ENVIRONMENTAL POLLUTION CONTROL
THE LIMITS OF THE CRIMINAL LAW

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"SEISMOGRAPHS RECORDING PUBLIC UPHEAVALS"

The development of environmental pollution control laws in New South Wales has been piecemeal, uneven and reactive to specific episodes. This is not an exceptional pattern. Its history in Britain has been described by Lord Ashby, former Chairperson of the Royal Commission on Environmental Pollution, as creating the impression that decision makers in Whitehall and Westminster are "no more than seismographs recording public upheavals".[2] Fundamentally, the problem is related to a fickle perception of environmental pollution - sometimes it is a neutral problem of market failure, sometimes of morally reprehensible behaviour.

That the pattern has not changed is evidenced by the latest political reaction in New South Wales to public anxiety about industrial pollution: the Environmental Offences and Penalties Bill 1989. Its hasty conception (and even hastier withdrawal), provides yet another example of a precipitate and legalistic response to social concerns. Most seriously, it demonstrates the piecemeal approach which has encumbered New South Wales with a patchwork of regulatory pollution controls. The 'system' is not only labyrinthine but, in design and implementation, has been overtaken by the changing nature of the control problems and significant shifts in public expectations. Burgeoning evidence of environmental harm, and sustained public concern, seem manifestly to call for a comprehensive response, based on thorough-going public debate. Essential ingredients of this debate would be an examination of the assumptions and values underlying pollution control, as well as imaginative re-thinking of strategies of enforcement.

The scope of this much-needed debate outstrips the limits of this paper. My more modest aim is to highlight some of the deficiencies in knee-jerk political reactions to environmental pollution concerns, such as the Environmental Offences and Penalties Bill. The interest for criminal lawyers is the predictable appeal to the symbolic force of the criminal law without, however, any appraisal of the likely outcome. The significant feature of the Bill is that it seeks to introduce draconian

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2 "Keynote Address" in Lack, T.J., ed, **Environmental Protection: Standards, Compliance and Costs** p 19

penalties into an arena which hitherto has been characterised by selective enforcement and strict liability, and in which prosecutions have rarely been vigorously defended.

"GOING FOR THE JUGULAR"

Stiffening the sinews of the criminal law against polluters has popular appeal for politicians. The previous government's attempts at law reform attracted newspaper headlines: "Bosses who pollute face jail"[3] and "Pollution: Govt's men face jail too".[4] The current New South Wales Minister of the Environment ushered in his government's latest attempt to strengthen anti-pollution laws with colourful bravado: "We are just going to go for the jugular of anyone breaking the law. We will take no prisoners", he is reported as saying.[5]

His strategy was the Environmental Offences and Penalties Bill (hereafter the Environmental Offences Bill). Four features of this Bill provide a framework for discussion:

- recourse to the criminal law;
- increased penalties;
- harnessing the civil law in aid of pollution control; and
- exclusive governmental enforcement.

It was the last feature that threatened the passage of the Bill through the Legislative Council and led to its withdrawal.

CRIMES AGAINST THE ENVIRONMENT

Criminal lawyers need not be reminded that the criminal law is a blunt weapon of social control. In environmental pollution control its use is residual, and the rationale elusive. The factors which trigger a decision to prosecute are varied, including both legislative and operational factors.[6] The legislative factors include the design of prescriptions and proscriptions, as well as the requisite intent (or absence thereof).[7] Not exceptionally, New South Wales legislation[8] is riddled with a confusing array of regulatory offences employing unsystematically a variety of terminology to require no, or low-grade culpability, and deserving of the criticism that:

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3 **Sydney Morning Herald** 21 July 1987 p 1

4 **Sydney Morning Herald** 22 July 1987

5 **Sydney Morning Herald** 10 April 1989 p 5

6 Richardson, G., Ogus, A. and Burrows, P., **Policing Pollution: A Study of Regulation and Enforcement** (1982); Hawkins, K., **Environment and Enforcement: Regulation and the Social Definition of Pollution** (1984); Grabosky, P. and Braithwaite, J., **Of Manners Gentle: Enforcement Strategies of Australian Business Regulation Agencies** (1986)

7 Rowan-Robinson, Watchman and Barker, "Crime and Regulation" (1988) **Criminal Law Review** 211, 212-214

8 The principal legislation referred to is the **State Pollution Control Commission Act** 1970 (SPCCA), **Clean Air Act** 1961 (CAA), **Clean Waters Act** 1970 (CWA), **Noise Control Act** 1975 (NCA), Waste Disposal Act 1970. The potential of the more innovative, but no less discretionary, **Environmentally Hazardous Chemicals Act** 1985 has yet to be explored in practice.

> perhaps we are to be faulted for not having developed some sort of classification scheme for analyzing environmental problems. The starting point in most disciplines is the creation of a taxonomy. We have no such taxonomy in environmental law. We talk about existing and valued industries, which might find it very difficult to abate their pollution problems; at the same time, we talk about individuals who knowingly dump toxic chemicals in the dark of night, and we fail to distinguish between them.[9]

Had the Environmental Offences Bill passed into law, a crime against the environment, supported by the toughest penalties yet enacted in Australia, would have appeared on our statute books. The Bill sought to criminalise:[10]

- wilfully or negligently disposing of waste without lawful authority
- wilfully or negligently causing any substance to leak, spill or escape from a container without lawful authority.

In both cases the offence depended on commission "in a manner which harms or is likely to harm the environment".

Conventionally such substantive offences, related fundamentally to environmental protection, are rare in contrast to the proliferation of regulatory offences related to failure to comply with administrative or procedural requirements.[11] For reasons of scientific and technological uncertainty, difficulties in defining and enforcing environmental standards, and, above all, ideological ambivalence, the criminal law is largely used to support the regulatory process rather than protect the environment from harm.[12] Pollution offences have been put in the category of "public welfare offences",[13] "not criminal in any real sense".[14]

Measures such as the Environmental Offences Bill more clearly communicate the moral opprobrium which the community attaches to environmental pollution. Criminalisation and codification of more serious forms of pollution is a trend apparent in other jurisdictions. Unlike New South Wales, however, it is being accompanied by extensive consultation and reflection on the contribution of the criminal law to environmental protection.[15] A Working Paper of the Canadian Law Reform Commission on *Crimes Against the Environment* justified several years of consultation, going beyond most Commission Working Papers, and four drafts, by

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9 Franson, R.T., "Procedure in Environmental Regulation: Comment" in Finkle, P. and Lucas, A., eds, **Environmental Law in the 1980s: A New Beginning** (1981) 126

10 Clauses 5 and 6 respectively

11 Fisher, D.E., "Environment Protection and the Criminal Law" (1981) 5 **Criminal Law Journal** 184

12 Unlicensed water pollution, however, is an offence: **Clean Waters Act** 1970 s.16

13 **R. v. City of Sault Ste. Marie** [1978] 2 S.C.R. 1299

14 **Alphacell Ltd v. Woodward** [1972] A.C. 824, 848; **Majury v. Sunbeam Corporation Ltd** [1974] 1 NSWLR 659

15 See, for example, Council of Europe, **The Contribution of Criminal Law to the Protection of the Environment** (1978); Law Reform Commission of Canada, **Crimes Against the Environment**, Working Paper 44

the novel, urgent and in some respects controversial nature of its proposal.[16] The proposal was to codify a new offence of a "crime against the environment", predicated on the view that the natural environment had now become an interest explicitly protectable in the Criminal Code:

> Some acts or omissions seriously harmful or endangering to the environment should, if they meet the various tests of a real crime, be characterized and prohibited for what they really are in the first instance, crimes against the environment.[17]

'Real criminality' is satisfied if the offence contravenes a fundamental value; if it is seriously harmful; if it is committed with the required mental element; if enforcement measures would not themselves contravene fundamental values; if treating it as a crime would make a significant contribution to dealing with the harms and risks it creates.[18] The Commission had no doubt that intentional, reckless or negligent[19] acts or omissions seriously damaging or endangering the environment should be prosecuted as 'real crimes' in accordance with unmodified criminal procedure.

The Commission, however, was not prepared to go so far as to acknowledge an intrinsic right of *the environment* to be protected from serious pollution. Risk to human health, or impairment of human use and enjoyment of nature, were the points of reference. The fundamental value which was identified as being contravened by environmental pollution remained essentially anthropocentric: the right to a safe environment, or the right to a reasonable level of environmental quality. No basic reorientation of values to embrace an ecocentric ethic is involved, but merely a development of the traditional values of sanctity of life, the integrity of persons, and the centrality of human life and health.[20]

The Commission emphasised the limits of its proposal as a response to environmental pollution. The criminal law should be employed with great restraint and as a last resort. The function of a crime against the environment, in the Commission's view, is to fill a gap in existing legal defences against environmental pollution; namely to provide the important goal of *value underlining*, by means of repudiating and deterring instances of gross environmental pollution.[21] In this role it would complement and reinforce existing and evolving regulatory/administrative techniques and civil remedies. The Commission acknowledged that administrative and civil enforcement, focussing on *prevention* and *compliance*, would remain the front-line defences.

This careful process of law reform contrasts unfavourably with the *ad hoc*, add-on approach which characterises pollution control legislation in New South

16 Law Reform Commission of Canada, **supra** n.15 at 1. For an update on legislative developments in Canada (in Ontario and at Federal level), see Jeffery, M., (1990) 7 **Environmental and Planning Law Journal** 61

17 **id.** 2

18 **ibid.**; Law Reform Commission of Canada, **Our Criminal Law**, Report 3 (1976)

19 The degree of negligence required should be that which falls well below the standard of reasonable care required for ordinary or civil negligence: **supra** n.16 at 31-33

20 **supra** n.16 at 14-15

21 **supra** n.16 at 43

Wales. While the Commission's proposal leaves untouched the vast regulatory field, it contains the seeds of a taxonomy within which the criminal law could be confined to its morally significant, but effectively limited, sphere. The New South Wales public, on the other hand, was offered the Environmental Offences Bill as a panacea. Yet the Bill, and the debate which has surrounded it, leaves at large fundamental practical and policy issues relating, for example, to the required mental element and threshold of environmental harm. Given that there can be no scientific measurement of ecological tolerance, we are thrown back on social and regulatory definitions of environmental harm. It might be expected therefore that close attention be given to the values and interests sought to be protected by the the criminal law.

INCREASING FINES: "FLAT-EARTH THINKING"[22]

Increasing conventional penalties for environmental pollution offences has been a common political response to growing evidence of environmental degradation and mounting public anxiety.[23] The Environmental Offences Bill provides for maximum fines of $1 million in the case of corporations and in other cases, $150,000 or seven years imprisonment.[24] Provision is also made for proceedings against directors and management of offending corporations;[25] and orders for restoration and compensation.[26]

Maximum penalties for unlawful waste disposal (which is not prosecuted as an incident of water pollution or a breach of air pollution legislation) have been historically low and a good case can be made for increasing them.[27] Beyond this, however, making provision for high maximum fines is a limited and unimaginative response, although it might have immediate public appeal. Low rates of prosecution and low fines have bred public disillusionment with pollution control law and enforcement. But public perception and political response proceed on a limited

22 "It is flat-earth thinking...to suppose that the range of options begins and ends with fines": Fisse, B., "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 **Southern California Law Review** 1141, 1243

23 And see Jeffrey, **op.cit. supra** n.16. Calls for increased prosecution and harsher sentencing can also be found in academic journals; for example, Comment, "Putting Polluters in Jail: The Imposition of Criminal Sanctions on Corporate Defendants under Environmental Statutes" (1985) 20 **Land & Water Law Review** 93

24 Clause 11. As usual, an alternative procedural route via the Local Court and carrying lower penalties is also available - a salutary provision lest enforcement officers be deterred from pursuing minor violations. Maximum fines which the Land and Environment Court can impose for the serious offences under the CAA and CWA are, for corporations, $40,000, plus, in the case of a continuing offence, $20,000 for each day the offence continues; for individuals, $20,000 plus $10,000 per day (CAA s,32; CWA s.16; SPCCA s.17D (breach of licence condition), s.17K (breach of condition of pollution control approval)

25 Clause 10. See also SPCCA s.30B

26 Clause 14. See also CWA s.33A, SPCCA s.30A, CAA s.33A

27 A successful prosecution under the **Waste Disposal Act** 1970 (NSW) provides a rare example of a maximum penalty being imposed for a pollution offence: **Farrell v. Bridge** (unreported, Land and Environment Court, 23 August 1988) - $1,000

understanding of the prosecution and sentencing process, and persistent ambivalence surrounding sentencing objectives, in environmental law. They also overlook the deficiencies of the fine to sanction the most common defendants, namely corporations. The conclusions of an unfortunately rare study of sentencing in environmental cases are instructive:

> The major problem in sentencing is not the one perceived by the public - that fines are generally too low. In fact, the average fine handed down by the courts is commensurate with the gravity of the typical offence that comes before the court and the means of most small offenders...
>
> The problems lie not with the fine levels in typical cases, but with matters such as the inadequacy of the fines as the sole sanction available, the lack of available alternatives to the fine, the substantive law relating to corporate liability, and the fact that the same offences may entail so many degrees of risk and culpability that fines appear to the public to be too low even when they may be appropriate to the circumstances of the case.[28]

The study suggests that it is the exceptional case that gives rise to problems in sentencing. Even then only some of these problems can be addressed by higher fines. What is needed is an exploration of alternative sentencing options. As the 'big' polluters are by and large corporations, a range of sanctions which can be tailored to the economic, reputational and organisational characteristics of violators would seem to be justified.[29]

Environmental lawyers have much to learn from the literature on corporate criminal law. Negatively, it provides insights into the inadequacies of the fine to serve either the goals of corporate deterrence or retribution.[30] Positively, imaginative resolution of the vexed questions surrounding liability and punishment of corporations would have significant implications for environmental protection through the criminal courts,[31] as well as for the design and application of environmental standards.[32] Innovations designed to activate institutional and structural reforms within the corporation - such as a concept of corporate fault based on the offender's responses to harm-causing or risk-taking[33] - would further long-term goals of restoring and maintaining environmental quality. So also would

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28 Swaigen, J. and Bunt, G., **Sentencing in Environmental Cases**, a Study Paper prepared for the Law Reform Commission of Canada (1985) p 71

29 DiMento, J.F., **Environmental Law and American Business - Dilemmas of Compliance** (1986) pp 178-179

30 See, for example, Fisse, **op.cit. supra** n.22. With respect to the "deterrence trap", see Coffee, "'No Soul to Damn: No body to Kick': An Unscandalized Inquiry into the problem of Corporate Punishment" (1981) 79 **Michigan Law Review** 386, 389-393

31 See, for example, Fisse, **op.cit. supra** n.22; Fisse, B. and Braithwaite, J., "Corporate Offences: The Kepone Affair" in Weston, R., ed, **Combatting Commercial Crime** (1987) Ch.4

32 See, for example, Braithwaite, J., "Enforced Self-Regulation: A New Strategy for Corporate Crime Control" (1982) 80 **Michigan Law Review** 1466; Fisse, B. and French, P., "Corporate Responses to Errant Behaviour: Time's Arrow, Law's Target" in Fisse and French, **Corrigible Corporations and Unruly Law** (1985) Ch.10

33 Fisse and French, **op.cit. supra** n.32

potentially more interventionist penalties such as probation, adverse publicity, community service and punitive injunctions.[34] Equity fines would facilitate the objective of deterrence, with the added appeal that environmental interest groups could be designated as beneficiaries of the shares.[35]

The design of sanctions depends on clarifying the rationale for punishment, which in turn will indicate the required facts for an appropriate application of sanctions. Currently the assessment of penalties is unsatisfactory in both respects, proceeding as it does in a milieu of conflicting values and on an inadequate factual basis. The Environmental Offences Bill represents a new departure by providing an inclusive checklist of matters to be considered in imposing penalties. In substance, it probably does no more than articulate factors which currently influence the sentencing process. These factors also explain the relatively low penalties which courts at present impose. Clause 9 lists as relevant considerations:

- the extent of the harm caused or likely to be caused to the environment by the commission of the offence;
- the practical measures which may be taken to prevent, control, abate or mitigate that harm;
- the extent to which the person who committed the offence could reasonably have foreseen the harm caused or likely to be caused to the environment by the commission of the offence;
- the extent to which the person who committed the offence had control over the causes which gave rise to the offence;
- whether, in committing the offence, the person was complying with orders from an employer or a supervising employee.

It is not surprising that the courts resile from imposing high penalties when the assessment process involves balancing ecological, economic and technical considerations, and assimilating degrees of culpability. A specialist court, such as the Land and Environment Court, may be expected to be attuned to intangible and non-utilitarian values, but the reality is that these values must compete with contrary objectives embodied in conventional principles of criminal justice and the ideology of economic growth. Quite apart from the courts' competence to evaluate these considerations, the trial process does not usually generate an adequate factual basis. Inviting the courts to impose high penalties, even gaol sentences, will inevitably influence the exercise of both prosecution and sentencing discretion. But *how* it will do so is an issue which law reform in New South Wales has not addressed. Certainly the Environmental Offences Bill does little to resolve the ambiguity surrounding the

34 See, for example, Fisse, "Sanctions Against Corporations: The Limitations of Fines and the Enterprise of Creating Alternatives" in Fisse and French, **op.cit. supra** n.32 Ch.7

35 **ibid.**; Coffee, **op.cit. supra** n.29

justification for punishment. Still less does it provide a framework for resolving conflicting values.

"'CIVILISING' CRIME"[36]

Developing a taxonomy of environmental offences, and thinking creatively about issues of corporate fault and punishment, would contribute substantially to the justification and application of civil remedies.[37] The trend, long apparent in the United States, towards resolving patterns of pollution control in favour of civil remedies,[38] has been driven largely by expediency. The criminal fine has been recognised as being too blunt a weapon, and the criminal process too cumbersome and onerous, and not well-suited to corporations and other business organisations.[39] The evidentiary and procedural safeguards have been regarded as being based on irrelevant premises: pollution offences are 'morally neutral' and neither stigma nor severe punishment attaches to conviction.[40] Retaining strict liability, but applying it in a non-criminal context, is said to effect a compromise between its proponents and critics.[41] It is further claimed that civil enforcement meets the objection that, in practice, 'blameworthiness' is prejudged at agency level.[42] Above all, there is the instrumental justification that the civil law encompasses an array of remedies, including fines, damages and injunctions which are more flexible, interventionist and effective in addressing the overarching objectives of pollution control policy:

> The regulator can fashion civil remedies such as the injunction to address the specific causes of noncompliance. Government can enjoin a firm from using its sewer outlet to dispose of toxics; each such use is a violation. A manufacturer may be instructed to produce an emission control device according to detailed standards. Government can direct a handler

36 The expression is that of Arie Freiberg, "'Civilising' Crime: Parallel Proceedings and the Civil Remedies Function of the Commonwealth Director of Public Prosecutions" (1988) 21 **Australian and New Zealand Journal of Criminology** 129

37 See, for example, Fisse, **supra** n.22

38 Morris, J.S., "Environmental Problems and the use of Criminal Sanctions" (1972) 7 **Land and Water Law Review** 421; Grad, F., **Environmental Law** 2.08

39 Kovel, A., "A Case for Civil Penalties: Air Pollution Control" (1969) 46 **Journal of Urban Law** 153; Grad, **supra** n.38. See also Kadish, "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations" (1963) 30 **University of Chicago Law Review** 423; Developments in the Law, "Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions" (1979) 92 **Harvard Law Review** 1227, 1365-1375

40 Kovel, **supra** n.39; Grad, **supra** n.38

41 Olds, D., Unkovic, J.C. and Lewin, J.L., "Thoughts on the Role of Penalties in the Enforcement of the Clean Air and Clean Water Acts" (1977) 17 **Duquesne Law Review** 1, 17. But strict liability needs to be understood within the totality of the regulatory scheme: Richardson, G., "Strict Liability for Regulatory Crime: the Empirical Research" [1987] **Criminal Law Review** 295

42 Richardson, **supra** n.41

of hazardous waste to indicate the nature of the contents of drums and to report those contents according to published schedules.[43]

As Coffee has observed, it is "a curious paradox that the civil law is better equipped at present than the criminal law to authorize these interventions".[44]

In the United States, the civil process is widely used, by both agencies and citizens, in preference to criminal enforcement. In addition to injunctive relief, substantial civil penalties are available, designed to deprive the offender of the economic advantage obtained from its polluting activities, or the benefit which the violator receives from non-compliance with standards. Citizen suits extend to enforcing agency duties,[45] and more controversially, under state legislation such as the *Michigan Environmental Protection Act*, to obtaining declaratory or equitable relief against practically any defendant "for the protection of air, water and other natural resources and the public trust therein from pollution, impairment or destruction".[46]

Instructive contrasts have been drawn between the more open, rule-oriented and adversary administrative and political culture of the United States and the secretive, highly discretionary and conciliatory Anglo-Australian tradition.[47] The compliance strategy in New South Wales, reinforced by legislation which is neither agency nor technology forcing, has meant infrequent resort to the criminal, still less the civil, jurisdiction of the courts.[48] The NSW Land and Environment Court has civil jurisdiction to enforce the State's pollution control legislation,[49] but standing to invoke it has not been conferred on 'any person', nor until recently have agencies attempted to use it. The pattern may be changing. The Metropolitan Waste Disposal Authority recently sought an order to freeze assets of a company charged with offences under the *Waste Disposal Act* so as to provide a fund for the payment of fines and costs in the event of conviction. Although the Land and Environment Court held that it had no jurisdiction to make such an order, it did extend standing, in an appropriate case, to statutory corporations and instrumentalities to enforce through the civil jurisdiction the statutory scheme for which they are responsible.[50]

The Chief Judge of the NSW Land and Environment Court has expressed his preference for civil enforcement of obligations imposed under environmental laws, including pollution control legislation. He has further argued in favour of a power to

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43 Dimento, J.F., **Environmental Law and American Business - Dilemmas of Compliance** (1986) p 49

44 Coffee, **supra** n.30 at 459

45 See the landmark case of **Sierra Club v. Ruckelshaus** 344 F.Supp. 253

46 There is similar legislation in Illinois, Minnesota, Massachusetts and Ohio.

47 See, for example, Vogel, D., **National Styles of Regulation** (1986)

48 With respect to enforcement strategy, see Grabosky, P. and Braithwaite, J., **Of Manners Gentle** (1986) Ch 3 Or (at p 2) non-strategy!

49 **Land and Environment Court Act** 1979 (NSW) s.20(3)

50 **Farrel v. Dayban Pty Ltd** (unreported, 7 June 1989); following **Peek v. NSW Egg Corporation** (1986) 6 N.S.W.L.R. 1. Contrast **Sydney City Council v. Lewy** (1986) 58 L.G.R.A. 221

award aggravated or exemplary damages to reflect the community's sense of outrage in an appropriate case:

> [i]t is not hard to envisage circumstances where it would be appropriate for the Court to have that power. Breaches of some environmental laws as, for example, the **Clean Air Act** and the **Clean Waters Act** often have serious consequences. It may be impossible to quantify the cost of rectification. Ordinarily, serious damage would be presumed but such damage might not be quantifiable. Such an example would be where toxic waste is unlawfully discharged into the sea. A proposal for damages in aid of civil enforcement of statutory obligations is not really novel. ... Under the proposals I have in mind, exemplary damages would go to the regulatory authority or to the State to be used for the furtherance of the objectives of environmental laws, one of which might be the provision of legal aid to appropriate bodies such as the Environmental Defenders Office if the 'standing' rules were removed.[51]

The Environmental Offences Bill reinforces a trend towards civil remedies. In addition to providing for the recovery of expenses for abatement and clean-up, and damages for property loss, both at the time of and after conviction,[52] it seeks to empower the Court to make a "restraining order" over any property of the defendant where the defendant may be required to make such payment or compensation.[53]

Furthermore, independently of the criminal process, the Environmental Offences Bill, seeks to extend the civil jurisdiction of the Land and Environment Court by authorising proceedings to restrain a breach, or apprehended breach, of the *Act, or any other legislation*, where the breach is causing or is likely to cause harm to the environment.[54] Proceedings, however, can only be brought by the Minister for the Environment or a person authorised by the Minister. There is justifiable public sceptism about the effectiveness of such a jurisdiction, especially in respect of public sector polluters, as long as it is left exlusively in the hands of the Minister.

Civil proceedings to remedy or restrain breaches of legislation have become an established mechanism in New South Wales for enforcing environmental planning and assessment law against public and private defendants. The criminal law is rarely invoked. Moreover, unlike the proposed Clause 25 of the Environmental Offences Bill, civil proceedings may be brought by *any* person without having to show common law standing or any other qualifying interest.[55] Parallel civil proceedings are available to enforce natural and cultural heritage legislation,[56] as well as the *Environmentally Hazardous Chemicals Act* 1985.[57]

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51 Justice Cripps, "Administration of Social Justice in Public Interest Litigation", Speech to the International Conference on Environmental Law, Sydney, 16 June 1989

52 Clauses 14 and 15

53 Clause 16

54 Clause 25

55 **Environmental Planning and Assessment Act** 1979 (NSW) s.123; **Sydney City Council v. Building Owners' and Managers' Association of Australia Ltd** (1985) 55 L.G.R.A. 444

56 **Heritage Act** 1977 (NSW) s.153; **National Parks and Wildlife Act** 1974 (NSW) s.176A; **Wilderness Act** 1987 (NSW) s.27

57 Section 57, which has never been used

A trend towards diversifying the scope and intensity of available remedies for pollution must be welcomed. It remains, however, to address the charge that civil enforcement further marginalises pollution offences. While offenders and even regulators may continue to view pollution offences as 'morally neutral activities with unfortunate side-effects', public perception is increasingly that they are grave and blameworthy.[58] It is thus imperative that multiple strategies be accompanied by principles which recognise the even greater diversity, in terms of nature and impact, of pollution incidents. Such principles are needed to inform the design of legislation as well as to structure enforcement discretion. In particular, clarity of thinking and principle is needed to demarcate the civil/remedial from the criminal/punitive so as to preserve the integrity of the judicial process and guard against abuse of civil penalties as substitutes for criminal penalties.[59]

ENDANGERING THE CO-OPERATIVE RELATIONSHIP

The demise of the Environmental Offences Bill was attributable to the Government's unyielding resistance to public involvement in law enforcement. Insofar as the point of contention is exclusion of the public from *criminal* enforcement,[60] it must be a rare private prosecutor who is able and willing to essay the hazards and hurdles of the criminal process. Outside the criminal jurisdiction, however, the New South Wales public has come to expect a role in questioning the legality, sometimes even the merits, of public and private behaviour in relation to the environment. The exclusion of the public from pollution control is historically explicable, but no longer (if ever it was) acceptable.

Historically, within the Anglo-Australian tradition, environmental 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, from law-making to law enforcement. Even the public, independent forum of the courts has been avoided, except where co-operative relationships have broken down. The closed, technocentrist attitude is typified in the indefensible response of the UK Chief Alkali Inspector to pressure for the public to be better informed about air pollution.[61] While accepting the need, he added the familiar qualifications: the inability of members of the public to understand technical data and that the Inspectorate should not be diverted from its real tasks "to the non-productive task of educating numerous enquirers". More particularly it would be wrong to endanger the practice of co-operative relationships with industry. Citizen suits, it is likewise argued, may distort agency objectives, upset enforcement priorities and divert resources.

58 Swaigen and Bunt, **supra** n.28 at 16

59 Olds, **et al**, **supra** n.41 at 17, 25. For a discussion of the 'civilisation' of organised crime in response to public concern, and the latent problems therein, see Freiberg, **supra** n.35

60 Clause 13

61 108th Annual Report, H.M.S.O. 1971 pp 11-14

Public involvement, on the other hand, can been defended from various ideological perspectives. The arguments are well-known, including that "public involvement is the logical way to identify spillovers, to inform the making of value judgments and to keep the negotiation process open and accountable".[62] Often the utilitarian argument is advanced, as expressed by the editors of the first major international symposium on environmental pollution and individual rights:

> while many countries are already equipped with adequate legal and administrative structures for preserving environmental quality, they lack sufficient oversight and enforcement capabilities and are thus unable to administer their existing laws effectively.[63]

Fundamentally, however, its justification is that pollution is not a technical or enforcement problem, it is a problem of value conflicts and unequal power.[64] Any law reform measure needs to address the form of public involvement at all stages from rule-making, through negotiation, to enforcement.

CONCLUSION

It might be concluded from these cursory observations on the limits of the criminal law, the failure to develop creative remedies, and intransigent opposition to public involvement, that environmental thinking in New South Wales is simply in a state of infancy, lacking depth and sophistication. In a climate of growing public concern, such get-tough statements as "going for the jugular" will increase, but must remain at the level of popular and political rhetoric until more is done to understand the enforcement process and the contribution of sanctions and remedies.

I would suggest a more worrying conclusion: that measures such as the Environmental Offences Bill are selected because they offer a 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. The tactic is all the more insidious when combined with measures to redefine the problem in terms of individual responsibility. The pathology has been relocated from the system to the individual. It is not law reform, still less criminal law reform, that will advance environmental quality, but fundamental changes in political and economic priorities.

POSTSCRIPT

The Environmental Offences and Penalties Bill was reintroduced and assented to on 27 November 1989. Labor and Independent opposition to the Bill dissolved in the face of public support for more draconian penalties: "although far from perfect, it would allow higher maximum fines".[65] Within seven months, the Environment

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62 Thompson, A.R., **Environmental Regulation in Canada: An Assessment of the Regulatory Process** (1981) pp 42-43

63 McCaffrey, S.C. and Lutz, R.E., eds, **Environmental Pollution and Individual Rights: An Interantional Symposium** (1978) p xxiii

64 Gunningham, N., **Pollution, Social Interest and the Law** (1974) Ch 7

65 **Planning Our Environment**, a bi-monthly newsletter from Pam Allan, Shadow Minister for the Environment and Tony Doyle, Shadow Minister for Planning, No.2, December 1989

Minister and the State Pollution Control Commission have advised that the Act is being reconsidered.

In its final form, the Act retains liability for wilfully or negligently disposing of waste without lawful authority in a manner which harms or is likely to harm the environment (s.5). A reference to the disposal of waste includes a reference to the causing or permitting of the disposal of waste. It is also an offence to wilfully or negligently and without lawful authority cause any substance to leak, spill or escape from a container in a manner which harms or is likely to harm the environment (s.6). If the offender is not the owner of the substance, the owner is also guilty of the offence. Other persons may also be guilty under s.6 if they wilfully or negligently, in a material respect, caused or contributed to the conditions which gave rise to the commission of the offence. These persons are the person in possession of the substance at the time; the owner of the container; the owner of the land on which the container was located at the time; and the occupier of the land on which the container was located at the time. The onus of proving lawful authority rests on the defendant, under both ss.5 and 6. There is a defence to either charge which is for the defendant to prove; namely that the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision.

If a corporation contravenes the Act, directors or persons concerned in the management of the corporation are deemed to have contravened the same provision, subject to three defences. They can be prosecuted without having to bring proceedings against the corporation. *Corporate* criminal liability, however, remains unsatisfactory, there being no express provision overriding the principle in *Tesco Supermarkets v. Nattrass*.[66]

The maximum penalties for offences against the Act remain unchanged. Private prosecutions can only be brought with the consent of the Environment Minister or the State Pollution Control Commission. Proceedings against public sector polluters are effectively in the hands of the Minister alone. Provision is also made for restoration, compensation and damages, and the making of restraining orders over any property of the defendant.

Civil enforcement is retained (s.25). The range of persons who can bring proceedings has been extended to include the State Pollution Control Commission, or any other persons with the consent of the State Pollution Control Commission. The Court may make such orders as it thinks fit to restrain a breach of the legislation.

As at June 1990, seven charges under the *Environmental Offences and Penalties Act* had been laid, but proceedings have only been instituted against Caltex

66 [1972] A.C. 153. Contrast the **Industrial Chemicals (Notification and Assessment) Act** 1990 (Cth) s.109; **Hazardous Waste (Regulation of Exports and Imports) Act** 1990 (Cth) s.59

Refining Company Ltd. Caltex faces 16 charges under the *Clean Waters Act*, *State Pollution Control Commission Act*, and *Environmental Offences and Penalties Act*.

There are indications of a rapid escalation in criminal enforcement of environmental laws (not confined to pollution control laws). In the NSW Land and Environment Court's criminal jurisdiction (Class 5), there were 190 prosecutions in 1989, compared with 40 in the previous year. In the period January to June 1990, some 250 Class 5 prosecutions have been brought.[67] Although these statistics are unconfirmed, the trend is apparent.

67 I should like to thank Mr Matthew Baird, tipstaff to Justice Paul Stein of the Land and Environment Court, for his research assistance.