PROSECUTING THE CROWN FOR ENVIRONMENTAL OFFENCES

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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
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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.

**References**

Starke, J.G. 1990, "The High Court’s new approach to the question whether the Crown is bound by a statute", *Australian Law Journal*, vol. 64, no. 9, pp. 527-30.

# Appendix I

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

<table>
<thead>
<tr>
<th>Case</th>
<th>Act/Section</th>
<th>Maximum Penalty</th>
<th>Actual Penalty</th>
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<tbody>
<tr>
<td><strong>SPCC v. Electricity Commission</strong> 1. 11/10/91 2. 6/12/91</td>
<td>s. 16(1) Clean Waters Act</td>
<td>$40000</td>
<td>$15000</td>
</tr>
<tr>
<td><strong>SPCC v. State Transit Authority of NSW</strong> 1. 26/10/91</td>
<td>s. 16 Clean Waters Act</td>
<td>$40000</td>
<td>$15000 + costs of $7979</td>
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<tr>
<td><strong>SPCC v. Water Board</strong> 1. 4/2/92</td>
<td>s. 16 Clean Waters Act</td>
<td>$40000</td>
<td>$15000 + $904.79 clean-up costs</td>
</tr>
<tr>
<td><strong>Hunter Water Board v. State Rail Authority</strong> 1. 12/2/92 2. 23/3/92</td>
<td>s. 16(1) Clean Waters Act</td>
<td>$40000</td>
<td>$25000 + $1000 for each of 2 days</td>
</tr>
<tr>
<td><strong>Environment Protection Authority v. Water Board</strong> 1. 25/3/93</td>
<td>s. 14(2) Clean Air Act</td>
<td>$40000; $20000 daily penalty</td>
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<tr>
<td><strong>Environment Protection Authority v. Electricity Commission of NSW</strong> 1. 26/7/93</td>
<td>s. 16(1) Clean Waters Act</td>
<td>$125000</td>
<td>$25000</td>
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APPENDIX II

Prosecutions commenced in the New South Wales Land and Environment Court

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Prosecutions Commenced</th>
<th>Year</th>
<th>Number of Prosecutions Commenced</th>
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<tbody>
<tr>
<td>1980</td>
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</tr>
<tr>
<td>1981</td>
<td>12</td>
<td>1988</td>
<td>40</td>
</tr>
<tr>
<td>1982</td>
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<td>1989</td>
<td>193</td>
</tr>
<tr>
<td>1983</td>
<td>17</td>
<td>1990</td>
<td>325</td>
</tr>
<tr>
<td>1984</td>
<td>15</td>
<td>1991</td>
<td>143*</td>
</tr>
<tr>
<td>1985</td>
<td>19</td>
<td>1992</td>
<td>37*</td>
</tr>
<tr>
<td>1986</td>
<td>35</td>
<td>1993</td>
<td>22*</td>
</tr>
</tbody>
</table>

(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 Parliament 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.