the form (*see* the comments of Deane J in *Waterford v. Commonwealth* (1986-87) 163 CLR 54 at 92).

  Where the consultant does not fit the characterisation as agent of the client, but is instead an independent contractor, communications with the lawyer only attract privilege if they are made for the purposes of litigation that is anticipated or commenced—it will not be privileged if the consultant's report is used solely to provide legal advice (*Byrne* & *Heydon* 1986, p. 638 citing *Alfred Crompton Amusement Machines Ltd v. Customs and Excise Commissioners* (No. 2) [1974] AC 405; *Trade Practices Commission v. Sterling* (1979) 36 FLR 244 at 245-8). This limitation will take most environmental audits prepared with the involvement of independent contractors outside the scope of the privilege. It will not be privileged simply because the information is incorporated into the lawyer's memorandum of advice (*Trade Practices Commission v. Sterling*, per Lockhart J, citing *Wheeler v. Le Marchant* (1881) 17 Ch D 675).

- The communication must have been for the sole purpose of legal advice/litigation

  No privilege will attach if the documents would have come into existence regardless of the client's request for legal advice (*Grant v. Downs* (1976) 135

CLR 674 at 675). The "sole purpose test" is intended to ensure that the lawyer is not used as a depository for all documents created by a corporation in order to created a technical case of privilege (*Grant v. Downs* at 688). Thus, if environmental audits are undertaken as part of a corporation's commitment to total quality management, or to find more efficient operating practices, the sole purpose test will fail. The "sole purpose test" will not fail, however, if the audit was initiated to provide legal advice on environmental compliance, but is later used to improve business practices or for some other reason.

- The communication was confidential

  Courts will scrutinise the measures taken by a company to ensure confidentiality in the preparation of the report, the people to whom the document was made available, and the reason for which it was made available. For example, where lower level employees are involved in preparing the audit report, care must be taken to ensure that they do not pass investigative materials on to fellow employees.

- The privilege has not been waived

  Legal professional privilege is waived if the materials are dealt with in a manner inconsistent with their confidential status (*A-G (Northern Territory) v. Maurice* (1986) ALJR 92). If the client uses some favourable portion of a document in proceedings while seeking to prevent disclosure of unfavourable portions, the privilege will be waived for the whole document (*Maurice* at 94, 96). Similarly, production of the document without at least asserting that the document was privileged will be construed as a waiver.

- The statute does not exclude the privilege

  This paper has already examined the broad investigatory powers granted to pollution control agencies and the circumstances in which the privilege against self-incrimination will be excluded by necessary implication. In *Corporate Affairs Commission of New South Wales v. Yuill* ((1990-1991) 172 CLR 319), the High Court held that a section of the Companies (NSW) Code requiring production of books, documents etc as required by the Commission excluded claims of legal professional privilege because to allow the privilege would impair the inspector's ability to satisfy the public interest in carrying out the investigation. Comments by each of the majority in *Yuill* indicate clearly that they considered the overall objective of the Act, instead of considering the words of the section in question and balancing their import with the purpose served by legal professional privilege. This means that even where the provision granting powers to compel production of documents is not so broad as *necessarily* to exclude the privilege, it may be so construed where the broad aims of the Act would be hindered by allowing a claim of privilege.

Proposal for a Statutory Self-Evaluative Privilege

Where a pollution control statute gives the regulatory agency broad powers of investigation, courts are likely to infer that the privilege against self-incrimination has been excluded. This means that corporations will be duty-bound to produce copies of environmental audit reports, unless they can somehow show that they are subject to legal professional privilege. The foregoing analysis suggested that this will rarely succeed. The New South Wales and Victorian EPAs have both announced that they do not intend to compel disclosure of voluntary audit documents for use in enforcement proceedings, but neither state has enacted legislation that would make this policy enforceable.

This part sets out a suggested model privilege for voluntary environmental audits that could be inserted into any environmental protection legislation. In the United States, Arizona and Colorado attempted to enact similar provisions in the late 1980s, but both Bills were defeated. The commentary that follows the proposal refers to some of the weaknesses of those Bills and addresses some of the problems inherent in claims of legal professional privilege.

§. CERTAIN MATERIALS NOT TO BE USED:

1. Definitions. As used in this statute:

"Person" includes corporations, partnerships, natural persons, and non-profit organisations, but does not include government entities or statutory corporations.

"Environmental Audit" means any inquiry, investigation, or monitoring activity conducted by or on behalf of an organisation for the dominant purpose of ascertaining compliance with applicable environmental laws.

2. Application

(a) Subject to subsection (b), in any current or pending criminal enforcement proceeding under this Act:

(i) No person may be compelled to testify as to the contents or existence of any documents, reports, transcripts, notes, memos, samples or test results, or any other materials that came into existence during, or as a result of, an environmental audit conducted by or on behalf of an organisation.

(ii) No person may be compelled to produce or disclose the contents or existence of any documents, reports, transcripts, notes, memos, samples or test results, or any other materials that came into existence during, or as a result of, an environmental audit conducted by or on behalf of an organisation.

(b) Subsection (a) does not apply in any of the following circumstances:

(i) if the person seeking disclosure of the item can prove on the balance of probabilities:

(A) that neither the item nor the factual information contained therein can be obtained by any other reasonable and lawful means; and

(B) that, for reasons of public health, welfare or safety, the public interest favours disclosure.

(ii) if the person seeks to rely on the material requested in its defence of any civil, criminal or administrative enforcement action taken under this Act.

(iii) if, within [8 weeks] of the conclusion of the audit, the person:

(A) fails to initiate action to remedy any breach, or prevent any anticipated, suspected or threatened breach of the provisions of this Act that is revealed, indicated or suggested from the results of the audit; *or*

(B) fails to notify the [*name of government agency authorised to enforce the statute*] of any breach, or prevent any anticipated, suspected or threatened breach of the provisions of this Act that is revealed, indicated or suggested from the results of the audit

(iv) if the person uses the material in a fraudulent manner or in any manner inconsistent with the purpose for which the audit was conducted.

(v) if the environmental audit was conducted pursuant to:

(A) a permit requirement;

(B) the monitoring requirement contained in [*sections x, y, z of this Act*]; or

(C) a valid order of the [*relevant statutory authority*].

(vi) Where the audit is prepared by an organisation, the contents of the documents, reports or materials are disclosed by the organisation to any party outside the organisation *or* to any persons within the organisation whose terms of employment do not require that they have knowledge of the contents. The contents will be deemed to have been disclosed by the organisation even if disclosure was accidental or inadvertent unless the organisation can show that it took all reasonable precautions to preserve the confidentiality of the items and their contents.

(c) A person is not deemed to have waived its privilege by virtue only of the fact that it provided a copy of the materials to the Minister, either voluntarily or at the Minister's request.

3. Saving Provisions

This Act shall not be interpreted to remove or otherwise affect any privilege that a party is entitled to assert under Common Law or under statute.

s. 1 "Person"

The privilege should not extend to government departments or entities because a government entity should not experience the same disincentive for conducting environmental audits if confidentiality is not assured. Moreover, any presumption that the public interest favours the preservation of confidentiality does not obtain in relation to government bodies, especially where scepticism over government secrecy and corruption is widespread. Apart from the exclusion of government bodies, the entities who may rely on the privilege should be kept as broad as

possible. The qualification in the draft Arizona statutory privilege that it should only extend to "regulated entities" is unnecessarily restrictive because companies may conduct an audit in order to ascertain whether they are affected by the provisions of particular statutes at all.

s. 1 "Environmental Audit"
The definition of environmental audit has been drafted in very broad terms. It anticipates that many audits will be conducted by independent consultants and acknowledges that checking compliance with the law need not be the sole reason for conducting the audit. Perhaps most importantly, the definition does not contemplate or necessitate the involvement of lawyers, provided the predominant purpose of the audit can still be shown. This intentional omission makes clear that the statutory privilege is entirely unrelated to legal professional privilege, as the focus is on the subject matter of the investigations, rather than the parties conducting the investigation.

s. 2 (a): " . . . current or pending criminal enforcement proceeding . . . "
The privilege should be limited to criminal enforcement proceedings because it is inappropriate to permit companies to derive an unfair financial advantage from non-compliance with environmental laws by immunising them from civil or administrative proceedings.

> "(i) . . . no one may be compelled to testify . . . [or] . . . (ii) produce . . . documents"

This is the substantive part of the privilege and has been drafted widely to ensure that, provided the other conditions are met, no member, employee, or independent contractor of the organisation, or indeed anyone else, can be required to give evidence or surrender any documents or materials at an enforcement proceeding. The breadth of this provision is designed to avoid any problems that may arise from cases like *Freer v. Freer* [1956] SASR 163 and the principle that while the document attracts privilege, the investigator may still be compelled to give oral evidence.

> . . . the contents or existence of any documents, reports, transcripts, notes, memos, chemical samples or test results, or any other materials that came into existence during, or as a result of, an environmental audit . . .

All aspects of the documents and other investigatory materials are protected, unlike the common law privilege for self-critical analysis, which has received some judicial support in the United States and which limits the scope of protection to the subjective parts of the document (*Webb v. Westinghouse Elec. Corp.*, 81 FRD 431, 434 (ED Pa. 1978); Leonard 1988, p. 4). The rationale for the evaluative-factual distinction in the common law self-evaluative privilege is that compelled discovery of facts that are readily identifiable or ascertainable by independent means will not discourage the company from conducting future investigations (Comment: 1983, p. 1094). This reasoning is naive and ignores commercial reality because it assumes that companies will continue to pursue investigations that uncover potentially incriminating facts or circumstances even when they know that the facts may then be used against them. Given the choice between doing nothing and placing the investigative burden on the government, and conducting an audit

which places evidence in the hands of the authorities, it is difficult to see why a company would choose the former just because the evaluative portions of the documents were omitted.

> . . . documents, reports, transcripts, notes, memos, chemical samples or test results, or any other materials that came into existence during, or as a result of, an environmental audit . . .

There is little to be gained from an assertion of privilege in relation to the final audit report if the notes and other materials that were used to prepare the report are still discoverable. The statutory protection has therefore been drafted to include any material that owes its existence to the performance of the audit. In this way, it is more detailed than both the Arizona and Colorado Bills. The Arizona Bill refers to "any communication or information prepared, received or uttered in connection with an environmental audit" (Arizona Senate Bill 1446 §(A)(1)) and the Colorado proposal protects "any report, finding, communication, opinion, or draft thereof directly related to, and essentially constituting a voluntary self-evaluation" (Colorado Senate Bill 90-1204 §(1)). The Colorado Bill leaves little, if any, room for protection of preparatory materials, and this omission could render the whole privilege worthless.

s. 2(b)(i): "Public interest" exception

The public policy underlying the adoption of a self-evaluative privilege for environmental audits should be limited to situations in which the advantages of maintaining confidentiality outweigh the usual presumption that the public interest favours full disclosure of discoverable materials. Thus, the protection of audits should only be a qualified privilege that can be negated by a showing of extreme necessity and hardship to the prosecution if disclosure is not compelled. The concept of a qualified privilege comes from the United States' work product doctrine and the developing common law privilege for self-critical analysis. As a qualified protection, the court considering the confidentiality of an environmental audit would balance the need for discovery against the public interest in maintaining confidentiality (Allen & Hazelwood, p. 373). Typically, it would require that the factual information contained in the audit could not be obtained by any other reasonable and lawful means. In assessing the reasonableness of the means of obtaining the evidence, courts would consider such factors as cost, reliability of evidence (for example, in relation to volatile substances), and any potential danger or risk posed by the need to obtain evidence. For example, in the United States case of *Ybarra v. Arizona* (161 Ariz. 188, 194-5, 777 P.2d, 686, 691-2 (1989)), the court rejected the Government's assertions of undue hardship because the soil that was sampled was equally available to the government, and indeed had actually been sampled by the State authorities on previous occasions.

s. 2(b)(ii): Use of the audit in defence of enforcement action

This exception is the same as one of the circumstances in which legal professional privilege may be waived and is based on the logical argument that a party ought not be permitted to take advantage of parts of the audit document while at the same time seeking to resist disclosure of the less favourable parts. The United

States, NSW and Victorian EPA policies on the use of audits also support such an exception.

s. 2(b)(iii): Failure to remedy breach or notify authorities
This exception is probably the most crucial, as it underlies the whole rationale of allowing some form of privilege for audit documents and materials. The assumption that a privilege is a good thing can only be upheld if the audit is then used to improve a company's environmental record. If problems or breaches are detected but not acted on, there is no reason why the company should not be disadvantaged for having conducted the audit. The corollary of this is the principle that the company should not be "punished" for having improved its operation, as this would be a powerful disincentive for conducting the audit in the first place.

In many cases, the corrective action may take some considerable time, but this can be remedied by providing in the alternative that the organisation must notify authorities of the problem within the specified time. In this way, the relevant agency may be able to help the organisation achieve compliance. Moreover, it avoids time-consuming and costly litigation over whether "remedial action" has been undertaken within the prescribed period.

s. 2(b)(iv): Fraudulent or inconsistent use of audit
This exception also reflects the position in relation to waiver of legal professional privilege (*R v. Cox* & *Railton* (1884) 14 QBD 153). The application of this exception will necessarily depend on case-specific facts, but where it is clear that the audit was conducted in order to create a shield from liability, rather than assess compliance with the law, the privilege will be denied.

s. 2(b)(v): Audit required by law or statute
Discharge permits issued under State pollution control legislation frequently contain reporting or monitoring requirements. If an audit is conducted as part of one of these compulsory reporting requirements, it cannot be withheld by relying on the proposed statutory privilege, as this would defeat the statutory intent of the requirement. While this limitation invites law enforcement agencies to impose a wide range of reporting requirements, this must be more desirable than rendering all reporting requirements valueless. The statutory privilege is designed to assist organisations who conduct *voluntary* audits, not those mandated by statute or permit.

s. 2(b)(vi): Failure to preserve confidentiality
The inclusion of this exception is based on the same rationale for including the exception 2(b)(ii) and is also drawn from conditions attaching to an assertion of legal professional privilege. It is hoped that the specific reference to what circumstances will constitute a breach of confidentiality will avoid some of the problems that have arisen in relation to legal professional privilege in the corporate context. The last sentence in §2(b)(vi) is particularly important because it places the burden on the organisation to ensure that confidentiality of the document will be maintained.

s. 2(c): Providing Minister with audit not a waiver
This provision is intended to confirm that the privilege does not extend to supplying the government with information, merely to the use of that material in enforcement proceedings. It enables the relevant government agency to ensure that breaches are in fact remedied, by enabling them to obtain a copy of the document. While many members of industry will criticise this provision, this author sees it as a necessary check on potential abuse of the privilege, and will further the overall objective of the statutory proposal.

s. 3: Saving provisions
The creation of a statutory privilege is not intended to detract from the availability of common law privileges, such as legal professional privilege and the privilege against self-incrimination. Rather, it should supplement those privileges in areas where their application is uncertain. Section 3 is designed to make this clear in order to avoid unnecessary litigation over whether the statute is intended to be exhaustive.

Conclusion

The High Court's decision in *Caltex* makes corporate documents very vulnerable indeed because statutory powers of production were interpreted broadly and because the privilege against self-incrimination was held only to extend to private individuals, not corporate entities. Legal professional privilege is not likely to attach to audit documents, even where they were prepared under the supervision of lawyers. The NSW and Victorian EPAs have undertaken not to demand voluntary audit documents, but in the absence of some statutory protection, there is little incentive for companies to run the risk. This paper has addressed the need for confidentiality in audit materials by proposing a draft statutory privilege for self-critical analysis or self-evaluation. There is little likelihood in the current economic climate that more resources will be allocated to pollution control and regulation, so considerable reliance must be placed on industry itself to take the lead. A self-evaluative privilege like the one recommended here would provide industry with the assurance it needs in order to continue its voluntary environmental compliance practices.

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SELF-REGULATION

Ian A. Prince

A Vision

A VISION FOR THE ENVIRONMENTAL PERFORMANCE OF AUSTRALIAN business and manufacturing industry, by the turn of the century, is one where industry recognises and manages environmental responsibilities in exactly the same manner as its other key fiduciary, economic, legal, human relations and social responsibilities. As a matter of course all key decisions will be examined from an environmental perspective. Each decision will be required to meet robust and rigidly enforced internal environmental performance criteria. No business actions will be implemented unless they fully meet all of the environmental determinants and comply with short and long-term environmental risk criteria.

Every business decision will be made on the optimal use or allocation of environmental as well as financial and capital resources. The full implications of each decision will be well understood by all decision makers and their line and advisory staff. Decisions and action will not occur until these implications are clear. The environmental ramifications of:

- resource use, such as raw materials, energy, environmental media;
- manufacturing processes;
- any unavoidable remaining waste generation;
- product transport, storage and use;
- ultimate product and waste disposal;
- unavoidable land and habitat disturbance;

and other critical issues will be considered automatically.

All of the environmental data, models and knowledge of systems required will have been established, mostly through cooperation between industry, government agencies and scientific experts. The fierce debates and disagreements on environmental values and the need to account properly for environmental resources and their use, which characterised the early 1990s, will be considered as irrelevant ancient history. Accounting practice will routinely incorporate environmental resource accounting and valuations. Market pricing will fully embrace environmental values, locally, nationally and globally. Most of those involved will have no personal memory of when this was

not the case. In fact, the issues will be so inextricably intertwined that it will be not be possible to consider them as other than one. Attitudes in business and the community will be fundamentally different.

By the turn of the century, environmental knowledge will extend from the start of the supply chain to the end of the chain including the use and final disposal of the product and beyond. All supply, service and purchase contracts will feature environmental performance obligations and guarantees as prime contractual conditions. Market imperatives will automatically enforce optimal environmental performance through shareholder, debtholder, supplier, customer and community requirements. Failure to perform environmentally will result in certain disqualification from continuing to do business. Customers, suppliers, financiers, insurers and industry associations will impose sanctions through the marketplace. Environmental crime will be seen as one of the more odious criminal activities against the whole community. Those found guilty of such crimes will be subject to criticism and vilification as well as substantial monetary and economic penalties.

In the first decade of the next millennium, the environmental regulatory effort will have charged. Safety net regulatory controls will be in place but will be rarely utilised. Legal sanctions will be much more dramatic than now. A key regulatory focus will be on understanding the longer-term global environmental issues, where these involve continuing uncertainties. Regulators will assist the community and industry to adjust to the remaining global concerns and will be very involved in ensuring overall industry competitiveness. Supporting and supervising industry efforts to maintain environmental performance will be another major focus. The effort will encompass developing and maintaining the environmental data sets required by industry to make informed decisions. The data will include:

- marine, terrestrial and atmospheric environmental systems;
- habitats, flora and fauna;
- biogeographical regional considerations and collective implications;
- environmental impact assessment methodologies and the tools to allow industry to make informed decisions.

The high priority will be dealing with community-wide environmental optimisation although much will have already been achieved in urban design, transport modes and demand and domestic environmental impacts. Expectations and requirements for environmental performance will have moved from policing regulatory authorities to action by industry, business and the community. This Vision is one of enlightened and effective environmental self-regulation.

The Present

At present, many environmental statutes are based on a policing and sanctions approach widely referred to as "command and control". They rely on the philosophical assumption that industry and the broader community need legislatively-based commands setting out appropriate environmental behaviour and that they must be coerced by statutory inspection and penalties. Historically, there have been good reasons for this approach and many will be able to point to cases where such an approach may still be considered essential. Some in industry seek to continue with this approach as a means of achieving a greater sense of certainty in their environmental obligations.

In a real sense, though, the fundamentals of the current regulatory framework have not been adequately examined from an outcomes and cost-benefit perspective. The recent report, *The Environmental Challenge: Best Practice Environmental Regulation* (BPER) by the Australian Manufacturing Council does provide a framework for commencing to evaluate the issues. The Vision enunciated earlier begs the critical question of whether historical regulatory incrementalism will indeed optimise environmental outcomes for the resources invested in the regulatory effort and achieve the eventual outcome the community wishes. It is contended here that policy incrementalism will not succeed for a number of reasons including resource limitations and the current changes underway in industry.

Recent investigations have highlighted some sobering statistics about the current regulatory effort. There are approximately 2000 Environment Protection Authority (EPA) licensees in Victoria and around 7000 firms and other enterprises subject to trade waste agreements such as those issued by the Melbourne Water Corporation. The EPA's regulatory effort covers about 16 per cent of the total manufacturing establishments recorded in the 1990-91 manufacturing industry census by the Australian Bureau of Statistics and a very much smaller percentage of the total number of firms contributing to environmental impacts in Victoria. The extension of the EPA effort to all manufacturing firms alone could require up to six times its current resources—from 300 staff to closer to 1800. Clearly, this is impractical and from a community viewpoint, unacceptable. Additional resources will not become available. The "command and control" and inspection approach is resource-limited. It cannot achieve the Vision outlined earlier. (None of these comments should be taken as critical of the Victorian EPA. On the contrary, the EPA has had to cope with the problems of fewer resources and greater expectations.)

The world to be environmentally regulated has changed. Environmental performance in responsible companies is now moving with and is sometimes in advance of community expectations and the requirements of governments. To meet these expectations and requirements, as well as duty of care and due diligence imperatives, forward thinking organisations are implementing robust environmental management systems. These are often based on the Total Quality Management principles already being applied to company or organisation processes, such as manufacturing operations.

The best practice management systems usually incorporate:

- leadership and commitment;
- systems and standards;

- discipline through full self-auditing of systems and performance as well as in decision-making;
- preparedness for emerging requirements and "crises", and;
- openness via external accreditation and communications with employees, communities, governments and the media on environmental issues.

Many leading companies, including BHP, DuPont, BP, L&K Rexona, SC Johnson, ICI Australia, and Amcor have developed and publicised specific environmental goals and objectives. The commitment to environmental management in responsible companies and organisations is now beyond doubt. The results of these management systems are already apparent and are being widely acknowledged in reports such as BPER and included in annual and environmental reports.

Other examples of change include the actions of industry associations. They are playing a broad leveraging role in industry by raising awareness of the importance of environmental stewardship; for example, the Business Council of Australia, published *Principles of Environmental Management* in 1992. These Principles cover such issues as environmental protection, environmental management, performance assessment, assessment and management of environmental risk and more. They are complementary to the *Business Charter for Sustainable Development* released in 1991 by the International Chamber of Commerce and endorsed by over 500 companies internationally.

The Australian Chamber of Manufactures' *Environmental Management Handbook for Small Industry* and the chemical industry's commitment to the Responsible Care program are also excellent examples of the changes underway. The Australian Manufacturing Council's *The Environmental Challenge: Best Practice Environmental Management* (BPEM), a companion publication to the BPER report referred to earlier, captured the essence of these environmental changes in industry. The report highlighted the continuing need for enhanced commitment by industry and recommended action by industry, regulators, trade unions and the community to speed the achievement of best practice on environmental issues.

The ecologically sustainable development process and strategy in Australia and the sustainable development goal of meeting the needs of the present without compromising the needs of future generations have been important in underpinning the emergence and maturation of environmental commitment in industry.

Regulatory incrementalism if adhered to will be out of step with these changes and worse, may actively discourage or impede their development and adoption.

The Next Steps

There are a number of options which can be implemented now and which will assist in achieving the Vision described in this paper. The options include:

- risk-based decision making (the "performance standard" option);
- pledge and review (the "voluntary environmental improvement plan" option);
- tradeable permits (the "market instruments" option);
- technical support (the "information" option);
- self-auditing and external accreditation (the "self-regulation" option); and
- commercial arrangements (the "contracts" option).

Each of these will play a role in the achievement of the Vision.

It is perhaps surprising and pleasing that developments in these areas are now well underway. Examples drawn from the BPER report include:

- differential environmental resource use pricing (most Australian States);
- cooperative sewerage treatment (New South Wales);
- environmental guidelines (Queensland);
- environmental management plans (Queensland);
- "The Question of Trust": accredited licensee system (Victoria);
- voluntary waste reduction agreements (Victoria);
- Kwinana airshed program (Western Australia).

Other key initiatives include the establishment of the Australia Centre for Cleaner Production (ACCP) in Victoria. The Centre is being sponsored by the Victorian Government through the EPA. It will be self-funding and will promote the adoption of internationally competitive cleaner production philosophies and practices which meet the needs of industry and the community. This Centre has more scope to accelerate the move towards the Vision than many other initiatives because it will provide the necessary information to industry decision-makers for real environmental and economic improvements at the plant and process level. ACCP is being complemented by other important cleaner production initiatives such as *A Cleaner Australia 2001—Cleaner Production* program being implemented by the Commonwealth Environment Protection Agency.

Each of these approaches assist in moving industry and the whole community towards the Vision. Additional innovative approaches are needed. These can come from asking the right questions now and working cooperatively to frame the solutions, but only if we unshackle our thinking and practice from the past. Some of the environmental law dilemmas being faced now, such as third party standing, will cease to be relevant. Others, for example, compulsory environmental audits will be routine elements in little used "safety net" statutes.

The Means

Further far-reaching changes will be required, focussing on industry and related enterprises. Legal practitioners, financiers and insurers will all play a key role in facilitating change. In many ways, this is happening already. The net effect will be one of a self-regulating market-based approach to environmental improvement.

Industry changes will also be necessary. To achieve the optimum economic and environmental outcomes, there is no doubt that industry must perform and be seen to perform environmentally in a manner acceptable to the community. In the end, it is only through a community's tacit licence that any company can continue to operate and generate benefits to all stakeholders. Optimum environmental and economic performance will not happen quickly unless there are real and commensurate regulatory and compliance cost reductions flowing to industry. Time, technology, knowledge and resources are also important.

Kinhill Engineers and similar firms with expert environmental, engineering and process capabilities are contributing substantially to change through environmental management, systems, audit, improvement planning, cleaner production and process design, technology, life-cycle analysis, waste management, environmental impacts assessments, product design and related services. Several organisations are also providing external environmental accreditation services.

Community and environmental groups may also play an important role in effecting environmental improvements in the direction of the Vision. The greatest achievements will be made if their efforts are directed towards cooperative solutions.

These means are vital and their continued development is a prerequisite to furthering attainment of the Vision of enlightened and effective environmental self-regulation. Achieving the optimum sustainable development outcome is a real challenge.

EMPOWERING THE PUBLIC: INFORMATION STRATEGIES AND ENVIRONMENT PROTECTION

Neil Gunningham

THE THEME OF THIS PAPER IS THE IMPORTANCE OF INFORMATION IN achieving effective environmental policy making and environmental protection. Its particular focus is on toxic substances and chemical hazards. It asserts that the community is a major stakeholder in respect of environmental policy, and it argues that access to information is an essential prerequisite for effective community input into environmental decision-making. More specifically, information concerning industrial waste and chemical hazards is fundamental to public accountability and for people to protect themselves and the environment from those hazards.

The need for information is graphically demonstrated by major accidents at Seveso, Bhopal, and the explosion at the Coode Island chemical and storage facility in 1991. Such disasters have sensitised the community not only to the severity of the toxic hazards problem, but also to the need for access to information as a fundamental first step in addressing that problem. The threat of chemical accidents in particular, generates a need for access to risk assessment, emergency response planning, and more general information about the toxic properties of chemicals stored, used, and emitted from manufacturing installations.

Of course, if adequate information is already available in the public domain, and those who have that information are willing to provide it voluntarily, then there is no problem. Unfortunately, this is usually not the case.

Industry, which has access to crucial information about toxic substances and chemical hazards, has often been extremely reluctant to disclose that information voluntarily. Companies often fear that disclosure will enable some competitor to gain an unfair advantage, that some public interest group will sensationalise or otherwise exploit information provided or that the public will misunderstand its significance and overreact. In any of these cases, the company concerned stands to lose, either indirectly in terms of its reputation, or directly if the information is used to pressure it to spend on clean-up or safety measures, or as the basis for bringing a law suit against it.

Governments have also, on occasion, chosen to disclose far less than they know about environmental hazards, or their own role in policing pollution, fearing both political embarrassment and electoral disadvantage.

Since business—and perhaps also government—has a strong incentive not to disclose sensitive and potentially damaging information about environmental hazards, the public interest might best be served by requiring disclosure of relevant information—and the most obvious way to do that is by means of legislation (*see*, for example, Brodeur 1985).

When disclosure is mandatory then non-governmental organisations (NGOs) and public interest groups (PIGs) can make effective use of that information as advocates of the public interest to pressure regulators and industry to both improve their environmental safety performance and reduce the use of toxics. Information in this way becomes a regulatory tool that can complement traditional licensing and enforcement.

The importance of information to effective environmental decision-making, and the crucial role of NGOs, was made explicit in Agenda 21, the main policy document to emerge from the Rio Earth Summit in 1992. Agenda 21 urges governments to make accessible to NGOs the information necessary for them to contribute to the design, implementation and evaluation of environmental programs. In particular, it recommends the enactment of legislation requiring the communication of hazard information to the general public, and the provision to citizens of greater access to chemical information (UNCED 1992, Chapters 19 & 27).

So if legislation mandating information disclosure is desirable, what form should it take? In particular, are existing statutory provisions up to the task or is some new legislative scheme necessary to achieve the aims stated above?

It must be acknowledged that some legislation already on the statute books, does require business and others to disclose information about hazardous substances in certain circumstances. Modest and limited rights to information on specific issues are contained in a variety of statutes relating to occupational health and safety, dangerous goods, drugs, poisons and controlled substances, agricultural preparations and under the National Industrial Chemicals Notification and Assessment Scheme (PIAC 1991). More generally, freedom of information legislation also enables access to information about emissions from manufacturing facilities where government has a monitoring, oversight and management role. However, as has been pointed out elsewhere:

> Existing legislative provisions are not all encompassing, contain many gaps and exemptions, lack enforcement, sometimes only provide access to specific constituencies and do not provide researching and information to enable the community to use information that is made available (Adams & Ruchel 1992, p. 17).

Accordingly, there is a prima facie case for the enactment of broader, environmental focussed legislation, compelling the disclosure of information about toxic chemicals and environmental hazards.

However, one further objection to the enactment of such legislation might be raised—namely that we already have voluntary codes of practice in place under the terms of which industry discloses relevant information voluntarily, without need for a more formal, and perhaps unnecessary, expensive and restrictive legislation approach.

In particular, the Australian Chemical Industry Council's Responsible Care scheme—which covers well over 90 per cent of the Australian chemical industry, already

includes specific provisions dealing directly with information disclosure. Responsible Care's stated objective is to reduce chemical accidents and pollution and to involve the community in decision-making. The vehicle through which this latter aim is to be achieved is the "Community Right to Know" Code of Practice. In general terms, this Code requires industry to provide information to the public and in particular to the local community concerning the dangers presented by on-site chemical hazards.

The Code is yet to become fully operational so it is too early to judge its effectiveness. However, it is fair to point out that:

- the code only applies to companies that have agreed to participate in Responsible Care. Thus, a small minority of chemical companies and the entire non-chemical sector of industry (about 90 per cent of industry in total) are not subject to its terms;

- the code is voluntary and relies entirely on self-monitoring and self-regulation. There is no independent third party monitoring or oversight;

- the code does not extend the type of information companies are required to prepare beyond existing licensing or internal management requirements such as corporate management and performance codes;

- the chemical industry has a very poor record of disclosing information to the public, having only recently advanced beyond what one astute commentator describes as "the stonewall stage" (Sandman 1991);

- studies produced by organisations such as Friends of the Earth, in the USA, the UK, and Australia, all suggest that only a small minority of companies are currently disclosing information consistent with the Community Right to Know Code of Practice. For example, one study in the UK found only six major companies willing to provide information voluntarily on toxic emissions, with a further 19 companies refusing to provide details (Friends of the Earth 1992; *see also* Bloustein et al. 1992).

For all these reasons, it would be most unwise to rely exclusively on information supplied voluntarily by industry itself. Given the compelling need for such information identified earlier, and the inadequacy of existing legislative provisions, there is a compelling case for legislative intervention to guarantee a public right to information about environmental pollutants.

What role then can and should the law play in requiring the disclosure of relevant information? What are the essential elements of an information based strategy and how should it be implemented?

Probably the best vehicle for addressing these concerns and making information available is Community Right to Know legislation (CRTK). Such legislation is already in operation in the USA and is the most desirable and likely approach for Australia to follow—if and when it enacts its own legislation in this area.

What is Community Right to Know?

In general terms, CRTK requires industry to provide information to the public and, in particular, to the local community, concerning the dangers presented by on-site

chemical hazards or industrial waste that may be released into the environment as a result of industrial processes. The central components of CRTK were admirably summarised in one recent report as including the right of the community and workers:

1. to have information about hazards they may be exposed to from the manufacturing, processing, storing, handling, disposing or transporting of hazardous chemicals;

2. to be warned about plans to introduce new hazardous chemicals into their environment and workplace, and to be involved in decisions about whether this should occur;

3. to know what toxic chemicals have been used to make consumer products;

4. to be informed and be involved in decisions concerning the planning and siting of chemical facilities;

5. to know and have a say in how hazardous chemicals are to be transported through their areas;

6. to inspect hazardous chemical facilities with their own experts and representatives;

7. to monitor the performance of government regulation and monitoring of chemical facilities;

8. to have information about hazardous chemicals in forms which are accessible and up-to-date (Adams & Ruchel 1992, pp. 3-4).

A further component of CRTK is access to government and industry monitoring information with respect to emissions, waste and efforts towards achieving cleaner production. For present purposes, neither emergency planning provisions (for example the establishment of state emergency response and local emergency planning arrangements) nor toxic use reduction legislation are included in CRTK, though both are clearly important developments in their own right.

In the United States, the Emergency Planning and Community Right to Know Act 1986 (EPCRA) involves various measures designed to ensure that information about chemical risks are adequately communicated to the public. Specifically, that legislation stipulates:

1. that manufacturers who produce or use designated hazardous chemicals in excess of threshold levels must compile an annual inventory of the quantities of such chemicals they are using or storing at their facility (chemical inventory reports);

2. they must provide both the public and the Environmental Protection Authority (EPA) with estimates of the amounts of the chemicals they are releasing into the environment annually and supply details of accidental releases of acutely toxic chemicals (toxic chemical release and emissions inventory reports);

3. they must file material safety data sheets (MSDS) with State and local authorities in respect of each designated chemical they manufacture, use, handle or dispose of. Under EPCRA, CRTK operates in conjunction with (and provides the information base) for a number of related strategies: accident prevention planning, emergency response planning, accident reporting and enforcement mechanisms.

Probably the most important of the above sources of information required under EPCRA is the toxic release and emissions inventory report which requires firms to disclose to State and Federal agencies the amount of specified hazardous chemicals[1] they release annually into the air, land, water and transfer to off-site facilities for treatment and storage.[2] Data on both routine and accidental emissions of toxics are required. The EPA stores this information in a computer database and makes it publicly available. Methods of dissemination include published reports, an online computer database, CD-ROM and a phone hot line. This reporting mechanism is known as the Toxic Release Inventory (TRI).

Benefits of CRTK

The potential benefits of CRTK are readily apparent. In respect of toxic and hazardous chemicals, where the connection between exposure and ill-health is difficult to establish, then access to adequate information is fundamental to effective community action.

Community right to know:

- gives community groups insights into the severity of the chemical hazards they face, and through this coverage encourages greater public participation and involvement in the environmental policy making process;

- gives community groups increased political leverage both through the media and in plant level negotiations, enabling them to more effectively pressure polluters to reduce emissions.[3] For example, in the United States, some of the worst polluters, conscious of the likely public reaction now that their environmental record is in the public domain, have voluntarily implemented

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1. Initially, the list contained over 320 substances. A further 200 chemicals are expected to be added by EPA later in 1993. Since 1988, nearly 20 000 manufacturing facilities have been filing statements on their direct emissions into the environment and their production of toxic waste. In April this year the EPA announced that the reporting obligations will extend to other facilities, including government enterprises and electricity utilities.

2. The Pollution Prevention Act 1990 expanded the Toxic Release Inventory reports to promote pollution prevention and the development of cleaner technologies by including information in the inventory about on-and-off site recycling and treatment, and source reduction activities.

3. Data from the US National Toxic Release Inventory indicate that release of toxic chemicals have decreased approximately 20 per cent since 1987 (Pease 1991 quoted in Adams & Ruchel 1992, p 24 which noted that "on the eve of the first national release of US Toxic Release Inventory data in 1987, Monsanto Corp went public with a pre-emptive pledge to reduce by 90 per cent the company's worldwide toxic emissions to air by 1992".)

pollution control measures on a scale far greater than previously contemplated;

- exposes government and regulatory agency shortcomings, creating pressure to increase levels of inspections and enforcement and to enact new and tougher laws to protect the environment;[4]

- stimulates pollution prevention by sensitising companies to toxic hazards, raises the priority of that issue within companies, and strengthens the hands of environmental managers;[5]
- gives workers more opportunity to reduce workplace hazards, and provides for union and community group collaboration to achieve cleaner production processes (Adams & Ruchel 1992, p. 25);

- can lead to the establishment of "good neighbour agreements". Information gained under Right to Know laws has served as the impetus both for citizen inspection of local industries and for direct negotiations with local companies to enhance environmental protection measures (Lewis quoted in Adams & Ruchel 1992, p. 66);

- improves the quality of public debate about the environment, enables better policy decisions by both government and industry by providing a much clearer profile of the extent and location of toxic hazards;

- provides the public with sufficient information to enable the challenge of licensing and enforcement decisions.[6]

The toxic release inventory in particular has had a dramatic effect in its early years. Specifically, the TRI:

- in its first year revealed that 22 billion pounds of harmful chemicals had been discharged into the environment by manufacturing plants covered by the

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4. Over a dozen States have now supplemented the EPCRA regulation with specific regulations, to reduce the use and emissions of certain toxic substances. Federally, TRI statistics demonstrating that 80 per cent of all toxic industrial emissions into the air were not covered by any regulation, were used to justify changes to air quality incorporated in the *Clean Air Act 1990* (Cwlth).

5. A Tufts University research group also found "that the mere gathering of information promoted mutual assistance in the company, the transfer of good practices from division to division, and increased contact with customers and suppliers. And although SARA required no community relations efforts, most companies (studied) developed outreach efforts nonetheless": *Harvard Business Review*, July/August 1991, p. 42.

6. At present, licences are granted following negotiation between an individual company and the Environment Protection Authority. Regrettably, in most States there is no direct right to community input at this stage, although in Victoria, public notification is given of works approval applications and there is opportunity for public submissions to be made. In some jurisdictions there is limited right to challenge decisions, provided rights of standing can be established (Preston 1989, pp. 36-9).

inventory. These alarming statistics brought substantial remedial action from industry and government (Environmental Action 1991);

- demonstrated that the vast majority of toxic chemicals are not regulated by government (*see* footnote 3);

- enabled citizens to develop a "league table" of toxic polluters, to compare one company's performance with another's and to compare the same company's performance over consecutive years and to produce national pollution score cards;

- enabled the identification of local toxic "hot spots" leading in turn to EPA enforcement action (Shenkman 1990);

- has provided compelling evidence to justify the introduction of Toxic Use Reduction Legislation: "legislation which seeks to reduce the quantity of toxic chemicals in circulation within the community by requiring large users of toxic chemicals to implement changes in their production processes and choices of raw materials" (Pick & Wells 1993, p. 171);

- produced information which has galvanised many companies into voluntary action. Thus "numerous companies, after years of thinking in terms of minimum compliance with pollution laws, have come forward with voluntary plans to cut toxic waste and reduce emissions to levels far below what is legally required" (Shenkman 1990, p. 22), in order to preserve their credibility;

- revealed to many facilities that they were emitting far higher levels of toxic substances than they realised. As they focused more directly on the problem, they often found that reducing emissions was a way of saving money or that they could find safer alternative substitutes for toxic chemicals;

- brings together in one place, information that is not available from another source, and which is geographically referenced.

In summary, CRTK and the TRI can mobilise public interest groups and workers in a number of effective ways and bring effective pressure to bear on industry and governments. As one report, summarising the USA experience put it:

> As a result of Right to Know legislation the community is producing scores of reports that identify toxic pollution problems and advocate solution, negotiating directly with industry to change industrial practices, compelling enforcement of existing regulation, suing to bolster compliance and to establish pollution prevention plans, advocating passage of state toxics use reduction laws and illustrating the potential off-site consequences of sudden chemical releases (Adams & Ruchel 1992, pp. 24-5).

None of this is to suggest that CRTK is a panacea. Like any other single strategy, it has its limitations and is best seen as simply one important component of an overall regulatory mix, its strength being how it can be used in conjunction with other

strategies rather than operating in isolation. Among the most serious limitations of CRTK (Adams & Ruchel 1992, pp. 24-5) are that:

- CRTK does not imply a "right to act". In particular, it does not give any person the right to participate in decisions in respect of standard setting, licensing and enforcement of pollution control or chemical safety regulations. Nor does it deliver community involvement in management regimes to improve environmental performance, although this can be achieved indirectly;

- the TRI is limited to approximately 320 chemicals, only about 5 per cent of the total emissions discharged into the environment. Yet reporting requirements on the TRI chemicals alone, impose a substantial administrative burden both on industry in collecting the information and on government in collating and classifying it into a user-friendly form;

- much of the information provided under CRTK and the TRI "lacks explanation, context or regulatory direction. It provides no analysis of the data, and contains no mechanisms to ensure that the dangers noted in the hazard information have been minimised or eliminated".[7] In particular, EPCRA does not provide any means of putting the disclosed information in perspective by supplying the public with an assessment of the risk presented by a particular release;

- although EPCRA requires companies to communicate substantial amounts of information, it provides no independent means for this essentially self-reporting system to be verified by the public: "missing from the extensive array of communication duties is any authority for anyone, agency or industry to do a rigorous, site-specific facility safety analysis" (Wise & Kenworthy 1993, p. 145);

- a variety of strategies can be used to disguise the failure of companies to achieve significant reduction in emission levels. For example, pollution may be transferred from one medium to another (the toxic shell game) used off-site or put into products thereby avoiding the TRI reporting requirements even when the processes ultimately result in toxic releases (Adams & Ruchel 1992, p. 21). Thus effective tracking of toxics is still extremely difficult for public interest groups and resulted in amendments to the TRI reporting requirements in the 1990 Clean Air Act;

- information on toxic releases alone cannot be used to assess risks because "small releases of some chemicals may be worse than large releases of other chemicals but (the TRI) does not require the EPA to provide useful information on the potency or health effects of the chemicals on the list";

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7. This problem has been partly addressed in the Right-to-Know program of the New Jersey Department of Health, which has prepared more than 1000 Hazardous Substances Fact Sheets, providing easy to understand information about the chemicals including all of the 320 TRI chemicals.

- reported figures may themselves lack accuracy, particularly since companies are only required to estimate their releases and may use a variety of EPA approved methods to make that calculation. Some State legislation requires mass balance information to ensure that all inputs and outputs are accounted for. This allows accuracy of estimates to be tested and for emissions to be compared with rates of production;

- there is usually a massive disparity between industry's technical expertise and access to financial and other resources, and that of community groups. While CRTK helps redress the balance, it can only do so to a very limited extent;

- TRI does not include major non-manufacturing release of toxic chemicals including mining and milling operations, hazardous waste and treatment and disposal activities;

- the TRI only applies to facilities with at least ten full-time employees that manufacture, import or process at least 25 000 pounds or otherwise use at least 10 000 pounds of a toxic chemical and as such represents just "the tip of the toxic tower" (Wise & Kenworthy 1993, pp. 37, 44);

- the TRI does not provide information about "peak" releases, without which one cannot calculate the health effects of a company's discharges, for as Shenkman has pointed out: "the risk posed to a community may be very different if a chemical is discharged in a few bursts rather than at continuously low levels" (1990, p. 22). This means that the accuracy of data will vary from facility to facility.

Right to Know in Australia

A number of Australian jurisdictions have actively considered a role for information-based strategies for waste reduction, control of chemical hazards, and Community Right to Know. In Victoria, following recommendations from the Coode Island Review Panel in 1992, the then Labor government actively considered legislating for CRTK, but interest lapsed with the change of government. In New South Wales, the objectives of the EPA include "promoting community involvement in decisions about environmental matters" and "ensuring the community has access to relevant information about hazardous substances" (s. 6 Protection of the Environment Administration Act 1991 (NSW)). New South Wales also requires State of the Environment Reports to be prepared by the EPA every two years for the purpose of assessing the effectiveness of pollution control regulations. It is not known whether the NSW Government plans to enhance these measures with Right to Know legislation, although a recent inquiry into hazardous materials suggests that this is a serious possibility.[8] Queensland has also re-examined its legislative requirements for the use

8. Early in 1994 the Hazardous Materials Policy Coordination Committee is expected to release its discussion paper on community access to information regarding hazardous materials. However, the focus of this paper is expected to be on emergency response, rather than be the development of an emissions inventory. A previous Working Group report did, however, explicitly recommend the development and implementation of community right to know legislation.

and storage of chemicals and hazardous substances, including strategies for better communication of information and consultation processes with the community (*see*, in particular, Queensland Emergency Services 1992).

At the national level a number of developments indicate support for the principle of mandatory reporting obligations on industry and concomitant rights to information on chemical hazards and emissions. Firstly, the National Occupational Health and Safety Commission (Worksafe Australia) is introducing a package of Codes and a model regulation which provides comprehensive and consistent worker rights to information on hazardous substances.[9] While still in the developmental stages, after at least four years of public discussion, the Worksafe package will become law in the States and Territories when finally agreed upon.

Secondly, the Australian Democrats have shown great interest in Community Right to Know, introducing a Toxic Chemicals (Community Right to Know) Bill in 1992 and again in September 1993. The Toxic Chemicals CRTK Bill provides for the establishment of a Registrar of Toxic Chemicals who is to maintain a number of national registers of toxic chemicals, monitor production and use of toxic chemicals, prepare Codes of Practice and conduct public information programs. Unfortunately, the Bill has been developed without sufficient discussion with peak environment groups working in the area. It also appears to ignore the current administrative arrangements and expertise which are primarily within State government agencies, coordinated to varying degrees by national organisations such as Worksafe. The Bill is therefore of limited practical use. The Democrats have also proposed numerous changes to the *Agricultural and Veterinary Chemicals Act 1988* (Cwlth) reflecting community right to know principles in that area.

Thirdly, and most significantly, there is the Commonwealth's 1992 commitment to a legislatively backed National Pollution Inventory (NPI), based on information provided by State agencies and industry. A related commitment is the creation of a central national register on waste minimisation and recycling technology with Commonwealth funding sources to assist recycling initiatives (*see* CEPA 1992).

The Prime Minister's Statement on the Environment on 21 December 1992, outlined the NPI initiative in the following terms:

> The Commonwealth Government is committing $5.9m over the next four years to establish a legislated National Pollution Inventory, in cooperation with State and Territory governments. It will provide an important stimulus for waste minimisation and the introduction of cleaner production practices.
>
> The inventory will be publicly available, and will progressively bring together data on the emission of pollutants to the air, water and the land.
>
> There is a demand for more information on the range of chemicals being released into the environment. There is currently no national database which collates this information; the National Pollutant Inventory (NPI) will fill this role. It is intended

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9. *See* National Model Regulations for the Control of Workplace Hazardous Substances; National Code of Practice for the Labelling of Workplace Substances; National Code of Practice for the Preparation of Material Safety Data Sheets. *See also* the Draft National Standard for the Control of Major Hazardous Facilities which specifies that various types of information should be comunicated to the public regarding a major hazardous facility.

> that reports on the NPI will be tabled annually in the various Parliaments of Australia.
>
> Experience in the United States of America suggests that such an inventory not only meets the public need for information, but also acts as an important tool for promoting cleaner production practices. It achieves this in part through increased public awareness. Equally importantly, though, it results in organisations looking at wastes and therefore inefficiencies of their production process. This will often lead to cost savings.

If implemented, the NPI will make a very substantial contribution to effective CRTK in Australia by providing many of the benefits achieved in the USA through the TRI. It is this development which is the focus of the following section.

A National Pollution Inventory

The concept of an NPI is now well recognised internationally. The USA has had at least five years experience with the TRI under EPCRA. A Canadian NPI, based on the USA model, was introduced in 1993 on a trial basis. In the UK, the government released a 1993 discussion paper proposing the introduction of a Chemical Release Inventory. This follows introduction of public rights to pollution information in 1991 under the Pollution Prevention Act. However, unlike the TRI, the 1991 Act only provides public access to existing information collected by Her Majesty's Inspectorate of Pollution as part of pollution control licence monitoring. Other NPIs maintained by European governments include: the Norwegian Government's more general Pollutant Inventory, based on annual environment performance reports which must be included in annual reports of corporations; and The Netherlands NPI maintained since 1974, based on three-yearly reports compiled by government with information provided voluntarily by industry. It is more akin to State of the Environment reporting as its purpose is environmental assessment and planning.

Internationally, there is considerable support for an NPI, not only in Agenda 21 but also through a number of international organisations which have subsequently taken initiatives in support of the concept. Agenda 21's Chapter 19 on Management of Toxic Chemicals calls on governments to adopt right to know programs and national pollution inventories. The UN International Program on Chemical Safety and the US EPA convened a planning meeting on NPIs in February 1992 which recommended that the OECD prepare guidance and technical programs to assist development of NPIs (*see* Irwin 1993).

An NPI is a potential tool for quantifying volumes of emissions from industrial and other activities. It will usually rely on estimates of total emissions to be provided on a regular basis by facilities processing, using or producing specified amounts of chemicals. The estimates are based on self-monitoring reports prepared as a condition of emissions licences, or on estimates made in accordance with guidelines approved by the relevant government agency. They provide a method for tracking not only chemical emissions but can also provide information on recycling and source reduction (reduction in the use of toxic chemicals per unit of production). This information is then actively disseminated to the public by the appropriate government authority.

An NPI generally covers a far wider number and type of facilities than are covered by pollution control laws. Traditional pollution control licensing is based on narrow concerns about a relatively small number of chemicals and on questionable assumptions

about the environment's assimilative capacity to absorb pollution. There is currently no compilation of statewide, let alone national, emissions information in Australia. A publicly accessible NPI in Australia would therefore offer a radical change to both the form and content of information available to the public on industrial emissions.

The proposed Commonwealth NPI is expected to operate on a voluntary basis for one year in order to allow industry and regulators to develop appropriate reporting requirements and to develop a legislative scheme. The NPI will probably be underpinned by joint Commonwealth and State legislation. The federal law will establish the database and the framework for the reporting system. Under a national agreement pursuant to the IGAE the States would each enact parallel laws requiring industry to report emissions information annually. Mandatory reporting would commence in 1995.[10]

Preliminary information about the NPI proposal indicates that it will include modules from a number of sources—hazardous or toxic chemicals from industry, transport and photochemical smog related emissions in major cities, solid wastes, intractable waste and greenhouse gas emissions. The core module concerns hazardous chemical emissions from secondary industry. The justifications for limiting core module reporting to secondary industry are:

- too wide a scope of application would produce an unworkable administrative burden;
- secondary industry is well accustomed to regulation and could both deal with the burden of reporting and experience the benefits of improved tracking of materials better than other sectors of the economy;
- secondary industry is a significant and intensive user of toxic chemicals.

At this stage it is expected that financial and resource constraints will result in the initial NPI core module inventory being restricted to between 50 and 70 chemicals. However, the NPI will be designed so as to allow expansion in the numbers of both chemicals and industries covered. Thus, it is likely that as the inventory is streamlined and more information becomes available on toxic hazards the core module will be adjusted to suit future needs.

The other modules currently contemplated arise as a result of international commitments (for example, targets for reduction of greenhouse gas emissions). The module on photochemical smog from transport will be particularly useful, given that the greatest volume of pollution in Australian cities results from vehicle emissions.[11]

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10. CEPA's public discussion paper on the proposed NPI will be followed, it is hoped, by the establishment of a multi-stakeholder committee.

11. Australia currently has the highest output of lead per capita of any OECD country. The single great cause is motor vehicle exhaust emissions—accounting for 60 per cent of air pollution, including 90 per cent of lead pollution and 60 per cent of benzene pollution (*see Conservation News*, August 1993, p. 12). Some sobering statistics from the US on motor vehicle emissions include: 85 per cent of the airborne carcinogen, benzene, comes from gasoline; one gallon of gasoline produces 19 pounds of carbon dioxide; 25 per cent of carbon dioxide emissions from burning fossil fuels are contributed by motor vehicles in the US; and 70-80 per cent of air pollution in Los Angeles is contributed by cars (Nadis & Mackenzie 1993).

A national database would have considerable advantages in terms of economies of scale over separate regional reporting systems and the pooling of technical and human resources would result in a more comprehensive and efficient pollution inventory. In any event, some States simply lack the resources necessary to make the initial capital expenditure required for the establishment of a toxic emissions database.

The other advantage of a national program is the uniformity, consistency and discipline that it would provide. States implementing separate CRTK programs would duplicate data collection, chemical risk assessment, technical research, and community and worker education. A national program would provide uniformity and consistency for these complex functions. Consistency is especially valuable in relation to the database. A national inventory provides the opportunity to analyse chemical use at regional, State or national level. Geographic comparisons can be made between areas or States, and between individual facilities nationwide. This enables better assessment of national environmental quality, and the information has greater utility for planning purposes at all levels. The increased efficiency of a national CRTK program would provide better discipline in compliance than an individual State regime with less funding.

A number of key questions concerning the proposed NPI are as yet unresolved. They include: what information on emissions will be required; how should the information be provided to the public, and what mechanisms to enforce obligations will be provided? These issues have been explored at length elsewhere (Cornwall & Gunningham 1994).

In the remainder of this paper, some critical constraints on the effectiveness of CRTK and the proposed NPI, and the role of these mechanisms in a broader regulatory mix are examined.

Constraints on the Effectiveness of CRTK: Enforcement

It is one thing to impose a requirement to disclose information, it is another to enforce it, particularly where the central mechanism on which the legislation is based is self-reporting, without any provision for independent verification by the public (Baram 1988).

In the early years of EPCRA, less than 50 per cent of firms complied with its reporting requirements. Smaller firms in particular, lacking resources and expertise, were particularly reluctant, or even incapable, of fully complying with the information disclosure requirements.

The US EPA itself is inevitably limited in the extent of its direct enforcement action against those who do not comply. First, there is the technical problem of identifying violators—although this may be to some extent overcome by EPA comparing its various databases on regulated facilities that fail to lodge reports, or fail to lodge accurate reports. Second, even where violations are detailed, lack of resources inevitably hampers the extent of EPA enforcement action.

In part to redress the limitations of direct government regulation, the US legislation allows citizen suits against a facility for failure to comply with reporting obligations. "Citizen enforcement" actions may be brought to enforce EPCRA against past or current violators. Attorney's fees and other litigation costs may be recovered. In order to have standing, plaintiffs must prove they have suffered or will suffer at least

some injury that may be redressed by judicial action. However, while citizens can seek an order compelling a facility to disclose Right to Know information, they cannot obtain penalties for noncompliance. Moreover, a citizen suit is barred where the EPA has commenced and is diligently prosecuting an administrative or civil action to enforce a requirement of the Act. Even so, citizen enforcement may result in increased compliance and in the imposition of substantial civil penalties, or injunctive relief.[12]

The problems of enforcement are likely to be far greater in Australia. In particular, the resources proposed for the NPI as a whole, are extremely modest, leaving little likelihood of a government regulator maintaining any significant enforcement profile. Moreover, there are very few significant sources of independent information available in Australia about who is using toxic substances and in what amounts. Accordingly, it is difficult to know how government regulators would even begin the task of identifying defaulters.

There is of course the possibility that third parties (primarily citizen groups) might bring their own actions to enforce compliance with the NPI. Yet over and beyond the financial and other resource constraints on NGOs playing such a role, there are also the obstacles presented by the Australian legal system. Citizen groups have difficulty establishing rights of standing to bring an action at common law, making it essential that any legislation creating the NPI also expressly provides that third parties may bring their own action to enforce compliance.[13] This would at least enable public interest groups to act as a countervailing force, in part compensating for the deficiencies of State regulatory agencies.

A final possibility is to harness the self-interest of competitors in ensuring that individual companies not only file returns but also file accurate returns. Whistleblowing by competitors can be a highly effective way for under-resourced regulatory agencies to facilitate compliance. However, in this case its effectiveness may be constrained by the difficulties competitors face in obtaining sufficient initial information on which to assess their likely emissions of their rivals.

Right to Know and the Regulatory Mix

It has been argued that CRTK can make a considerable contribution to environmental protection. Nevertheless, a strategy which relies heavily on community pressure and involvement to achieve emission and/or toxic use reduction, is likely to be uneven in its impact. For example, its success is likely to be far greater where there are concentrated toxic "hot spots" adjacent to cohesive communities, than where pollutants are more widely dispersed and where there is an absence of potential whistleblowers.

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12. There are cases where out of court settlements have led to a commitment to reducing pollution, the industry financing for local community committees and to Good Neighbourhood Agreements between industry, community groups and unions pledging improved environmental performance and community monitoring of activities. *See* Adams & Ruchel 1992 for a discussion of such Agreements.

13. *See*, for example, the standing provisions under most NSW environmental legislation, which provide that "any person" may bring proceedings: e.g., s. 123 of the *Environmental Planning and Assessment Act 1979* (NSW); s. 153 of the *Heritage Act 1977* (NSW); s. 176A of the *National Parks and Wildlife Act 1974* (NSW); s. 27 of the *Wilderness Act 1987* (NSW) and s. 57 of the *Environmentally Hazardous Chemicals Act 1985* (NSW).

Thus like any other single strategy, CRTK has its limitations and is best seen as one important component of an overall regulatory mix. Its strength lies not only in its capacity to empower public interest groups, but also in its capacity to contribute to and integrate with other strategies of environmental protection.

The main role of CRTK in an overall regulatory mix is probably the contribution it makes in the context of a tripartite strategy involving direct "command and control" government regulation, industry self-regulation, and public interest group participation. The details of a tripartite strategy have been explored elsewhere (Ayres & Braithwaite 1992). Here it is noted that neither direct "command and control" nor industry self-regulation, have been unblemished success stories, and that effective oversight of those mechanisms might be provided by a number of sources, the most potent of which are likely to be environmental audit and public interest groups. CRTK will fundamentally strengthen the capability of public interest groups to fulfil that role, while the information companies compile as part of a National Pollution Inventory will, in particular, provide a very valuable resource for third party environmental auditors.

Conclusion

It has been argued that not only business and government, but the community too, must be directly involved in decision-making about the environment. The role of public interest groups as representatives of the community is particularly crucial when (as is frequently the case) firms are reluctant to implement environmental improvements voluntarily, and regulatory agencies are under-resourced and relatively ineffective. Yet public interest groups are frequently hampered by a lack of information, without which their effective participation in tripartite initiatives is likely to be seriously prejudiced.

Thus an information-based strategy such as "Community Right to Know", has a fundamental role to play, because 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.

It has been noted that in the USA, corporate decision-making with respect to toxic substances appears to have been substantially influenced by the Emergency Planning and Community Right to Know Act (EPCRA) 1986. In particular, the EPCRA has generated considerable public scrutiny and criticism of manufacturers' operations (Abrams & Ward 1990; Finto 1990), fuelled community debate about the location and development of industrial facilities close to residential areas and created a substantial public backlash against the least regulated emissions of industry such as, in the USA, air emissions.[14] As we have seen, this backlash has prompted a number of major chemical manufacturers to reassess their own operations and to modify their

[14]. The total level of pollution reported in 1987 under s. 313 of EPCRA exceeded 20 billion pounds (Bureau of National Affairs (BNA) *Environment Reporter,* 26 April 1989; Yost & Schultz 1990). Substantial evidence exists that the extent of under reporting of environmental pollution is widespread (*PR Newswire*, 11 December 1991; "Tons of toxic chemicals above", *Christian Science Monitor,* 11 November 1989, p. 19; BNA, *Environmental Reporter,* 22 July 1988, p. 3399; 30 December 1988, p. 1782; Poje & Horowitz 1990).

environmental control strategies even in the absence of government legislation requiring them to do so.[15]

However, it is important not to dwell only on the pressures imposed by CRTK, for CRTK has also created substantial opportunities for business. Specifically, when facilities are forced to scrutinise their processes and calculate their discharges, they often become aware of the advantages of cleaner production and waste minimisation methods, and thereby save large sums of money as a result (Romm 1992; *Business Horizons*, March/April 1992, p. 35). Similarly, the mere gathering of information has often prompted mutual technical assistance within the company, the transfer of good practices from division to division, and increased contact with customers and suppliers (*Harvard Business Review*, July/August 1991, p. 42).

Equally important, although CRTK may not actually require improved community relations, many companies have nevertheless developed substantial outreach efforts. The results are often rewarding to both sides, leading to a reduction of confrontation and hostility and the building of mutual trust and respect.[16]

In summary, the benefits of community right to know, not only to the public and community groups, but also to business, may be very substantial. Former US EPA Administrator William Reilly is almost certainly correct in asserting that CRTK is "one of the most effective instruments available" for reducing toxic air emissions (Reilly 1990). Within Australia, a National Pollution Inventory, appropriately designed, enforced and resourced, would provide an essential basis for achieving similar benefits here.

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15. The compilation of the national toxic release inventories between 1987 and 1990 greatly assisted environment groups to campaign for a thorough overhaul of the Clean Air Act in 1990. However, it must be noted that there were numerous additional pressures leading to the changes (Latin 1991); Millar 1991; BNA, *Environment Reporter*, 24 March 1989, p. 2512; 31 March 1989, pp. 2543-4; 12 April 1989, p. 192; BNA, *International Environment Reporter*, 21 November 1990, pp. 490-1.

16. *See further* C. Holmes, Shell Australia, paper for Hazardous Substances Conference, Melbourne 1992, at p. 7, who notes that CRTK may avoid some (but not all) of the very substantial management effort which currently goes into dealing with crisis and public opposition.

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CITIZEN SUITS¾ TOOLS FOR IMPROVING COMPLIANCE WITH ENVIRONMENTAL LAWS

David Mossop

> So long as . . . discretionary decisions of governmental agencies are immunised from citizen challenge in the courtroom, government officials will retain their practical monopoly over the business of implementing the public interest.
>
> It is extraordinary for government to take the position that citizens—who have the most direct stake—should have no significant role to play in the determination of their environmental destiny. Is pursuit of the public interest to be the exclusive preserve of a professional bureaucracy? (Sax 1971, p. 10)

IT MAY HAVE BEEN EXTRAORDINARY TO JOSEPH SAX THAT THE government and the bureaucracy were so hostile to the idea of allowing ordinary citizens to assist in enforcing environmental laws but today we have learnt that, although citizen suits have existed for over 20 years, there is still strong reluctance in Australia to adopt them as a mechanism for increasing compliance with environmental laws.

There are two (related) reasons for this. First, the prospect of citizen suits gives real enforcement "teeth" to public law. Public law creates and regulates public rights. While the public at large benefit from the enforcement of public rights there are private interests that will not. In the environmental field this conflict is obvious. The private interests opposing the expansion of public rights and the elements of the executive that support those interests, are hostile to citizen suits.

Second, citizen suits create a form of accountability that has been lacking from the process of government administration. Why is this so? It is because citizen suits empower ordinary citizens to enforce the law, so that environmental decision making is government by the rule of law and not the rule of bureaucrats and Ministers.

The reason why this is so significant is that environmental law is an area where there are clearly conflicting aims that either have not, or cannot, be reconciled. These are: the goals of environmental protection, and the goals of a western, capitalist, resource-intensive society. While the contradiction and conflict inherent in pursuit of these opposing goals has not been addressed in any serious way by the population at large, regulatory agencies governing pollution and resource management must deal with them every day. It is here that tensions are strongest and it is here that the need

for accountability is greatest if the public values expressed by parliament are to be vindicated.

This paper seeks to explore these aspects of citizen suits so as to understand why they are a useful enforcement mechanism that can complement the criminal law.

Definition

Citizen suits are court proceedings brought by citizens who seek to enforce public rights. In the environmental arena they are cases brought to enforce the rights or obligations created by environmental laws. They are civil as opposed to criminal cases. While citizen suits are often brought against government authorities this is not a definitive feature.

Some of the features that help define citizen suits as a distinct form of litigation are detailed in the following sections.

The type of action

It may help to be more specific about the types of actions that are covered by the concept. They include both actions analogous to traditional common law judicial review cases as well as civil enforcement cases brought pursuant to liberalised standing laws. This is not a clear distinction in legal terms as statutory or common law judicial review cases are also a form of civil enforcement.

The rights that they enforce

Environmental law is one of the better examples of public law. In so far as it is true environmental law (as opposed to property law or resource allocation law) its aim is to protect public rights. The motivation for environmental law is the protection of the environment either so that all society may benefit from environmental quality (an anthropocentric approach) or for its own sake (an ecocentric approach) based clearly around benefits to society as a whole or a philosophical view about the relationship between humans and the natural environment. It is clearly creating and regulating public, as opposed to private rights.

Who brings them?

Because this paper includes civil enforcement actions in the definition of citizen suits, some distinction needs to be made between the motivation of the parties bringing such actions. For example, most civil enforcement of s. 52 of the *Trade Practices Act 1974* (Cwlth) pursuant to s. 80 of that Act has been by business competitors rather than by people who, for altruistic reasons, seek to enforce public laws (Trade Practices Commission 1981).

Consequently another feature of citizen suits is that they are brought not by people wishing to advance their own financial or proprietary interests but by people with a desire to fulfil what they perceive to be the public interest in the enforcement of the law. In the case of environmental citizen suits the distinction is between those who act in order to uphold environmental laws for the environment's sake and those who act to uphold environmental laws because this will advance their own private interests.

Against whom are they brought?

Citizen suits are brought against two distinct types of parties. This obviously depends upon the nature of the case. The first type of case is the more routine enforcement case that involves ensuring compliance by a regulated party with the requirements set down by the relevant regulator. In this function citizen suits are essentially complementing existing regulatory enforcement efforts. This is the type of action that gives the enforcement "teeth".

The second type of case is that which is brought principally against the regulatory agency in order to ensure compliance by the agency with its empowering statute or other regulatory requirements. While these cases may have wider implications for regulatory behaviour they usually challenge a particular regulatory action and hence regulated parties such as polluters or foresters may also need to be joined in the proceedings. It is when these parties are involved that the accountability aspect of the litigation is most important.

The Need for Statutory Provisions

A prerequisite for most citizen suits are statutory provisions allowing citizens to bring actions to prevent breaches of the law. There are two reasons why such provisions are necessary.

The first reason is to overcome the restrictive common law rules of standing. The well known position is that in *Australian Conservation Foundation v. Commonwealth* (1980) 146 CLR 493 where the Court held that the plaintiff did not have standing to enforce the provisions of the *Environment Protection (Impact of Proposals) Act 1974* (Cwlth). Justice Gibbs (as he then was) made the notorious comment that the special interest for the purposes of standing "does not mean a mere intellectual or emotional concern . . . A belief, however strongly felt, that the law generally, or a particular law, should be observed . . . does not give its possessor locus standi" (at 530-1).

The impact of this decision has been mitigated somewhat by later decisions of the High Court (*Onus v. Alcoa* (1981) 36 ALR 425) and decisions of the Federal Court (*Ogle v. Strickland* (1987) 71 ALR 41, *Australian Conservation Foundation v. Minister for Resources* (1989) 76 LGRA 200) but these have all been working within the restrictive framework of the *ACF* case. Special leave was given by the High Court in 1989 in a case which would have allowed the reconsideration of the *ACF* decision (an appeal from the decision in *Central Queensland Speleological Society v. Central Queensland Cement* [1989] 2 Qd R 512). However, unfortunately, due to manoeuvring in the lower court, the case was not heard.

Thus, any potential applicant must rely on statutory provisions liberalising standing or have the type of direct interest required by the *ACF* case.

Standing provisions alone will only allow the bringing of actions in the nature of traditional judicial review. While the ability to bring judicial review proceedings is a valuable advance on total exclusion from the implementation of environmental laws, it is only half the picture. The other element of citizen suits is civil enforcement. This allows breaches of statutes to be enforced by civil, in addition to criminal, means.

Special provision needs to be made to allow this to occur. This is because where criminal sanctions are provided there are strong policy reasons why, in the absence of specific statutory provisions, civil remedies should not be granted to enforce the law (*see Peek v. New South Wales Egg Corporation* (1986) 4 NSWLR 1). Without specific

legislative authority a plaintiff will have great difficulty seeking civil remedies for breaches of a statute if these remedies effectively bypass the criminal sanctions provided by the legislation.

History of Citizen Suit Provisions

Citizen participation in the enforcement of the law is not new. Public rights under the English common law have been protected to some extent by private prosecution of criminal offences and actions such as public nuisance.

United States

The real impetus for the development of citizen suits has come from the United States. In 1943 in *Associated Industries v. Ickes* (134 F.2d 694 (2d Cir. 1943)) the right of "private Attorneys-General" to enforce public rights created by statute was recognised, so long as the private litigant's interests were sufficiently affected. In 1963 the Supreme Court recognised the legitimacy of public enforcement of non-economic public rights in *National Association for the Advancement of Colored People v. Button* (371 US 415 (1963)).

The great breakthrough for citizen suits in the environmental field was the inclusion of a citizen suit provision in the federal Clean Air Act 1970. This in turn was derived from the provisions of the Michigan Environment Protection Act of 1970 which was originally drafted by Professor Joseph Sax of the University of Michigan (Axline 1991).

Following the adoption of the citizen suit provisions in the Clean Air Act all but two of the major federal environmental statutes now includes provision for citizen suits.

With the exception of citizen enforcement of the National Environmental Policy Act, the availability of citizen suits did not lead to widespread citizen enforcement efforts until after 1980. Since then there has been an explosion in citizen suit actions to such an extent that "citizen enforcement of public rights now is embedded permanently in the framework of [the United States] government" (Axline 1991, pp. 1-10; *see also* Boyer & Medinger 1985).

Australia

Although environmental citizen suits have been possible in the absence of specific statutory provision (for example *Kent v. Johnson* (1973) 21 FLR 177) Australian legislatures were not quick to follow the lead of those in the United States in making statutory provision for them. Indeed, the Commonwealth legislation equivalent to the National Environmental Policy Act (NEPA), the *Environment Protection (Impact of Proposals) Act 1974* was specifically designed so as to exclude the possibility of citizens taking action to enforce its provisions (*see* the Minister Cass' second reading speech, *Debates*, House of Representatives, 26 November 1974, p. 4082).

Some scope is now provided for remedying breaches of Commonwealth environmental laws on the traditional judicial review grounds by the *Administrative Decisions (Judicial Review) Act 1977*. The advantage of such a statute is that it provides a mechanism for judicial review of most Commonwealth legislation and, although the standing requirement is restrictive (limited to a "person aggrieved"), it has

been used in some environmental cases (*see Australian Conservation Foundation v. Minister for Resources* (1989) 76 LGRA 200). However, even if the standing provision was not so restrictive, it would only provide one element of an effective citizen suit provision —judicial review—and not for civil enforcement more generally.

In contrast, at about the same time as the *Environment Protection (Impact of Proposals) Act* was passed, provisions were included in the *Trade Practices Act 1974* allowing civil enforcement of Parts 4 and 5 of the Act. Since then the Commonwealth has been slightly less reluctant to allow citizens access to the courts to enforce environmental laws (*see Industrial Chemicals Notification and Assessment Act 1987* s. 83; *World Heritage Properties Conservation Act 1983* s. 14; *Hazardous Wastes (Regulation of Imports and Exports) Act 1989 s41; Endangered Species Conservation Act 1992*, s. 131).

Today, the only citizen suit provisions of any worth in practice are those in New South Wales. The first, the best known and most used provision allowing citizen suits is s. 123 of the *Environmental Planning and Assessment Act 1979*. This allows any person to bring proceedings to remedy or restrain a breach of the Act whether or not any (private) right of that person has been infringed. As a result it allows both the civil enforcement type action and the judicial review type action.

Taking into account the nature of the legislation, s. 123 has wide application. Not only does it cover local, regional and State environmental planning and development control but also the State government's responsibilities for environmental impact assessment.

Section 123 has allowed a number of very significant environmental protection cases to be run in New South Wales (for example, *Jarasius v. Forestry Commission (No.1)* (1988) 71 LGRA 79, *Corkill v. Forestry Commission* (1990) 71 LGRA 116, *Vaughan-Taylor v. David Mitchell-Melcann* (1991) 73 LGRA 366).

Sections equivalent to s. 123 have been copied or inserted into many pieces of State environmental legislation since then (*see Environmentally Hazardous Chemicals Act 1985*, s. 57; *Heritage Act 1977*, s. 153; *National Parks and Wildlife Act 1974*, s. 176A; *Wilderness Act 1987*, s. 27).

While these citizen suit provisions covered the important development control and nature conservation legislation in the State, until 1991 there were no workable citizen suit provisions covering the State's pollution laws. When the *Environmental Offences and Penalties Act* was passed in 1989 it contained a provision allowing civil enforcement of *any* law if there was a breach likely to cause harm to the environment (s. 25). While such a provision was of potentially very wide application, bringing citizen suits under it was made almost impossible because of the requirement that any citizen bringing proceedings under the provision must have the consent of the State's pollution licensing agency, the State Pollution Control Commission. This rendered the provision unworkable when government, or government supported, interests were being challenged (*see* Preston 1991, pp. 40-1).

Following these difficulties, the provision was amended in 1991. The section still retains its broad application to breaches of any law likely to cause harm to the environment but instead of an overtly political gatekeeper such as the State Pollution Control Commission, the role is handed to the Land and Environment Court.

Before proceedings under the section can commence the applicant now needs the leave of the Court. When considering whether leave should be granted the Court is required to determine that there is a significant likelihood that the orders sought will be made, that the proceedings are not an abuse of process and that the proceedings are in

the public interest. Although this provision has only been considered on one occasion it appears that, although an unnecessary hurdle for potential applicants, the hurdle is not too great (*see Environmental Offences and Penalties Act 1989*, s. 25(3), and *Brown v. Environment Protection Authority* (1992) 75 LGRA 397). The approach taken by the Court is consistent with the legislative intent (Mossop 1993).

Other Countries

As an aside, it should be pointed out that citizen suits do not just exist in the west. Although in most states statutory provision has not been made for the bringing of citizen suits, in Malaysia, the Philippines, Colombia, Argentina and India cases that could be classed as environmental citizen suits have been run.

Perhaps most notable are the cases in India run by an advocate of the Supreme Court named M.C. Mehta. These cases, mostly reported as *M.C.Mehta v. Union of India* are a fascinating study in citizen suits in their own right. Making use of the Supreme Court of India's provision for public interest litigation (*see Gupta v. Union of India* AIR 1982 SC 149; *Peiris* 1991). Mehta, as both plaintiff and advocate, has challenged his own government and hundreds of polluting corporations in the Supreme Court. Remarkably he has, by and large, been successful. For those interested in citizen suits as David and Goliath type struggles an examination of the reported cases in which Mehta has been involved is recommended (*see M.C. Mehta & Anor v. Union of India* AIR 1987 SC 965; *M.C. Mehta v Union of India & Ors* AIR 1987 SC 982; *M.C. Mehta v. Union of India & Ors* AIR 1987 SC 1086; *M.C. Mehta v. Union of India & Ors* AIR 1988 SC 1037; *M.C. Mehta v. Union of India & Ors* AIR 1988 SC 1115; *M.C. Mehta v. State of Tamil Nadu & Ors* AIR 1991 SC 417; *M.C. Mehta v Union of India & Ors* AIR 1991 SC 1132; *M.C. Mehta v Union of India & Ors* AIR 1992 SC 382; *M.C. Mehta v State of Orissa & Ors* AIR 1992 Orissa 225).

The Nature and Utility of Citizen Suits

The need for new mechanisms for accountability of government

The need for citizen suits coincides with the decline of parliaments as a means of public accountability. Although public accountability through the parliament remains important, it is now no longer the sole means of calling the state machinery and officials to account (Goldring 1981, p. 8). Other mechanisms have been developed in order to keep the state accountable. Mechanisms include the establishment of an ombudsman and judicial or quasi-judicial review mechanisms such as administrative appeals tribunals. The mechanisms under the new administrative law regime also provide avenues of review for the decisions of government. Citizen suits should be seen as a part of this process of finding alternative means to keep government accountable.

A mechanism for promoting open regulation

One of the important aspects of citizen suits is that they bring regulatory behaviour into the public arena and hence open it up to public scrutiny. "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman" (Brandeis 1933, p. 62). Citizen suits illuminate regulatory conduct and hence assist in promoting regulatory behaviour in accordance with the law and closer to the expectations of the community.

This is a process of moving away from the "secretive, highly discretionary and conciliatory Anglo-Australian tradition" of regulation (Franklin 1991, p. 89) to a more open, rule oriented style of regulation.

In the pollution area in particular,

> pollution control . . . has been a notoriously in-house affair, driven by professional concerns and a technical/engineering orientation. Interests outside the symbiotic regulator-regulated relationship have been systematically excluded at all stages . . . (Franklin 1990, p. 91).

The recognition that pollution control is largely a social, value based process rather than a strictly technical one means that the old style of regulation is artificially and harmfully restrictive. The open hostility of regulatory agencies to citizen suits (*see* Franklin 1990, p. 91, and *Brown v. Environment Protection Authority* (1992) 76 LGRA 197) results from a failure to abandon the culture of the old style of regulation and a perception that law enforcement by citizens disrupts the cooperative relationships between polluter and regulator.

This is because, in practice, the law itself is only the background to the real regulation of environmentally destructive activities. The real regulation is a process of bargaining and negotiation and compliance and non-compliance with the law which depends much more on the negotiating process and the relationships between the parties than on the law itself (Rankin & Finkle 1983, pp. 36-9, and Hawkins 1984). Citizen suits avoid both the subtleties, compromises and arguably the capture by the negotiation process. They aim to enforce the law as it is publicly stated rather than as it privately practised.

This is not to say that negotiation and bargaining should not be part of environmental regulation but simply that where this is a closed process, citizen suits are an important mechanism for keeping that process lawful and ensuring that the gap between public perception and the reality of government regulation is minimised. For this reason they are seen by administrative agencies as disruptive, but from the point of view of public administration and accountability, they are absolutely essential.

Privatised regulation

Another way of seeing citizen suits is as a form of privatised regulation. Although from the point of view of a regulatory authority that feels threatened by open and accountable regulation citizen suits are undesirable, from the point of view of an authority keen to achieve environmental goals, third party civil enforcement through citizen suits is an aid rather than an impediment to its activities.

In the United States the recognition of the complementary nature of public and private sector enforcement of environmental laws is well developed. Indeed, discussions have now turned to the specialisation and coordination of enforcement roles between the public and private enforcers rather than whether or not private enforcement should have a role to play at all (*see* Boyer & Medinger 1985, pp. 879-80, 895-922).

With limited resources, enforcement will always be the weak link in regulatory control. Thus, if there is a constituency which, for altruistic or self-interested reasons, is available to assist in enforcement and help achieve greater compliance then it would seem logical to make use of that constituency.

The Future of Citizen Suits in Australia

Procedural prerequisites for citizen suits

There are several procedural factors which will influence whether or not citizen suits are run. The principal ones are the nature of environmental laws, standing and funding. As a policy question it is to these factors that legislators and administrators must pay attention when trying to encourage or discourage citizen suits. Only a brief discussion is included here as the topic has been discussed more extensively elsewhere (*see* for example, Australian Law Reform Commission 1985; Boer 1986, and Preston 1991).

In order for citizen suits to be possible there must be laws that create enforceable obligations. One might contrast the *Environment Protection (Impact of Proposals) Act 1974* (Cwlth) with the *Environmental Planning and Assessment Act 1979* (NSW). The former arguably does not create enforceable obligations in relation to environmental impact assessment while the latter clearly does. Simply in terms of the implementation of environmental policy, enforceable obligations would seem essential (Mossop 1992) but obviously without them there is little scope for citizen suits. A weak environmental law is a weak environmental law no matter how it is enforced.

Once there are environmental laws that are worth enforcing, the next question is whether citizens can enforce them. These are the issues of standing and civil enforcement as discussed above.

If citizens have standing and there are statutory provisions allowing civil enforcement then there remains the question of funding. Even where there are enforceable environmental laws and citizens have standing to bring civil enforcement proceedings, the final hurdle, that of funding, is often too great to cross.

There are several mechanisms that can be adopted to allow the funding hurdle to be crossed. To date the principal mechanism for this has been through legal aid.

Until 1993 legal aid was available in New South Wales through the Legal Aid Commission. Because of cutbacks in funding and government frustration at the number of cases brought successfully against the government, legal aid was first made almost impossible to obtain under this scheme and then officially abolished from 1 January 1993 (*see* Johnson 1993). Not only has this meant that there is no funding to run such cases but also potential applicants are denied the indemnity against costs orders available under s. 47 of the *Legal Aid Commission Act 1979*. The threat of adverse costs orders is a very significant disincentive to the bringing of citizen suits which is not present, for example, in the United States where there is no general rule that costs follow the event.

Other states have not been so lucky as to have legal aid abolished since legal aid for environmental cases has never been available (*see* for example, Molesworth 1992).

Although the Commonwealth does have a scheme of legal aid which does cover environmental matters affecting the national interest or matters of national concern, it is a highly discretionary scheme from which few grants of aid for environmental cases have been made.

Related to the question of funding are the procedural obstacles such as applications for security for costs and undertakings as to damages that inevitably face those bringing citizen suits.

In the absence of a satisfactory scheme of legal aid, there are both statutory and judicial means of overcoming the funding and funding related difficulties of citizen suits

which will have to be pursued (*see* for example, Boer 1986; Jeffrey 1988; McElwain 1993, and Preston 1993)

Criminalisation or civilisation?

There has been much scepticism expressed recently about the utility of the criminal process as a means of preventing environmentally destructive activities.

The difficulties of the criminal process are particularly evident in the area of pollution control (*see* Franklin 1990; Farrier 1990, and Farrier 1992). In this area the use of criminal sanctions has been the principal means of enforcement.

Criminal sanctions provide a highly visible sign of enforcement. The symbolism of the criminal law and the large maximum penalties available under statutes such as the *Environmental Offences and Penalties Act* are clearly of great political value. The reason is that,

> they offer high visibility political response without interfering with bureaucratic/business interests. They neither challenge the paradigm of growth, nor do they fundamentally re-direct corporate or bureaucratic behaviour (Franklin 1990, p. 92).

A large number of cases passing through the courts dramatises the process of pollution control and gives the misleading impression that "the pollution problem" is being addressed. Criminal laws provide a means of satisfying the public demands for environmental protection without fundamentally questioning the role of polluting industries (Gunningham 1974, pp. 86-7). This, in itself, may be seen as a useful role but it is certainly not a role that the advocates of criminalisation of environmentally damaging activities are willing to admit.

Perhaps we should be thankful for small mercies, that there is now some form of law enforcement rather than a program restricted almost entirely to negotiation and cooperation (*see* Grabosky & Braithwaite 1986, p. 40).

The criminal law fails to address the institutionalised respectable polluters who routinely and lawfully pollute our land, air and water. It is here that politically difficult pollution issues arise. It is here that regulators such as the Environment Protection of New South Wales are hamstrung by the conflicting aims of pollution control—reducing pollution while maintaining industry.

However, even if we accept these institutionalised problems, there is room to ask whether civil enforcement and third party enforcement of pollution laws should play a greater role and whether a broader mix of enforcement strategies would achieve greater level of compliance.

Unlike the drugs area, where theories of criminalisation, punishment and deterrence are so entrenched that there is little political space for alternative approaches, there is more room for discussion of alternatives to criminal law in the area of pollution (Farrier 1992, pp. 84-5, and Franklin 1990, pp. 86-7). This is a much broader debate about the role of law in controlling the behaviour of corporations (*see* for example Fisse & French 1985).

At the heart of such a debate must lie a serious desire to actually reduce pollution rather than a desire to be seen to address the pollution problem. For reasons outlined below, the impetus will have to come from the parliament rather than the executive government.

Parliament or the executive?

One of the important aspects of Australian political life and perhaps modern western government is its domination by bureaucracy. It is the nature of citizen suits that they allow the public to enforce the law. The bureaucracy's decisions about when or when not to enforce the law are sidestepped. Not only do citizen suits deny the bureaucracy a monopoly on determining the public interest but they also subject it to challenge if its actions are unlawful. Neither of these matters are welcomed by bureaucrats or the executive.

Consequently, it is unlikely that proposals for the greater use of citizen suits will come from the bureaucracy. Without enlightened leadership, it is also unlikely that provisions allowing citizen suits will emerge from the executive government. Allowing private citizens to challenge the lawfulness of government actions is not popular. Citizen suits challenging government or government supported interests are extremely unpopular amongst those who do not have a healthy respect for democracy and the rule of law. For a government committed to a particular political agenda it requires a relatively broad-minded view of the democratic process to welcome citizen challenges to government conduct on the grounds of its unlawfulness.

One of the reasons that citizen suit provisions have not been more widespread is that there has not been a clear parliamentary recognition that mechanisms other than parliament and ministerial responsibility are necessary to control executive and agency behaviour. This contrasts with the position in the United States where:

> [c]itizen suits provisions have been found to be helpful both in encouraging diligent Federal enforcement of environmental statutes and taking actions against violators of these Act (Gaba & Kelly 1990, p. 929).

The reason for this is, perhaps, that in a parliamentary system dominated by two parties, with a government which controls the parliamentary process, the interests of the executive government and the interests of the bureaucracy are closely aligned. The executive has little incentive to introduce provisions allowing third parties to ensure the lawfulness of government behaviour.

Certainly in New South Wales the parliamentary process has been immeasurably improved with the balance of power in both houses of parliament lying outside the control of the major parties. A more active parliamentary committee process has also allowed better scrutiny of, and more parliamentary input into, bills developed by the executive.

The fate of citizen suit provisions may, therefore, be aligned with the fate of the parliamentary process and mechanisms to make governments more accountable.

Conclusion

Citizen suits are an important mechanism for enforcing public laws. In so far as they provide a mechanism for civil enforcement they are an alternative to criminal enforcement. Moreover, because they allow citizens to test the lawfulness of executive conduct they fulfil a role not met by the criminal law. Citizen suits should, therefore, form an important part of any scheme aiming at compliance with environmental laws. Whether they will, however, largely depends upon how willing executive governments are to expose themselves to this form of accountability and to what extent parliaments are able to impose it upon them.

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BILL OF RIGHTS LEGISLATION AS A SANCTION AGAINST ENVIRONMENTAL OFFENDERS

Peter Breen

THE FITZGERALD REPORT EXPRESSED CONCERN THAT CIVIL LIBERTIES HAD deteriorated in Queensland during the Bjelke-Petersen years and noted in particular that the individual has a right to protection from the State. The Ahearn Government set up the Electoral and Administrative Review Commission ("the Commission") to investigate and report on ways of preserving and enhancing rights and freedoms of the individual. By late 1992 the Commission had invited the people of Queensland to consider a Bill of Rights. An issues paper was published, submissions received and public hearings conducted throughout Queensland, including the Torres Strait Islands. The Commission's Report to the Goss Government is due to be published shortly and the recommended legislation ("the proposed legislation" or "the draft bill") is likely to include a radical new way of dealing with offences against the environment.

Introducing the concept of community rights into the proposed legislation, the Commission was able to move outside the boundaries traditionally associated with individuals' rights. Individuals' rights may be described as rights essential to the dignity of the person while community rights are rights attaching to a person by reason of his or her membership of a group or community. Of course, community rights are derived from individuals' rights, and they are no less essential to human dignity, but they represent the next stage or "third wave" in the evolution of human rights:

> The first wave was civil and political rights, the second economic, social and cultural rights. The third wave is of importance because . . . it represents a synthesising of the two groups of rights which previously tended to be held apart, as in the case of the two Covenants, ICCPR and ICESCR (Bailey 1990, p. 16).

The first wave of human rights, the civil and political rights (also known as the blue rights), were first set down in the *Magna Carta* of 1215 to protect individuals from arbitrary interference by government. King John signed the document under pressure from the English barons. Four centuries later, the English Parliament enacted the Bill of Rights 1688. Opponents of Bill of Rights legislation in Queensland argued that these two documents offer sufficient protection of individuals' rights, but the

Commission adopted the view of Griffith, C.J. in *Chia Gee v. Martin* (1905) 3 CLR 649:

> The contention that the law of the Commonwealth is invalid because it is not in conformity with *Magna Carta* is not one for serious consideration.

The best known statement of civil and political rights is probably the American Bill of Rights 1791 which originally comprised the first ten amendments to the United States Constitution 1789. This important statement of individuals' rights tends to be the human rights benchmark in the area of civil and political rights, although Australian courts are more likely to look for guiding principles to the International Covenant on Civil and Political Rights (ICCPR) which was ratified by Australia in 1980.

The second wave of human rights (the red rights) was recognised by the international community following extensive lobbying by communist countries in the early days of the United Nations following the Second World War. Economic, social and cultural rights focus on the right to work, the right to an adequate standard of living and the right to pursue cultural interests. Australia ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1975, and although none of the provisions have been directly incorporated into Australian law, nevertheless the courts will look to the Covenant for guiding principles.

The third wave of human rights (green rights) began with a recognition by the international community that neither of the two Covenants recognised the rights of groups of people, or communities. Thus, the African Charter on Human and People's Rights was opened for signature in 1981 and included rights not vested in individuals but in collective groups of individuals called "peoples" (Bailey 1990, p. 9). The rights of "peoples" in the Charter include:

> . . . a general [sic] satisfactory environment favourable to their development (Article 24).

The Declaration on the Right to Development 1986 advanced the notion of community rights a further step by effectively denying the traditional distinction between rights in the two Covenants.

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised . . . (Article 1).

Part 5 of the draft bill accompanying the Commission's Report is likely to be headed "Community and Cultural Rights" and to begin with a provision which affirms the right to collective and individual development (*see* Appendix 1). Other provisions canvassed by the Commission for possible inclusion in Part 5 include rights particular to Aboriginal people and Torres Strait Islanders, the right to culture, rights particular to an author, the right to environmental protection and conservation and the right to ecologically sustainable development. This paper focusses on the last two of these provisions.

Right to Environmental Protection and Conservation

Environmental law and human rights law have enjoyed a parallel, if sometimes contradictory, history. Human rights law originated with the Universal Declaration of Human Rights in 1948, while environmental values came to be regarded as relevant about the same time. It is immediately obvious, however, that constraints on the individual as regards the environment stand opposed to the notion of individual rights recognised by established legal theory.

The Commission invited Queensland's Environmental Defender, Professor Douglas Fisher, to address a public hearing in an attempt to resolve the conceptual problems that were involved in placing environmental rights in a Bill of Rights:

> . . . the concept of environmental rights is difficult for the law because of its nature and because of the nature of the environment. The obligations are easy to understand; rights much more difficult, simply because the environment can have no legal rights as an institution, because the environment does not exist as an institution within the law. It may be the beneficiary of other institutions but it has no rights in its own sense. It is difficult to conceive of individual rights in relation to the environment at large, that is the community, the public aspect of environment, rather than the coincidence of private interests and public interests (Electoral and Administrative Review Commission 1992-93, p. 948).

In one sense the Commission was attempting to place square pegs in round holes. Environmental rights do not fit comfortably with our ideas about individual rights. But once the notion of community rights is introduced into the equation, and the idea of shared resources is entertained, immediately an ancient legal principle opens up new possibilities:

> The idea that natural resources belong to an entire community of people who share rights of access and use dates back to at least Roman times. Under the Roman law the concept of *res communes*, the air, running water, the sea and the seashore were common to all. Private use of the resources was recognised, but such use did not confer a right of ownership upon the resource owner. Furthermore, the resource users' access to the resource was conditional upon his or her not damaging the resource and not impeding the access of other users to it (Chiappinelli 1992, p. 570).

Queensland is not the first jurisdiction to tackle the problem of environmental rights in the context of Bill of Rights legislation, but it might be making the boldest attempt. Article 30 of the proposed South African Bill of Rights provides:

> Everyone has the right not to be exposed to an environment which is dangerous to human health or well-being or which is seriously detrimental thereto and has the right to the conservation and protection of that environment (South African Law Commission 1991, p. 696).

The provision has two deficiencies which troubled Professor Fisher. The first is that any environmental right, expressed as a negative in Bill of Rights legislation, fails to impose a positive obligation on the state to protect the environment. Secondly, the provision is decidedly anthropocentric, which means that the proposed legislation fails to acknowledge the intrinsic value of the environment itself. The equivalent provision in Queensland's draft bill addresses the question of enforceability by the state, and is

ecocentric, an approach that may not have been possible in a Bill of Rights strictly limited to individuals' rights.

Right to Ecologically Sustainable Development

This provision, the last in Queensland's draft bill, is surely only possible in a Bill of Rights which includes a community rights section. Even the South Africans avoided it and at least one commentator alluded to the comprehensiveness of South Africa's proposed legislation:

> During its 45 years in power, South Africa's governing National Party has routinely denied blacks their rights. Now that it must soon share power with blacks, the white regime is undergoing a deathbed conversion. Officials unveiled a bill of rights aimed at preventing a black government from ever carrying out similar abuses against the white minority (*Time Australia*, 15 February 1993, p. 12).

The Commission itself recognised the possible scope of the provision and interlineated the word "promote" before the words "ecologically sustainable development". Consequently the right is more akin to carrying a placard than sitting in front of a bulldozer. Nevertheless the importance of the right should not be understated. The concept of ecologically sustainable development would appear to have a firmer footing in the legal system than the notion of environmental rights.

Professor Fisher says that ecologically sustainable development lies at the heart of the Intergovernmental Agreement on the Environment which was concluded in 1992 between the Commonwealth, the States, the Territories and the Australian Local Government Association:

> In particular, the Agreement recognised that the "concept of ecologically sustainable development . . . provides potential for the integration of environmental and economic considerations in decision-making, and for balancing the interests of current and future generations" (Fisher 1993a, p. 2).

The concept of ecologically sustainable development is also recognised in international human rights instruments and the Commission took the view that, provided such instruments were ratified by Australia, the Queensland Parliament was free to enact legislation to give full effect to the instruments. The Parliament, after all, enjoys legislative sovereignty under the State Constitution which predates the Commonwealth. This idea may raise a few Commonwealth eyebrows, but the basis of the complaint to the United Nations Human Rights Committee about Tasmania's homosexual laws, appears to relate to the alleged failure by the Commonwealth to properly implement an international instrument which Australia has ratified. The Commonwealth cannot prevent the States from enacting legislation which the Commonwealth itself should properly enact. If the States then get it wrong, individuals who feel aggrieved may be able to approach the Human Rights Committee.

The Rio Declaration on Environment and Development proclaims in Principle 1:

> Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

Whatever one may think about the enforceability of the Rio Declaration, it is submitted that introducing the provisions into Bill of Rights legislation does provide a

mechanism for emphasising the importance of the environment for its own intrinsic value by recognising the notion of community rights. In response to Professor Fisher's other objection to the South African provision, it is suggested that a Bill of Rights with a hierarchy of enforcement procedures offers a flexible approach to the ways in which the State may protect the environment.

Enforcement Procedures in the Draft Bill

The Commission was anxious to recommend that all the rights in the draft bill should be observed and promoted by the State as a matter of government policy. Provisions were to be included in the preamble to state this objective, and to provide for education of Queenslanders as to their rights. Overseas experience suggests that the educative role of a Bill of Rights is significant since it sets down in one document all the fundamental rights that a person has in relation to the state. Other provisions of the Bill are likely to incorporate the various ways rights may be used.

Civil and political rights are enforceable in the Supreme Court or in any proceeding in which the right is relevant to an issue in the proceeding. The enforcing party is any "person" which includes a corporation or body politic under the *Acts Interpretation Act 1954* (Qld). The rights must be observed by the legislature, executive and judicial branches of the State and any person or body representing the State.

Bill of Rights legislation is not available to bring an action where the offending party is not the State or representative of the State. On the face of it this may appear to be a serious limitation on the value of a Bill of Rights as a sanction against environmental offenders. Indeed, the proposed legislation in Queensland is likely to include a clause that no rights (apart from civil and political rights), are enforceable merely because of the Bill. How then does the draft Bill assist where a perceived environmental breach is caused by a person or corporation who is not a representative of the State?

In Queensland, only s. 2.24 of the *Local Government (Planning and Environment) Act 1990* gives standing on environmental questions and the provision is limited to actions in the Planning and Environment Court. No general standing exists under the proposed legislation to object to environmental offenders, but the draft bill is likely to provide that a person has the right to object if the right to environmental protection and conservation is not observed and to expect that government will accept and act on a reasonable objection. If development is not ecologically sustainable, again, a person has the right to object and to expect that government will accept and act on a reasonable objection.

These provisions are clearly something more than statements of legislative objectives and something less than justiciable provisions. It is fair to say that Queensland's draft bill is breaking new ground in the area of sanctions against environmental offenders, and it is able to do that because of the development of the notion of community rights in human rights law. Time will judge the fruits of the proposed legislation. They may be radical. One certain result will be a new awareness of other ways of dealing with environmental offenders. Government policy, too, will be obliged to conform to the legislation since rights that warrant inclusion in a Bill of Rights prevail over inconsistent laws.

In conclusion I would like to repeat an observation made by Professor Fisher that the exercise of property rights, whether in the interests of an individual or the public at

large, has been an important instrument for environmental management in Queensland. The *Nature Conservation Act 1992* (Qld) gives the State property rights in native plants and animals to protect them from commercial exploitation. Similarly, rights of property in relation to land have been modified by the enactment of the *Aboriginal Land Act 1991* (Qld), the *Torres Strait Islander Land Act 1991* (Qld) and the decision of the High Court in *Mabo v. Queensland* (1992) 107 ALR 1 (Fisher 1993b, pp. 99-101).

Any Queensland Bill of Rights will be an acknowledgment by the State that there are certain fundamental rights and freedoms which the State cannot transgress, and some of those rights attach to communities. To the extent that the State defends the communities against other transgressors, the State is acting in a representative capacity to protect a public interest that includes property rights. The idea is a radical one.

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APPENDIX 1

PART 5¾ COMMUNITY AND CULTURAL RIGHTS

Right to collective and individual development

40. All persons have the collective and individual right to participate in, contribute to and enjoy political, economic, social and cultural development in which the fundamental rights of the person can be fully realised.

Rights particular to Aboriginal People and Torres Strait Islanders

41. Aboriginal People and Torres Strait Islanders have the following collective and individual rights -

(a) the right to revive, maintain and develop their ethnic and cultural characteristics and identities, including -

  (i) their religion and spiritual development;

  (ii) their language and educational institutions;

  (iii) their relationship with indigenous lands and natural resources;

(b) the right to manage their own affairs to the greatest possible extent while enjoying all the rights that other Australian citizens have in the political, economic, social and cultural life of Queensland;

(c) the right to obtain reasonable financial and technical assistance from government to pursue their political, economic, social and cultural development in a spirit of co-existence with other Australian citizens and in conditions of freedom and dignity.

Right to culture

42. (1) All persons have the collective and individual right of reasonable access to all culture, arts, sciences and languages.

(2) All persons have the collective and individual right, without fear of prejudice, to freely do the following -

(a) express their culture and arts;

(b) enjoy the benefits of the sciences;

(c) use their language.

Rights particular to an author

43. An author of an original work has the following rights -

(a) the right to be known as the author of the work, and

(b) the right to have the integrity of the work respected.

Right to environmental protection and conservation

44. (1) A person has the right to have the environment of Queensland -

(a) protected by government from excessive, undue or unreasonable human interference; and

(b) reasonably conserved by government for its own intrinsic value.

(2) A person has the right to object if the right in this section is not observed and to expect that government will accept and act on a reasonable objection.

Right to ecologically sustainable development

45. (1) A person has the right to promote ecologically sustainable development in the interests of current and future generations.

(2) A person has the right to object to development that is not ecologically sustainable and to expect that government will accept and act on a reasonable objection.

INNOVATIVE ENFORCEMENT MECHANISMS IN THE UNITED STATES

Mark Squillace

ENVIRONMENTAL CRIME IS AN AMBIGUOUS SUBJECT. THE LINE BETWEEN violations which merit criminal sanctions and those which merit civil sanctions, or perhaps no sanctions at all varies greatly depending on the jurisdiction, the statute, and the agency in charge of enforcing the law. The characterisation of the offence as civil or criminal, however, may be less important than its ability to deter the offender. Thus, this paper is not particularly concerned with whether a particular enforcement provision is or should be characterised as civil or criminal. Rather, its focus is on innovations that may offer a better solution to obtaining compliance with environmental laws.

A common lament one often hears from agency bureaucrats involved in environmental regulation is that they would like to conduct more inspection and enforcement activities, but they lack sufficient resources. It is easy to sympathise with their plight. During times of shrinking budgets, enforcement activities are just about the easiest thing to cut. Ironically, the less enforcement activity, the less likely that the agency will be able to recognise that an enforcement problem exists. I have often heard agency administrators describe the good working relationships which they have developed with companies subject to their jurisdiction. The implication is that environmental compliance is not a problem within their program. I remain suspicious. Of course, there are plenty of companies which are trying very hard to comply with the law. But inevitably there are a few renegades. And a system which relies on trust promotes renegades.

The US media recently reported that the Louisiana Pacific Corporation (LP) has agreed to pay a $US11.1m fine—the second largest pollution fine in the history of US environmental enforcement. LP is a multinational company with sales last year totalling $US2.2b. The government claimed to have strong evidence that the company had deliberately submitted false information containing grossly low estimates of the amount of air pollutants that would be emitted from 14 waferboard facilities all across the United States. According to one newspaper account, officials from eight different states claimed that the company had avoided a more stringent form of permit review by deliberately underestimating, often by thousands of tons a year, how much pollution the new waferboard plants would produce (*The New York Times*, 2 June 1993, p. 22). Some believe LP's actions gave the company a competitive advantage which was

instrumental in allowing the company to capture 43 per cent of the $1.2b waferboard market in the US.

If a large, multinational corporation is willing and able to get away with falsifying documents over the course of several years, one wonders what other renegades might be operating in a similar fashion. Indeed, as the LP case suggests, there may be enormous economic incentives for noncompliance, and this basic fact is bound to influence some companies. And so my instincts tell me that those who proclaim that enforcement is not a problem are wrong. Whether or not those instincts are right, however, enforcement is critical to a successful program. If the regulated community believes, rightly or wrongly, that enforcement action is not likely to be taken, it becomes very difficult to maintain strict standards.

This paper will discuss some innovative enforcement provisions from just two American laws. They are the Clean Air Act and the Surface Mining Control and Reclamation Act (SMCRA), which regulates environmental problems from coal mining. These statutes have been selected for particular reasons. The 1990 Clean Air Act Amendments contain the most recent formulation of a comprehensive enforcement policy from the Congress of the United States. If past patterns hold, most of the other federal pollution control laws will eventually encompass the same or similar provisions.

The Surface Mining Control and Reclamation Act merits consideration if for no other reason than the fact that it is probably the only complex regulatory program addressing environmental problems that is administered outside of the US EPA. SMCRA is under the jurisdiction of the US Department of the Interior. It establishes reclamation requirements for virtually all surface and underground coal mines, as well as ancillary facilities like preparation plants. SMCRA has been included here because it focuses on protection of land resources, as opposed to air and water, and because it includes some of the more interesting enforcement provisions of any federal environmental law.

The Clean Air Act

Throughout its history, which dates back essentially to 1970, the Clean Air Act has often been the vehicle for innovation and experimentation with pollution control. It was the first American statute to require the imposition of penalties based upon the economic advantage obtained by the violator, and it was the first to promote emissions trading as a vehicle for cost efficient pollution control. Until the 1990 Amendments, however, most objective observers would have said that the law was, in large measure, a failure; that the key purpose of the law—cleaning the nation's air—had not happened despite the expenditure of billions of dollars on pollution control programs. Indeed, although ambient air quality has improved marginally in recent years, more than one-half of the people in the United States still live in areas where the government air quality standards, which are designed to protect public health, are not being met.

Although the lack of an adequate enforcement program cannot be blamed for all of the earlier law's failures, it has played a significant role. It is too early to tell whether the 1990 Amendments will bring greater success, but several new and innovative provisions give cause for optimism. Not all of the provisions described here related to criminal enforcement, and some of the provisions, most notably the SO_2 emissions trading program, are not enforcement provisions at all. Nonetheless, each has or will make it easier for the US EPA to ensure compliance with the law. The mechanisms considered under the Clean Air Act include:

Annual fees

A requirement that regulated sources pay annual fees "sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the permit program . . . 502(b)(3)(A) (the minimum fee is $25/regulated ton, subject to maximum limits of $100 000/regulated pollutant). Among the costs that must be covered are those associated with reviewing and enforcing the permit, monitoring air emissions, and tracking emissions.

As noted previously, lack of resources is often the reason for inadequate enforcement. No longer will agencies be able to complain about inadequate resources. If more resources are needed to ensure compliance, annual fees must be increased.

Tradeable emissions program

The quintessential self-enforcement program is a system of tradeable permits, and the 1990 Amendments establish just such a program for SO_2 emissions from fossil fuel fired electrical generators. It is an enormously complex program, but its essence can be described simply. The first phase of the program, which will commence in 1995, involves only designated facilities in the eastern half of the United States. Each facility has been granted a certain number of SO_2 allowances, which correspond to SO_2 emission levels of 2.5 lb/mmBtu (each allowance is worth one ton of SO_2). This is roughly half of what many of these facilities currently emit. By 1995, each facility will have to have sufficient allowances to cover its emissions.

The second phase of the program commences in the year 2000, and will include all fossil fuel-fired electrical utilities in the country. Approximately 9 400 000 allowances will be available in 2000. This is roughly half of the current level of SO_2 emissions in the US. During the second phase, no facility will receive allowances greater than that which corresponds with an emission rate of 1.2 lb/mmBtu. Allocations to some utilities will be at a lower rate to reflect lower emission rates that have already been achieved.

Where SO_2 emissions exceed the allowances held by a company, a minimum penalty of $2 000 per ton must be paid. This is six to ten times the current market value of an SO_2 allowance. Companies can achieve compliance in basically three ways. First, they can simply purchase allowances sufficient to cover their emissions. Allowance futures are currently being traded on the Chicago Board of Trade under an agreement with the EPA. Secondly, they can install pollution control equipment (usually "scrubbers"), to lower their emissions. Thirdly, they can purchase fuel with a lower sulphur fuel content. Many companies will probably opt for some combination of these three options. For example, a company that installs scrubbers, may then have allowances available for sale. Some companies are likely to buy some lower sulphur fuel and some allowances in a combination necessary to ensure compliance with the law.

All allowances will be tracked through a recording system maintained by the EPA. A facility will not have the benefit of a purchased allowance until it has been properly recorded.

A key to the success of this program is ensuring that no-one cheats, and the law adopts an innovative system that should go a long way towards achieving this objective. Firstly, companies involved in the trading program will be required to install continuous emissions monitoring systems (CEMS) which will provide a permanent and continuous record of all relevant emissions from a source. Secondly, each source will be required to submit a certification to the EPA that it is in compliance with the law.

These "compliance certifications" must generally be made available to the public. Finally, and perhaps most importantly, each source must identify a single individual—a designated representative—from within the company who is responsible for compliance with the law. Note the importance of this provision. By naming a designated representative the company has identified a person to whom the EPA can readily look for criminal liability if a company has submitted false or misleading data. Criminal sanctions under the law can include penalties of up to 15 years in gaol. Few people who understand the stakes are likely to risk noncompliance. On the contrary, the designated representative has a strong incentive to exercise extreme care in submissions to the EPA.

Compliance certifications

As noted above, electric utilities will be required to submit "compliance certifications" which will provide detailed information regarding the companies' records of compliance over a period of time. In fact, these certifications will be required generally under the Clean Air Act for all "major stationary sources", which are defined somewhat broadly to include any source which emits more than 100 tons of any pollutant in a single year §114(a)(3). Importantly, these compliance certifications must generally be made available to the public; if they show noncompliance with the law, and EPA has failed to take action, the companies become easy targets for citizens who are interested in enforcing the law.

Citizens actions

Citizen enforcement has itself become somewhat easier as a result of the 1990 Amendments. In addition to citizen suits, which have been a fixture of the law since 1970, the 1990 Amendments also establish a "bounty" provision which authorises awards of up to $10 000 to persons who furnish information leading to a criminal conviction or civil fine. Furthermore, the citizen suit provision has itself been expanded. Citizen suits are common to most of the major environmental regulatory statutes in the United States. In essence, they authorise interested citizens to act as "private attorneys general" by suing persons who are violating the law, or suing the government for failing to take action required by the law. Citizens who are successful in bringing such actions may recover their costs and expenses, including legal fees, but generally, they are not liable for such fees if they are unsuccessful in prosecuting the action. Before the Amendments, citizens could not bring enforcement actions for wholly past violations. The new law allows such actions in those cases where the violation has been repeated. Thus, emission violations on two separate but wholly past occasions would likely be sufficient to warrant a citizen suit.

Failure to pay penalty

Nonpayment of penalties has been a problem in the past, in large part because overworked federal prosecutors rarely had the time to bring actions against recalcitrant companies. The 1990 Amendments may make it easier to engage in selective prosecutions which, because of the penalties involved, may convince others to pay their penalties in a timely fashion. Under the new provisions, the violator will be required to pay not only the penalty and accrued interest, but also the costs of

collecting the penalty, and fees associated with collecting the penalty, and a nonpayment of 10 per cent §113(d)(5).

Surface Mining Control and Reclamation Act

Although SMCRA has been around since 1977, it still contains some of the most interesting enforcement mechanisms of any of the American environmental statutes. Part of the reason for this distinction stems from the unique nature of the coal mining business in the United States. In the western US, and to a large extent in the central US as well, mining is dominated by larger companies. In the Eastern states, however, which still account for about one-half of US coal production, thousands of small mining companies move freely in and out of the mining business. Companies that fail to reclaim the land as required by the law disappear only to re-emerge as a different company with a new name. Eastern mining also tends to occur in close proximity to settled areas, thus creating regular conflicts with local residents. To address some of these problems Congress enacted some special enforcement mechanisms which include:

Mandatory enforcement

SMCRA is unique among US environmental laws to the extent that it does not afford the agency enforcement discretion. When an agency inspector sees a violation of the law, he or she is obliged to cite the operator. Over the years, inspectors have learned to use commonsense in implementing this requirement. If, for example, a trivial violation can be fixed while the inspector is on site, no citation is issued. But the general policy of mandatory enforcement remains in effect and has helped to promote SMCRA's reputation in the regulated community as one of the toughest environmental statutes.

Regular inspections

It seems a simple thing, but it has made a world of difference to the enforcement of the Act. SMCRA requires monthly inspections of each mine site that is subject to the Act without prior notice to the company. Complete inspections must be done quarterly. As noted earlier, when budgets are cut, as they so often are in these days of fiscal austerity, inspection programs seem to be among the first things to go. SMCRA is not immune from these fiscal pressures. But the statutory requirements for regular monthly inspections make it much more difficult for the agency to cut its inspection and enforcement budget. Should it do so, and fail to carry out regular inspections as required under the law, the agency will be vulnerable to a citizen enforcement action.

Individual civil penalties against corporate officers

Fines are often written off by companies as part of the cost of doing business. Indeed, in the case of Louisiana Pacific, the company bragged to the press that it was "pleased with the settlement", and that the penalty would not affect the company's earnings. Unfortunately, the Clean Air Act does not have a provision like that found in SMCRA, which authorises civil penalties to be assessed directly against corporate officers or directors who knowingly commit a violation of law. Such a fine may not be paid by the company. While criminal penalties are also available under SMCRA, the lower burden

of proof required for individual civil penalties assessed directly against corporate officers often makes this a more attractive option.

Citizen complaints

SMCRA is unique among US environmental laws in authorising citizens to complain about a violation of the law, and pursuant to that complaint, to accompany the inspector on the mine site during the inspection. When a complaint is received, an inspection of the mine must generally be conducted, usually within ten days, in any case when the complaint gives the agency reason to believe that a violation may exist. The opportunity to accompany an inspector empowers citizens in a way that must be seen to be appreciated. When done well, it also serves to educate citizens about mining practices, and companies and agency officials about the special concerns facing citizens. If a citizen complainant prefers, he or she can forego the opportunity to accompany the inspector and ask to remain anonymous.

Payment of fines into escrow

Procedural due process in the US (referred to as "natural justice" in Australia) requires that agencies afford a person who has been assessed a fine, an opportunity for a hearing. For the reasons suggested above under the Clean Air Act discussion, collection of fines can be a serious problem. To overcome this problem, at least in part, SMCRA requires that a person pay the proposed penalty amount into an escrow account as a condition of getting a hearing. If a hearing is held, and the company loses, no further action to collect the penalty is needed. The money in escrow goes directly to the government. Moreover, the failure to pay the money into escrow within 30 days after a penalty is assessed constitutes a waiver of the right to a hearing, and any other right to contest the penalty. At this stage the company may no longer contest the fact of the violation or the amount of the penalty, and collection becomes a relatively simple judicial procedure.

Conclusion

Many of the enforcement mechanisms described here offer useful ideas for achieving better compliance with the law. Many of these mechanisms are under-utilised or abused by the agencies responsible for them in the United States, but each of those mechanisms described here, which has reached the stage of implementation, appears to have worked well when properly implemented by the agency. Hopefully, they suggest some innovative approaches for regulatory agencies in Australia.