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

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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
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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).


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, $250,000, 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 problems1.

### 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:

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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
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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.

\(^2\) *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 [ins]ufficient 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.

**Bibliography**

