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

Zada Lipman

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 (\textit{R v. Woodrow} (1846) 15 M & W 404, 153 ER 907; \textit{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 \textit{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 \textit{R v. City of Sault Ste Marie} (1978) 85 DLR (3rd) 161, (approved by the High Court of Australia in \textit{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:

\begin{quote}
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 (\textit{R v. City of Sault Ste Marie} at 165).
\end{quote}

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:

\begin{quote}
\ldots 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.
\end{quote}

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
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) 29 NSWLR 497). 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.
Application of General Principles of Criminal Law to Environmental Law

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" 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 . . .
- 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.

References

Environment Protection Authority 1993, Draft Prosecution Guidelines, NSW
Environment Protection Authority, Sydney.
Fisse, B. & Braithwaite, J. 1988, "The allocation of responsibility for corporate crime:
Individualism, collectivism and accountability", Sydney Law Review, vol. 11, no. 3,
pp. 468-513.
Hartcher, Hon. C. 1993, Address to the Environment Institute of Australia, Parliament
House Theatrette, Sydney, 27 April.
Law Reform Commission of Canada 1985, Working Paper 44, Crimes Against the
Environment, Ottawa, Canada.
Remedies, 3rd edn, Butterworths, Sydney.
Ministry for the Environment July 1990, Establishing an Environment Protection
Authority for New South Wales, State of the Environment, No. 7, Office of the
Minister for the Environment, Sydney, vol. 33.
Segal, J. 1991, Lenders' liability under environmental law, unpublished paper, National
Environmental Law Association Pollution Conference, Sydney, 28-29 October.
Sutherland, E. 1945, "Is 'white collar' crime?", American Sociological Review, vol. 10,