PROSECUTING DIRECTORS AND MANAGERS IN AUSTRALIA: A BRAVE NEW RESPONSE TO AN OLD PROBLEM?

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[Some environmental protection agencies in Australia have begun to prosecute directors and persons concerned in the management of corporations in recent years. There have, however, been few prosecutions so far, and in all cases similar defendants have been targeted. Agencies are now prepared to prosecute directors of smaller corporations and on-site managers in certain circumstances. There have, though, been no prosecutions involving directors of major corporations or more senior managers. This paper examines the factors that influence prosecutors when deciding whether or not to prosecute individuals and some of the legislative and practical difficulties they face, particularly in Victoria. It also puts forward proposals for change.]

CONTENTS

I INTRODUCTION

State environment protection agencies in Australia have the power to prosecute directors and those concerned in the management of corporations that breach environmental laws.[1] Express powers to prosecute not only offending corpora-

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[1] *Environment Protection Act 1970* (Vic) s 66B; *Environmental Offences and Penalties Act 1989* (NSW) s 10; *Environment Protection Act 1993* (SA) s 129; *Environmental Management and*

tions, but also those who control what they do, began to be inserted into State legislative regimes in the 1980s. These provisions were said to signal a hardening in attitude to corporate environmental non-compliance. The rationale was that pursuing directors and managers individually would promote better corporate performance because individuals managing companies would have a vested interest in ensuring that the corporations they ran performed well in order to avoid personal criminal conviction, any resultant fines, stigma and, in the worst scenario, going to jail.

Initially, these powers were not utilised by agencies who continued to take the approach of pursuing corporations, but not individual corporate actors, an approach which has been the norm in Australia for virtually all regulatory agencies.[2] The failure to use these powers undoubtedly sent a message to corporate players which was quite the opposite of that intended by the inclusion of such powers in the first place. In recent times though, agencies in Australia have begun to emulate the approach of their United States counterparts by prosecuting directors and managers for the offences committed by the companies they direct or manage.[3] There have, nevertheless, been few prosecutions to date.

It is intended in this paper to examine, firstly, the small number of prosecutions mounted against individual corporate actors to date in Australia, particularly those prosecutions undertaken in Victoria. Secondly, the discretionary factors which appear most to influence prosecutors and their clients in deciding whether or not to proceed against directors or managers will be identified. It will be argued that directors or managers who fit within the scope of what will be described below as a 'prosecution profile' are most likely to be pursued in the courts in addition to their corporation. Those outside the somewhat narrow scope of this profile are, at this point in time anyway, less likely to face prosecution. The paper also examines some of the legislative and practical difficulties prosecutors may encounter when contemplating prosecution of individual corporate officers, particularly in Victoria, and puts forward some proposals for change.

Pollution Control Act 1994 (Tas) s 60; *Environment Protection Act 1986* (WA) s 118; *Environment Protection Act 1994* (Qld) ss 182–3.

2 See further Peter Grabovsky and John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (1986).

3 Statistics reveal that in the United States, in 70 per cent of cases in which a prosecution against a corporation was mounted, prosecution of individuals as codefendants was also pursued: see further Mark Cohen, 'Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes' (1992) 82 *Journal of Criminal Law and Criminology* 1054, 1074. Smith has observed that 'Americans have taken a somewhat unorthodox approach to environmental crimes by focusing upon prosecution of corporate employees, managers, and directors': Susan Smith, 'Doing Time for Environmental Crimes: The United States Approach to Criminal Enforcement of Environmental Laws' (1995) 12 *Environmental and Planning Law Journal* 168, 168. It is an approach which she suggests has been, along with potential clean-up liability under the *Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 42 USCA s 9601 (West 1995) ('CERCLA'), one of the 'strongest forces ensuring environmental compliance': at 168

II PROSECUTIONS IN VICTORIA

In Victoria, s 66B was inserted into the *Environment Protection Act 1970* (Vic) ('the Act') in 1985.[4] It is similar to counterparts in many other jurisdictions. The section provides:

> (1) If a corporation contravenes, whether by act or omission, any provision of this Act or a notice or a licence or permit under this Act, each person who is a director or is concerned in the management of the corporation is also guilty of the offence which relates to the contravention and liable to the penalty for that offence.
>
> (1A) It is a defence to a charge brought under sub-section (1) against a person who is a director or is concerned in the management of a corporation if that person proves that —
>
> (a) the contravention by the corporation occurred without the knowledge of the person;
>
> (b) the person was not in a position to influence the conduct of the corporation in relation to the contravention;
>
> (c) the person, being in such a position, used all due diligence to prevent the contravention by the corporation; or
>
> (d) the corporation would not have been found guilty of the offence by reason of its being able to establish a defence available to it under this Act.

The section goes on to make it clear that a director or manager can be proceeded against whether or not the corporation is prosecuted. The section imposes strict liability in that it renders directors and those concerned in the management of a corporation guilty of offences committed by their corporation unless they can satisfy the reverse onus of proof and establish any one of the four defences.

The terms 'director' and 'those concerned in the management of a corporation' are not defined in the Act. However, similar terms in other regulatory legislation have been judicially interpreted. It has been held, for instance, that such terms will be construed strictly where they involve criminal liability.[5] In *Holpitt Pty Ltd v Swaab*, a similar expression in the then *Companies (NSW) Code 1981* (NSW) was said to include the board of directors, the managing director and other superior officers of a company who carry out the functions of management and speak and act as the company, including a delegate with discretion to act independently of instruction from the board.[6] The terms, it was said, did not include a person with a 'junior' role in a company who was not a director or a person whose management role could be likened to that of a director.[7]

[4] *Environment Protection (Industrial Waste) Act 1985* (Vic) s 36. See also a similar provision in the *Dangerous Goods Act 1985* (Vic) s 46(1).

[5] *Holpitt Pty Ltd v Swaab* (1992) 6 ACSR 488.

[6] Ibid 491. This definition could quite feasibly include insolvency practitioners in the position of administrator, receiver or liquidator.

[7] Ibid. See further *Commissioner for Corporate Affairs v Bracht* [1989] VR 821 where it was held that the phrase 'concerned in the management of a corporation' did not necessarily mean only persons who formed 'part of the board, nor even need they be executives': at 830. The term could, it was said, include a person whose involvement was 'more than passing', who had 'some responsibility, but not necessarily of an ultimate kind': at 832.

The enactment of a provision rendering directors and managers responsible for corporate offences provided another tool for the Victorian regulator to ensure corporate compliance with environmental laws. The difficulties faced by all manner of regulatory agencies in dealing with corporate clients are well documented.[8] A major problem in the environmental context is that a majority of environmental offences in Victoria (and, indeed, in Australia) are of strict or absolute liability, and the trade-off for liability without fault has been penalty regimes which impose little financial burden upon a corporation (particularly a large corporation) and which may easily be subsumed into the cost of doing business.[9]

This problem may be exacerbated where courts impose relatively lenient fines upon corporate offenders even by the standards set out in legislation. Victoria does not have a specialist court with jurisdiction to decide environmental prosecutions. Magistrates, who hear environmental prosecutions in Victoria,[10] are not infrequently inclined to impose penalties at the low end of the penalty scale, even where major corporate offenders are found guilty of environmental crimes.[11] This can cause frustration amongst enforcement officers and prosecutors who undertake a considerable amount of work in preparing a case for prosecution for what they sometimes perceive to be a very small return.[12]

[8] See further Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (1993); Brent Fisse and John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 *Sydney Law Review* 468.

[9] Penalties have been strengthened in some jurisdictions in recent years. The *Environmental Offences and Penalties (Amendment) Act 1990* (NSW), for instance, raised the level of fines significantly in NSW. Some corporate fines, for example, were raised from $40,000 to $125,000: sch 1. Fines for individuals were also raised, and imprisonment provided for where certain offences were proven. These increases were intended to address not only the results of inflation, but also community expectations that penalties for environmental crimes would reflect the seriousness with which they were viewed. As Mossop has pointed out, however, the increases in available penalties have not necessarily translated into correspondingly increased actual penalties: David Mossop, 'Sentencing Environmental Offenders in New South Wales' (1996) 13 *Environmental and Planning Law Journal* 423, 426. In Victoria, the maximum fine for a basic polluting offence where no fault is required to be proven is $20,000: *Environment Protection Act 1970* (Vic) s 67.

[10] All offences are summary in nature except s 59E of the *Environment Protection Act 1970* (Vic).

[11] A brief survey of EPA *Annual Reports* over the last decade reveals not only that the number of prosecutions in any given year is low (in 1992–93, for instance, there were 29 prosecutions: EPA, *Annual Report 1992–93* (1993) 60; in 1996–97 there were just 16: EPA, *Annual Report 1996–97* (1997) 67), but also that the penalties imposed are frequently at the low end of the scale. For example, in 1996–97 fines ranged from $1,000 to $7,500 per offence with fines of $10,000 or more in only two cases: EPA, *Annual Report 1996–97* (1997) 67. As one solicitor for the Victorian EPA has put it, 'the dollar value of the penalties imposed ... is, generally speaking, too low to have any meaningful deterrent effect on a corporation ... small penalties send a message that environmental offences are not looked upon as weighty matters': Ceide Zapparoni, 'Do We Need a Bigger Stick? Environmental Regulation' in National Environmental Law Association, *Conference Papers Presented to 'Managing Our Natural Environment: A Shared Responsibility' — The 16th National Environmental Law Association Conference* (1997) 171, 173–4 The *Annual Reports* in recent years also reveal a steady decline in prosecutions. In 1989–90 some 50 defendants were prosecuted: EPA, *Annual Report 1989–90* (1990) 60; whereas in 1996–97 not even half that number of prosecutions occurred: EPA, *Annual Report 1996–97* (1997) 67.

[12] Similar frustration was described by Hawkins as a result of his research into the operation of an environment protection agency in the United Kingdom: Keith Hawkins, *Environment and Enforcement* (1984) 188.

As a result, criminal prosecution of corporate offenders may become, for enforcement officers, a discretionary option of last resort. They prefer to invoke 'in-house' administrative law measures, such as pollution abatement notices and notices of contravention, rather than rely on external 'non-specialist' decision-making.[13] These enforcement mechanisms enable an officer to keep control over a matter within the agency. 'Private' methods of enforcement are pursued because 'public' methods are perceived to be failing. This can, however, have the undesirable effect of perpetuating any problems caused by lack of judicial expertise since magistrates are, as a consequence, given few opportunities to hear a matter. This is not to say that frustration does not occur in jurisdictions that do have specialist courts. They too may impose penalties which enforcers consider to be too lenient in matters where fault is not required to be proven. The situation may, however, be more problematic where individual decision-makers have very limited experience of environmental offences.

The criminal law, in this scenario, becomes marginalised. It is intended, within the regulatory scheme, to be used as a 'big stick' against those corporations that breach environmental laws or refuse to cooperate with regulators. Once it becomes clear that the big stick of prosecution may lead to no more than a bond without conviction or a 'slap on the wrist' type of fine, its effectiveness as a regulatory tool may be severely compromised.[14]

Prosecution of individual corporate officers was perceived to be an alternative way to focus the controlling wills and minds of a corporation — that is, its directors and managers — towards ensuring compliance. A director or manager faced with personal criminal conviction and any attendant stigma, the possibility of a fine or a term in jail, is less likely, it may be supposed, to be sanguine about breaches of the law by the entities they control. Where individual prosecution is concerned, the mere commencement of a prosecution against an individual may arguably have more impact on future behaviour than the conviction and fine of a company. Furthermore, the defence of due diligence offered to individuals in s 66B(1A) is intended to encourage the implementation of adequate corporate environmental management systems ('EMS') because the existence of an EMS might be used as evidence of due diligence where a prosecution does occur.[15]

[13] An examination of the EPA's *Annual Reports* over the last decade shows administrative measures are invoked far more numerously than criminal measures.

[14] While a 'win' in court may be seen by officers as a symbolic victory, the small fines imposed can also damage an officer's credibility, and, in some cases, may even be perceived by the defendant as a 'win'. Hawkins has made the point that the threat of prosecution may sometimes be more effective than actual prosecution because it does not reveal to those being regulated the often ineffectual reality of criminal prosecution: Hawkins, above n 12, 149–51.

[15] ISO 14000 is an emerging international standard. A central element of the standard is the preparation of an environmental policy that is defined by senior management. A system is then defined to ensure that this policy is carried out by the organisation. It involves aspects of planning, implementation, checking and review to ensure the system is working satisfactorily. The standard requires an organisation, inter alia, to put into place a management system that sets out a company's environmental effects and demonstrates how it will meet (or even exceed) legal requirements. The British standards BS 7750 suggests an EMS should contain certain elements if it is to be effectively relied upon as evidence of due diligence. They include identification of management and staff responsibilities for environmental performance and a system of records evidencing compliance with the EMS: *BS 7750* (1992).

Despite these perceived advantages, there were no prosecutions in Victoria under s 66B until April 1997. For 12 years the power to act against individual directors or managers who did not take their environmental responsibilities seriously lay dormant. The long period of delay in utilising the power in s 66B can be explained as being consistent with the EPA's enforcement approach, particularly in the 1990s. While in the 1980s the EPA was a moderately strict enforcer and the enforcement division was better funded than any other division at that time,[16] the situation has changed in recent years and the emphasis has been upon collaborative approaches to enforcement. Even though the Victorian and New South Wales agencies were in the '80s (and arguably still are in the '90s) the most adversarial of all Australian environment bodies,[17] neither agency has implemented a true 'sanctioning strategy' of enforcement. All agencies in Australia, to a greater or lesser degree, have engaged in a 'compliance strategy' for enforcement.

Enforcement based upon a sanctioning strategy would, as Hawkins has pointed out, involve a policy of achieving conformity to regulatory standards in a way more closely related to the way in which 'traditional' crimes (such as theft and assault) are dealt with.[18] Punishment follows the breaking of a rule and enforcers are judged to some degree on the 'statistics of success', that is, the number of successful prosecutions. Compliance strategies of enforcement, by contrast, involve achieving conformity with regulatory standards through negotiation and gradually increasing pressure on the uncooperative. Prosecution is not a sign of success, but of failure because more 'reasonable' means have failed. The criminal law is the ultimate pressure or threat to achieve cooperation, and prosecution occurs when other means have not worked. Significant prosecutions may be viewed as the 'statistics of failure'.

These methods of enforcement are 'shifting points on a continuum'[19] and the Victorian EPA has moved, in this decade, further into a compliance strategy and away from the sanctioning strategy. The number of prosecutions has dropped since the high watermark of the mid '80s and a policy of 'working with industry' has been the norm. It may be thought, therefore, that the recent activation of s 66B involves another shift back along the continuum, thereby bringing the EPA closer towards a sanctioning strategy of enforcement. However, it could also be said that the activation of s 66B involves no more than a typical compliance strategy approach, and that prosecution of individual corporate actors has begun to occur in situations where other methods have failed. The discussion below, it is contended, supports the latter interpretation.

16 EPA, *Annual Report 1989–90* (1990) 5.
17 Grabovsky and Braithwaite, above n 2, 38
18 Hawkins, above n 12, 12.
19 Ibid 4.

A *The Prosecutions*

All the matters which have so far been prosecuted in Victoria were in regard to Level 2 offences under the Act.[20] These are all summary offences, and were therefore prosecuted in the Magistrates' Court. In all three cases, charges against individuals were laid in addition to charging the corporation involved in the alleged contravention.

What follow are brief case studies of the incidents which led to prosecution, and then a discussion of the factors which appear to have most influenced prosecutors to proceed against individual corporate actors as well as the corporations concerned.

In the first prosecution pursued under s 66B,[21] a company and its managing director were convicted for causing an environmental hazard by storing prescribed industrial waste (including organic solvents and other toxic and flammable substances) in contravention of s 27A(1)(c) of the Act, and for unlicensed storage of prescribed industrial waste pursuant to s 27(1A) of the Act. The company was also convicted of transporting the waste without a transport certificate pursuant to s 53I of the Act. The charges arose as a result of a spill of an oily substance at the company's premises which resulted in the attendance of two officers from the EPA. In the course of dealing with this matter, the officers observed numerous drums on-site which were both stained and stacked in a disorderly fashion and were labelled in such a way as to suggest they contained flammable liquids. Samples were obtained and charges later laid against the company and its managing director.[22] Both defendants pleaded guilty to the offences outlined above and were convicted and fined $5,000 and $2,000 respectively, being jointly and severally liable for those fines.

The second prosecution[23] involved four defendants. The charges arose out of an incident that required the attendance of both the Country Fire Authority of Victoria and the EPA, and resulted in the evacuation of the company's site and 21 premises in the surrounding area. In this case, a self-employed driver, whom the company had contracted to deliver sulphuric acid, and the manager of the depot from which the delivery was made, were prosecuted pursuant to s 41(2)(b) of the Act for polluting the atmosphere so that it became 'offensive to the senses of

[20] The Act effectively classifies offences into four levels. Level 1 offences are few. They include the offence of aggravated pollution (s 59E — which is the only indictable offence) and the offence involving the giving of false information (s 59D). Level 2(a) offences involve intentional pollution (s 67AA), intentional environmental hazard (s 28(1)) and illegal dumping (s 28(2)). Level 2(b) offences include the main polluting offences — pollution of water (s 39(1)), air (s 41(1)), land (s 45(1)) and noise pollution (s 48) — and also breaches of licence (s 20) or works approval (s 19B(8)) and obstruction of an officer (s 55(6)). These offences do not require proof of intent or negligence. Indeed in *Allen v United Carpet Mills Pty Ltd* [1989] VR 323 it was held that s 39(1) created an offence of absolute liability. Level 3 offences are infringement notice offences involving minor contraventions (ss 28B(5), 31A(7), 31B(7), 62B(3)).

[21] *Melzer v Nova Group Pty Ltd* (Unreported, Moe Magistrates' Court, Magistrate Dugdale, 15 April 1997).

[22] The s 53I charge arose because the substances were alleged to have been delivered to the site without transport certificates.

[23] *Vasel v Aluminates (Morwell) Pty Ltd* (Unreported, Moe Magistrates' Court, Magistrate Dugdale, 10 November 1997)

human beings'. The company to whom the delivery was made and from whose premises the pollution occurred was also prosecuted under s 41(2)(b).

The pollution occurred when the driver, who previously had not been to the delivery site, transferred the sulphuric acid into the wrong storage tank where it became mixed with another substance which caused a dangerous reaction. The mixture overheated and began to escape from the storage facility, causing fumes. The transport company was prosecuted for polluting the atmosphere on the basis that it was vicariously liable for the actions of the driver. The driver whose actions led to the emission was prosecuted as an individual. The company on whose premises the incident occurred was prosecuted under s 62C of the Act which deems the occupier of commercial or industrial premises to have caused pollution emanating from its premises unless that occupier can prove that the discharge, emission or deposit was unrelated to its commercial or industrial undertaking. A manager of the transport company was prosecuted as 'a person concerned in the management' of the company. All the defendants pleaded guilty to the offences outlined above. Both companies were fined ($5,000 and $3,500 respectively) without a conviction; both individuals were placed on bonds and ordered to pay $500 into the court fund.

In the third prosecution,[24] a family company in the business of collecting waste, drums and containers from industrial sites for recycling, and one of its two directors were charged with failing to comply with licence conditions placed on the storage and handling of prescribed industrial waste materials at the site used to recycle such materials. The defendants were also charged with storage of waste on an unlicensed site nearby. An inspection and site audit of the licensed site by EPA officers revealed approximately 1,200 drums being stored on-site when licence conditions allowed no more than 300. Some drums were stored in an unbounded area in breach of licence conditions, and, in further breach of conditions, some were stored in the open without lids. There was evidence of spill marks around the drums. Further drums were being stored at an unlicensed site to the knowledge of the director. The prosecutions were the culmination of numerous efforts to ensure compliance through various notices. Both defendants pleaded guilty, and were convicted and fined $9,000 for both offences.

III FACTORS UNDERLYING THE DECISION TO PROSECUTE

There were, it is suggested, clearly identifiable factors that underlined the discretionary decisions to prosecute directors and managers in these cases.

A *Strong Evidence*

The evidence against all the alleged offenders was strong — strong enough in all three cases to elicit a guilty plea in relation to the charges with which the EPA

[24] *Melzer v Terich Industries* (Unreported, Moe Magistrates' Court, Magistrate Dugdale, 4 March 1998)

actually proceeded.[25] Enforcement officers initially prepare briefs of evidence for a prosecution. Prosecutors then make recommendations to the EPA on the basis of the available evidence, and all prosecutions must ultimately be authorised by the EPA. Prosecutors must clearly justify their recommendations and, to some extent, may be accountable for the consequences of those recommendations. It is the writer's opinion that they generally tend towards a conservative approach and usually prefer to recommend prosecution in cases where the evidence is strong enough to be fairly sure of a conviction.[26]

Agencies are, quite possibly, mindful of the frequently ineffectual reality of criminal prosecution, and may want to avoid exacerbating the situation by being seen to fail in securing a finding of guilt or a conviction.[27] Prosecutors, it would seem, particularly do not like to lose as a result of evidentiary problems that may reflect badly upon the agency and its staff. Since *Latoudis v Casey*,[28] the cost of losing a case, even in the Magistrates' Court, may pose a problem for an agency as they do not always enjoy an overabundance of resources. While it may appear that such costs could not be excessive, bearing in mind that most offences are summary, the hearing of a matter involving a company, and particularly involving individuals, may not be so quick and simple as might be expected. The appearance of Queen's Counsel in the Magistrates' Court is not unusual as companies become more fearful about losing or damaging their corporate environmental image.[29]

B *Blameworthiness*

Clear contraventions of the Act had occurred, and, in regard to the first and third prosecutions, the directors concerned were involved 'on-site' and aware that their companies were in breach of the law. In the second case, the individual manager prosecuted, while not at the site of the contravention, was directly concerned in the delivery made by the driver which led to the chemicals being incorrectly off-loaded into the wrong tank. He was advised that the driver was making an unaccompanied delivery of chemicals, despite never having made a delivery to the site in question before. Yet he did not alert anyone at the receiving company that the delivery was to be made.[30] Notification did not occur despite an informal arrangement that new drivers would be accompanied and supervised by

[25] Strong evidence is frequently used to negotiate guilty pleas in respect of some of a range of possible offences

[26] The EPA's written policy on prosecutions states that as a prerequisite for any prosecution 'the available evidence must establish a prima facie case': EPA, *Enforcement Policy*, Publication No 384 (1993) 16. Enforcement officers do not always, it would seem, agree with an assessment of the evidence by the legal division, and they may present a prosecution brief to the EPA even where a recommendation by the legal division is negative. However, it would appear that in practice this rarely occurs.

[27] See generally Hawkins, above n 12, ch 7.

[28] (1990) 170 CLR 534. The High Court held that a defendant will normally be entitled to an order for costs against the informant where charges are dismissed in the Magistrates' Court. The rule applies to all informants, including police and other public officers.

[29] This potential is magnified greatly where indictable offences are concerned.

[30] It was in fact made in the very early hours of the morning.

a more experienced person on their first visit. In each case then, the individuals prosecuted could be argued to have exhibited varying degrees of blameworthy behaviour, either by an awareness of the company's contravention of the law or by reckless or careless behaviour.

There was no requirement to prove blameworthiness in the prosecution of any of the offences pursued in these cases. All were offences of strict or absolute liability. Nevertheless, enforcement officers and prosecutors alike appear to prefer taking criminal action against those 'at fault'. This approach is consistent with the written enforcement policy adopted by the EPA in 1993.[31] It also reflects the findings of previous research that enforcement officers in particular respond in a manner that is 'organisational and moral rather than ... legal'.[32] Prosecutors, fully aware of the nature of strict and absolute liability offences, nevertheless also appear to be predisposed to prosecuting where blameworthiness of some kind is involved, not only due to moral considerations, but also because they want 'value for money' when utilising limited resources to prosecute.

C *Previous History*

A third important factor underlying the action taken in these cases was that defendants had less than spotless records.[33] There had been a variety of administrative measures employed by the EPA in previous attempts to enforce corporate compliance with the law including clean-up notices, infringement notices and the like. The decision to prosecute individual officers appears to have been taken in two of the three cases because other measures had not worked. This is consistent with both a compliance strategy of enforcement and also with the EPA's written enforcement policy.[34] It is clear from the cases and from the views expressed by enforcement officers that frustration with those who do not respond appropriately to notices and other administrative penalties will frequently galvanise the EPA into mounting a prosecution. Where a particular individual concerned in running a company is involved in that non-cooperation, they are now likely to become a target along with the company itself. This occurs, it is submitted, not only because the law is being flouted, but also because the authority of the individual officer is being flouted, and it is he or she who makes the initial decision to prepare a matter for prosecution.

[31] EPA, *Enforcement Policy*, above n 26. The factors to be considered in deciding which enforcement measure to adopt include the 'nature of the offence — this includes ... the intent of the offender': at 12.

[32] Hawkins, above n 12, 74. See also Susan Streets, *Absolute Liability and Environment Protection: Is Criminal Liability without Fault Desirable in Principle or in Practice?* (Masters thesis, Monash University, 1995) 225.

[33] This is also consistent with enforcement policy which requires the history of the offender and willingness to cooperate to be taken into account in any enforcement decision: EPA, *Enforcement Policy*, above n 26, 13.

[34] The *Enforcement Policy* is itself based on a compliance model of enforcement. The document makes it clear that 'the primary purpose of enforcement measures is to stop ... polluting activities': ibid 1; and that the 'overall approach' in enforcement 'is to facilitate good environmental practice and to seek co-operation and collaboration': at iii. Strong enforcement action is reserved for those who 'misuse' or 'damage' the environment: at iii.

D *Actual–Potential Harm and Visibility*

Another important factor in each case was the actual or potential harm arising out of the breach. Where actual harm to the environment is caused, and particularly where that harm has become a visible public event, there is more likely to be a strong response. In the second prosecution, for example, actual harm in terms of an emission of fumes resulted from the incident. Although the harm caused may have been transient, the incident became a very high profile event once the evacuations of the site and 21 other premises began. The media and other agencies, including the Country Fire Authority, became involved in measures to avert what could have been a very nasty event involving toxic chemicals. In circumstances such as these, where so much disruption has occurred and a potentially dangerous situation to public health and safety is concerned, the EPA must be seen to act. In both the other cases, a substantial risk of environmental harm or threat to public health was present in the poor storage of chemicals and prescribed waste on licensed and unlicensed sites. In all cases, the individuals prosecuted were apparently prepared to accept the risk of harm occurring or failed properly to consider the risks.

So, on the basis of the very small number of cases so far prosecuted in Victoria, it may be said that where an individual director or manager:

- exhibits some degree of fault in a contravention by their corporation;
- which results in actual harm, a serious risk or threat; and/or
- a high profile event; and/or
- where there has been or is a continuing failure to cooperate with the authority,

then he or she will be most at risk of facing prosecution along with the corporation they direct or manage.

IV SIMILARITIES BETWEEN THE DEFENDANTS

In the two matters outlined above in which directors of offending corporations were pursued on criminal charges, neither corporation was large and both were companies experiencing some financial difficulties that impacted upon the way they operated their affairs. One corporation was, as mentioned above, a family company. In both cases, day-to-day control of the organisation was in the hands of those directors who were ultimately prosecuted.

In the other prosecution, the individual prosecuted as 'a person concerned in the management of a corporation' was the site manager of a somewhat larger company. He was the manager of the depot from which the load of sulphuric acid originated, and was again concerned in the daily control of deliveries originating from that site.

As yet, no prosecutions have occurred involving directors of large corporations. Nor has there been a prosecution attempting to attribute responsibility higher up the corporate chain of a large organisation than the on-site manager. It seems it is very much those in control of smaller organisations, or on-site and in

control of activities on a daily basis, who are more likely to face prosecution at this point in time.

A reason for this seemingly narrow band of defendants may be that no incidents have occurred involving larger corporations in which it would be 'appropriate' to prosecute individual corporate officers.[35] Alternatively, it may be considered by enforcement officers that directors and managers who are not in daily control of particular activities have not demonstrated any personal fault and, as mentioned above, the existence of fault appears to have a significant bearing on a decision to prosecute. As fault is not required to be proven with regard to offences by directors and managers, this discretionary factor may arguably stand unnecessarily in the way of prosecutions of more senior personnel. Section 66B provides that each director or person concerned in the management of a corporation 'is also guilty of the offence ... if a corporation contravenes ... [the] Act'. Thus, each and every director is attributed responsibility without mention of fault.

However, another and possibly more significant reason why prosecutions have thus far been limited in their reach is the availability of several defences where directors or managers are prosecuted and the fact that they are, as yet, untested in Victoria. The defences, as set out above, primarily concern lack of knowledge or proof of due diligence. The EPA must prove that a corporation committed an offence whether or not it proceeds against that corporation; the burden is then reversed so that a director or manager will be deemed liable for the same offence unless he or she can prove one of the defences.

A factor which may be inhibiting prosecution is an apprehension that it would be more likely that a director or manager who is not on-site, or who is not in daily control of particular activities, would be able to establish one of these defences, particularly ignorance of the contravention. This is not necessarily always going to be the situation though, as was demonstrated in the Canadian case *R v Bata Industries Ltd [No 2]*.[36] As this case exemplifies, knowledge of a corporate contravention may well go beyond those on-site; indeed, it may be traced a considerable way up the corporate hierarchy, and failure by senior personnel to correct known problems can amount to a lack of due diligence.

The facts in the *Bata* case were, interestingly, not dissimilar to those in the first and third prosecutions described above. Bata Industries Ltd (a division of a multi-national organisation) manufactured shoes in Batawa, a town in Ontario, Canada. During a routine inspection of the company's site, environmental

[35] It should be pointed out that EPA *Annual Reports* show that numerous prosecutions of larger corporations have occurred since s 66B was introduced. However, no individual directors or managers of these entities have been singled out for prosecution, even though s 66B deems each director or person concerned in management to be liable. A survey of the *Annual Reports* also shows that some major corporations, particularly chemical and petroleum companies, have been prosecuted more than once for similar offences during that time. While the fines they receive upon conviction on subsequent occasions are increased, the amount these corporations have been fined is still very small. In these circumstances, it is suggested, it would be appropriate to consider individual prosecution as part of a tactical exercise if negotiated compliance appears to be failing and repeated prosecution is necessary.

[36] (1992) 70 CCC (3rd) 394 ('*Bata*'). The decision has been adopted in New Zealand in *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492, and applied in later sentencing cases.

officers discovered a considerable number of drums containing waste chemicals which were improperly stored and in various stages of decay. There was also significant evidence that the drums were leaking. Following extensive investigations and sampling, the corporation was charged with causing or permitting a discharge of liquid industrial waste pursuant to s 16(1) of the *Ontario Water Resources Act*[37] and similar offences under provisions of the *Environmental Protection Act*.[38] The company was subsequently convicted.

Three directors of the company were also charged, and two were convicted. The general manager, who was the on-site manager, was convicted. He was aware of the situation regarding the chemicals, some of which contained known carcinogens, and had actually canvassed ways to deal with the waste but had not acted. However, responsibility for the offences did not stop with him according to the Ontario Court. The president of Bata Industries Ltd was also convicted even though he was not in daily control on-site. The court found that he was aware of the situation from site visits and he also knew about the problems the company had been experiencing with the storage and disposal of the chemicals, including paying the cost of doing so in a permissible way. He too had taken insufficient steps to remedy the matter.[39]

The chief executive officer of the corporation was also charged. He was acquitted on the basis that he had little personal contact with the site in question, and there was no evidence that he was personally aware of the storage problems. He had, the court decided, placed an experienced director in charge of the site operation whom he was entitled to assume would take responsibility for the operation.[40]

The directors who were convicted had also sought to rely on the defence of due diligence. The general manager was unsuccessful because he had failed personally to deal with the problems and, where he had delegated the task to others, had failed to maintain adequate supervision and to ensure that his delegates had adequate environmental management training. He had also failed to ensure that detailed reports were received from delegates and that they were acted upon.[41] The president likewise failed in establishing the defence. While he may have issued instructions to those below him on the corporate ladder, he had failed to ensure they were carried out. He had also failed in his duty, said the court, to exercise proper supervision and control and to encourage acceptable standards of environmental behaviour.[42]

The *Bata* case was 'followed with considerable interest by both the media and the environmental bar' in Canada.[43] The court took the opportunity to set out a

[37] RSO 1980, c 361.
[38] RSO 1980, c 141
[39] *Bata* (1992) 70 CCC (3rd) 394, 432.
[40] Ibid 431
[41] Ibid 434.
[42] Ibid 432.
[43] Michael Jeffery, 'Canadian Environmental Case Law Update' (1992) 9 *Environmental and Planning Law Journal* 206, 207. Lowe has canvassed aspects of the 'significant body of judicial commentary' which has developed in Canada since the *Bata* case: Peter Lowe, 'A Comparative

comprehensive review of the duties and responsibilities of directors and managers of corporations. Ormston J outlined a range of factors which he considered would be relevant when evaluating the standard of a director's diligence for the purposes of reliance on the defence. Relevant matters included, for instance, whether the director had helped to establish or had established a pollution prevention system; whether the director had ensured that officers of the company reported periodically to the board of directors any substantial non-compliance; and also whether the director had immediately and personally reacted when he or she became aware the system had failed.[44] *Bata* sent out a clear message to those in the boardrooms of Canadian corporations engaged in potentially hazardous activities that 'it is absolutely essential that environmental issues be moved to the top of the corporate agenda'.[45]

There would appear to be no reason why a prosecution based on similar facts would not succeed in Victoria, assuming the availability of the evidence. None of the defences in s 66B(1A) would have been available, on the facts found, to the defendants who were convicted. It must be remembered also that the onus is upon the defendant to establish a defence and not upon the prosecution to disprove it. A director cannot sit behind the corporate veil and put the prosecutor to proving he or she was aware of the contravention and did not take proper care. He or she must bring evidence to prove lack of knowledge or influence. If enforcement officers contemplating prosecution are concerned that knowledge cannot be attributed to senior managers or directors, they could, it is suggested, as part of a strategic approach to achieving compliance, give written notice to senior personnel of any continuing contraventions by the corporation or lack of cooperation by on-site personnel. If this does not result in the desired action by the company, or if continued lack of cooperation leads to further breaches of the law, the notification would provide a basis upon which to prosecute the senior individual, as well as the on-site managers, and the corporation. Failure to act upon notification would also provide a basis for rebutting claims of due diligence.

V CHOICE OF CHARGES PURSUED

In none of the cases prosecuted thus far were the defendants, either corporation or individual, proceeded against for a mens rea offence. This is so despite the fact that there seems to be a discretionary tendency towards prosecuting defendants who are in some way blameworthy. If blameworthy defendants are to be targeted, one might ask why do so only by pursuing charges relating to strict or absolute liability offences which usually result in minor penalties? One reason, it is suggested, is the limited range of options available to prosecutors wanting to initiate such a prosecution.

Analysis of Australian and Canadian Approaches to the Defence of Due Diligence' (1997) 14 *Environmental and Planning Law Journal* 102, 107.

44 *Bata* (1992) 70 CCC (3rd) 394, 429. Lowe has commented that this 'imposes a positive obligation on directors and other corporate officers, such as managers, to obtain information and to remain informed': Lowe, above n 43, 107.

45 Jeffery, above n 43, 208.

There are two options the EPA could pursue where fault is considered to be present and provable. The EPA could utilise s 67AA,[46] which provides for higher penalties where a court is satisfied that certain offences (Level 2 offences) were committed intentionally. It is not clear whether this requires the prosecution to prove simply that intentional acts were involved which caused pollution, or also that there was an intention to pollute the environment. In New South Wales it has been held in regard to s 5(1) of the *Environmental Offences and Penalties Act 1989* (NSW), which makes it an offence to 'wilfully or negligently dispos[e] of waste', that the prosecution must prove the defendant 'either intended or was aware that the waste which he was disposing of would or was likely to harm the environment'.[47]

In Victoria, the basic polluting offences of the Act prohibit pollution of waters, the atmosphere or land such that the element is so changed as to make or be reasonably expected to make the element:

(a) noxious or poisonous or offensive to the senses of human beings;
(b) harmful or potentially harmful to the health, welfare, safety or property of human beings;
(c) poisonous, harmful or potentially harmful to animals, birds or wildlife;
(d) poisonous, harmful or potentially harmful to plants or other vegetation; or
(e) detrimental to any beneficial use made of the element.[48]

Therefore, if the approach taken in NSW were to be followed in Victoria, the prosecution would have to prove a defendant (corporation and/or director/manager) intentionally committed acts which were intended to bring about one of the above results or were done with an awareness that one of the results would occur.[49] This section would appear to catch, assuming the prosecution can

[46] This section was inserted into the Act in 1988: *Environment Protection (Amendment) Act 1988* (Vic) s 10. Section 67AA is a Level 2(a) offence, rather than a 2(b) offence, as were the offences prosecuted in the above cases.

[47] *EPA v N* (1992) 26 NSWLR 352, 356. As Lipman and Roots have commented, this decision 'makes it considerably more difficult for the prosecution to achieve convictions': Zada Lipman and Lachlan Roots, 'Protecting the Environment through Criminal Sanctions: The Environmental Offences and Penalties Act 1989 (NSW)' (1995) 12 *Environmental and Planning Law Journal* 16, 19

[48] *Environment Protection Act 1970* (Vic) ss 39(1), 41(1), 45(1).

[49] In the case of a corporation, s 66B(2) provides '[w]hen in any proceedings under this Act it is necessary to establish the intention of a corporation, it is sufficient to show that a servant or agent of the corporation had that intention'. Brunton has pointed out that the *Environment Protection Act 1993* (SA) has adopted the same approach as that preferred by the New South Wales Court of Appeal in *EPA v N* (1992) 26 NSWLR 352, 358. In his opinion, the development is an 'unfortunate' one for environmental criminal law. He argues that many individuals would not have the 'requisite scientific knowledge or technical understanding of the environment to possess the necessary knowledge that harm will or might result from their conduct': Nicholas Brunton, 'The South Australian Environment Protection Act 1993' (1995) 12 *Environmental and Planning Law Journal* 3, 7. Whether the same traditional criminal law approach would be adopted in Victoria is yet to be seen. A contrary approach adopted by Stein J in *State Pollution Control Commission v Blue Mountain City Council* (1991) 72 LGRA 345 might convince a court that requiring mens rea in regard to all elements of the offence could defeat the purpose for which the legislation was enacted. That argument certainly carried weight in *Allen v United Carpet Mills* [1989] VR 323 where Nathan J was prepared to impose absolute rather than strict liability in regard to a basic polluting offence (s 39(1)) because to do otherwise could defeat the purpose of the regulatory legislation: at 330. However, the penalty regime is much higher where

discharge the burden, only blatant polluters: that is, those few who deliberately pollute the environment with knowledge of the damage they will cause.

The section does not deal with those who pollute recklessly or, more importantly, negligently. Thus the legislation fails to provide for higher penalties against those who act carelessly without giving proper thought to the harm they may cause. As corporate offences not infrequently arise out of careless behaviour, lack of communication, lack of proper environmental systems or lax implementation of compliance procedures by individual corporate actors, the inability to seek higher penalties for such conduct is a deficiency in the law.

Alternatively, a defendant director or manager could be charged under s 59E of the Act (a Level 1 offence) which provides:

> A person who intentionally, recklessly or negligently pollutes the environment or intentionally, recklessly or negligently causes or permits an environmental hazard which results in —
>
> (a) serious damage to the environment; or
>
> (b) a serious threat to public health; or
>
> (c) a substantial risk of serious damage to the environment; or
>
> (d) a substantial risk of a serious threat to public health —
>
> is guilty of an indictable offence.

The penalties in the case of an individual are a fine of $250,000 or imprisonment for seven years or both, and, in the case of a body corporate, a fine of $1 million.

The insertion of s 59E into the Act in 1988[50] was again said to demonstrate a hardening attitude to environmental offenders; it constitutes the only indictable offence in the Victorian Act.[51] While the provision has been on the statute books in Victoria for 10 years, it has only very recently been invoked. Although charges had previously been laid based on s 59E,[52] only one case has proceeded to court. Both a corporation and its directors and managers (pursuant to s 66B) may be prosecuted for aggravated pollution in accordance with the section.

In the one prosecution to date,[53] a company and its director were prosecuted for causing a substantial risk to the environment by dumping waste onto land on the outskirts of Melbourne (owned by the director) over a period of months. Effectively, the land was used as an unlicensed tip for waste collected by the company as part of its commercial operations, thus saving a considerable amount in tip fees. Several gullies on the property were found to contain significant amounts of waste, and leachate from the deposits had the potential to contaminate

s 59E offences are concerned, and this would certainly militate against a utilitarian approach. A person who is wilfully blind as to any harm to the environment which their actions might cause would, it seems clear, satisfy the mens rea requirement: *EPA v N* (1992) 26 NSWLR 352, 358.

50 *Environment Protection (Amendment) Act 1988* (Vic) s 17.

51 It can also be prosecuted as a summary offence.

52 Including the charges against both the corporation and the director in the first prosecution discussed above.

53 *Jackson v Roda Transport Pty Ltd* (Unreported, Broadmeadows Magistrates' Court, Magistrate Doherty, 12 August 1998) ('*Roda*').

a nearby creek. The defendants pleaded guilty. The company was fined $25,000 and the individual was fined $15,000.[54]

One of the reasons why this section may have been so little used has much to do, once again, with uncertainty as to what is required to be proven by the EPA in order to be successful. None of the potentially ambiguous terms in s 59E is defined in the Act.[55] So, it is unclear whether 'intentionally' pollutes requires simply that one intentionally does the acts causing the pollution, or that one also intends the pollution.[56] It is also not clear what standard of negligence is required,[57] though negligence in this context will usually require a departure from the standard of awareness and behaviour of reasonable persons, and consideration as to whether precautionary measures instituted by the defendant were sufficient in the circumstances.

Nor is it clear what constitutes 'serious' damage to the environment or a 'serious threat' to public health, or what constitutes a 'substantial risk' of either result. The section appears to require that a very high standard of damage, threat or risk be involved. Section 59E(a), for instance, requires 'serious damage to the environment'. Thus, it would appear that only actual harm to the environment of a kind that results in significant damage would support a prosecution under this sub-section. Does this mean damage in the sense of lasting damage? Can a transient event suffice and how 'serious' must the damage actually be?[58] Likewise, s 59E(b) requires a 'serious threat' to public health. Does this mean that a threat of permanent injury or death must be present, or something less? Alternatively, sub-sections (c) and (d) provide that the offence is committed if the

54 Ibid. Costs of $41,137 were awarded against the defendants, which included the cost of expert reports on the risks presented by their activities. Clean-up operations will undoubtedly cost the defendants a considerable amount more.

55 The Victorian *Environment Protection Act 1970* (Vic) is not the first to suffer from a failure to define its terms. Lack of definition of important legislative terms gave rise to major difficulties for prosecutors in New South Wales, and resulted in significant amendment of the *Environmental Offences and Penalties Act 1989* (NSW).

56 As mentioned above, the latter was held to be a requirement under the *Environmental Offences and Penalties Act 1989* (NSW) where the offence is couched in terms of 'wilfully' disposing of waste in a manner which harms the environment: see *EPA v N* (1992) 26 NSWLR 352.

57 In New South Wales, it has been held that a high degree of negligence equating to 'gross' or 'criminal' negligence must be shown as per *Andrews v DPP* [1937] AC 576: *New South Wales Sugar Milling Co-operative Ltd v EPA* (1992) 75 LGRA 320 (which is the traditional approach to criminal negligence). However, by way of contrast, in *State Pollution Control Commission v Kelly Pty Ltd* (Unreported, Land and Environment Court of New South Wales, Hemmings J, 26 June 1991) <http://austlii.edu.au/au/cases/nsw/landenv/194.html> at 14 September 1998 (copy on file with author) [24], [26], the notion that only gross negligence would result in conviction was rejected. As Lipman and Roots point out, the later case of *EPA v Ampol* (1993) 81 LGERA 433 ('*Ampol*') has 'further complicated' the issue: Lipman and Roots, above n 47, 19. In *Ampol*, the Court of Criminal Appeal, upon a case stated, indicated that where 'negligence' is referred to in a statute, its meaning is to be determined by asking, as part of a process of statutory construction, what is meant by the term as it appears in the statute: at 437–8. Ampol was subsequently convicted by Pearlman J on what appeared to be a standard of negligence equating with the civil, rather than the traditional criminal, standard. As Lipman and Roots observe, 'unfortunately, the issue still requires clarification': Lipman and Roots, above n 47, 20.

58 The second reading speech of the *Environment Protection (Amendment) Act 1988* (Vic) describes the inclusion of this offence as a means to deal with the 'effects of intentional or reckless polluting acts, possibly motivated by profit, [which] are serious and may potentially be irreversible': Victoria, *Parliamentary Debates*, Legislative Assembly, 31 March 1988, 1168 (Tom Roper, Minister for Planning and Environment).

pollution causes a substantial risk of serious damage to the environment or a substantial risk of a serious threat to public health. Again, what is a substantial risk? Do these sub-sections require a more than 50 per cent risk of the result, a real as distinct from a remote risk of the result, or something else? Does, for example, intentionally polluting a creek in a very remote area of the State amount to serious damage to the environment where some aquatic life is affected but there is little or no risk to human beings?[59] As the only prosecution thus far was uncontested, these questions still require answers.

Furthermore, the fact that legislators have chosen to set the standard at 'serious' damage and 'substantial' risk and have coupled these terms with the heading to s 59E of 'aggravated pollution', seems to suggest that only blatantly blameworthy conduct which causes a high degree of harm will suffice to satisfy the provision.[60]

While there is, yet again, no guidance in the Act as to what 'aggravated' pollution means, a recent case in New South Wales may provide some assistance to prosecutors and courts. In *EPA v Gardner*,[61] the defendant, an owner-operator of a caravan park, was convicted of polluting waters contrary to s 16(1) of the *Clean Waters Act 1970* (NSW). The defendant pumped effluent, including human faeces and urine, from the park into the Karuah River through a concealed system of pipes which he had installed for that purpose. In sentencing the defendant to 12 months' jail and a fine of $250,000, Lloyd J took account of several 'aggravating' factors.[62] The defendant had, according to his Honour, engaged in deliberate acts of pollution repeated over a long period of time for the purpose of saving money. Those acts, he said, 'had the most serious consequences of environmental harm and likely environmental harm imaginable' to the 'community as a whole' and were done with knowledge of their illegality and with considerable effort to conceal what was being done.[63]

In the initial s 59E prosecution discussed above,[64] similar factors to those discussed by Lloyd J appear to have influenced the prosecution to bring an aggravated pollution charge. They included: the intentional character of the conduct over an extended period of time; the fact that the polluting activities resulted in a commercial gain to the defendants; and the prior history of the defendant company which had previously been convicted of illegally depositing waste on another unlicensed site.

Prosecuting directors and managers for aggravated pollution involves additional difficulties. Where a director or manager is prosecuted for aggravated

[59] In *Roda* (Unreported, Broadmeadows Magistrates' Court, Magistrate Doherty, 12 August 1998) the creek at risk of contamination from leachate was used for fishing and recreational purposes by members of the local community.

[60] As this is the only indictable offence in the Act, it may be argued that these requirements are justified. However, as mentioned above, the EPA may make application for a summary trial.

[61] (Unreported, Land and Environment Court of New South Wales, Lloyd J, 7 November 1997) <http://austlii.edu.au/au/cases/nsw/landenv/96_50072.html> at 14 September 1998 (copy on file with author).

[62] Ibid [11].

[63] Ibid.

[64] *Roda* (Unreported, Broadmeadows Magistrates' Court, Magistrate Doherty, 12 August 1998).

pollution, the defences set out in s 66B(1A) and discussed above are available. Therefore, even if prosecutors can prove a corporation committed the offence of aggravated pollution, for which its directors would be deemed liable, they may be wary of prosecuting individuals unless convinced there is very strong evidence that particular directors were implicated in a blatant and damaging contravention.[65] Charges under s 59E may, particularly if prosecuted as an indictable offence, be vigorously contested, as there is a possibility that an individual director could receive a jail sentence.

In summary then, and in light of the above discussion, it would appear that prosecution of on-site directors and managers of corporations (particularly directors of smaller individual or family-run companies) has begun in Victoria and is likely to continue.[66] Prosecution will generally occur where there is strong evidence against an individual, some element of blameworthiness on the part of the defendant and other methods of achieving compliance have failed. Such prosecutions are though, it is submitted, likely to continue to be commenced pursuant to lower level strict or absolute liability offences and, therefore, relatively low penalties will be imposed even where an element of fault is involved. It will usually only be in cases involving blatant polluting which results in significant damage or risk to the environment that a fault-based offence will be pursued.

If corporate compliance with environmental laws is the desired end, it is suggested that this situation is not satisfactory. Changes should be made which ensure that prosecutors in Victoria have a better range of alternatives against corporations and their directors and managers, and, in particular, improved options for prosecuting fault-based offences.

VI PROPOSED REFORMS TO WIDEN PROSECUTORIAL CHOICE

The Victorian legislation should be amended. One possibility would be to widen s 67AA to allow for higher penalties where a court is satisfied an offence was committed recklessly or negligently. Higher penalties could then be obtained against corporations and their managers for what are all too frequently described as 'accidents', but are often incidents caused by a lack of care and/or a lack of a proper EMS. Where corporations and corporate managers do not identify risks or prepare plans to prevent incidents occurring, they could, as discussed above, be put on notice that they too will be prosecuted if an incident does occur and that more severe penalties will be sought to reflect their negligence. A problem with this approach is that the offences are still basically strict or absolute liability offences and any 'higher penalty' upon satisfaction of fault is still within the framework of a relatively low maximum penalty.

An alternative approach would be to amend s 59E. It is suggested that it should be substantively amended by reducing the level of harm required to be proven.

[65] This was the situation in *Roda*, which yet again involved a small company under the day-to-day control of the director who was ultimately prosecuted: ibid.

[66] At the time of writing further charges were being considered.

Those who deliberately, recklessly or negligently harm the environment or public health or cause a risk of either event, whether individual, corporation, director or manager, should, it is contended, be held responsible without proof of 'serious' damage or 'substantial' risk. Courts have a wide scope when imposing penalties to allow for degrees of culpability and harm. Where more serious damage or a greater risk is proven, it could be reflected in the sentence imposed. Any changes to the legislation should include clear definitions of the terms used to guide both prosecutors and courts.

Legislative change in Victoria could provide more feasible options to prosecute directors and managers who do not take environmental management responsibilities seriously, with the result that more meaningful penalties could be imposed. Prosecutors would have a choice whether or not to proceed against a defendant for an absolute liability offence. Alternatively, a fault-based prosecution for a summary offence under s 59E could be undertaken, or, where the nature of the conduct and the nature of the harm are so serious as to warrant it, prosecution as an indictable offence would be available.

If these proposed changes were to be introduced, enforcement officers would have to be prepared to invoke the new provisions if they are to have any practical effect. The EPA would also have to be prepared to authorise more fault-based prosecutions in appropriate cases where sufficient evidence is available.[67] While the Victorian EPA has in the last decade adopted and pursued a policy of 'encourag[ing] industry and the community to work in partnership with each other and the EPA',[68] and has, to some extent, moved away from regulation and policing, it has, however, continued to warn that 'enforcement options are still available for those who choose not to act responsibly'.[69] The recent activation of both s 66B to target directors and managers, and s 59E, suggests prosecutors and the EPA are still prepared to take selective enforcement action against corporations and their personnel where cooperative strategies fall down. A wider range of options for prosecution would, it is submitted, aid in effectively targeting those who choose not to act responsibly. To take this approach would be entirely consistent with the current enforcement policy of prosecuting those at fault. At present, those who knowingly, recklessly or carelessly contravene environmental laws in Victoria are usually rapped over the knuckles on the basis of no-fault offences.

Whether or not these changes are introduced, the EPA should, it is suggested, consider expanding prosecution of directors and managers beyond those directors of small companies, which are, in reality, individual or family operations, and beyond on-site managers. Knowledge of non-compliance with environmental laws does not, as the *Bata* case demonstrates, stop at the gates of individual premises. Executive directors and managing directors visit operating sites within

[67] As mentioned above, s 66B lay untested for over a decade. Section 59E had only been employed once at the time of writing. Legislative changes are of little practical value if regulators do not employ them.

[68] EPA, *Annual Report 1996–97* (1997) 1

[69] Ibid.

their organisations regularly, and may be as clearly aware of what is occurring as anyone on-site. If they do not make themselves aware of environmental problems, or choose not to know, then such matters should be brought to their attention. They are often paid significant salaries to direct or manage corporations and receive other benefits for doing so. They should, as were the directors in *Bata*, be held responsible where a corporation they direct is, to their knowledge and however that knowledge is obtained, engaging in conduct which is not in compliance with environmental laws.

VII PROSECUTIONS IN NEW SOUTH WALES

In New South Wales, pollution offences are classified into three categories. Tier 1 offences concern wilful or negligent conduct. Division 1 of the *Environmental Offences and Penalties Act 1989* (NSW) ('*EOPA*')[70] deals with offences such as 'wilfully or negligently dispos[ing] of waste in a manner which harms or is likely to harm the environment'[71] and 'wilfully or negligently caus[ing] any substance to leak, spill or otherwise escape ... in a manner which harms or is likely to harm the environment'.[72] Tier 2 offences are prosecuted under *EOPA*, but comprise offences contained in other legislation, such as the *State Pollution Control Commission Act 1970* (NSW). These offences are equivalent to Level 2(b) offences in Victoria.[73] Tier 3 offences created by s 8G of *EOPA* concern minor contraventions which may be dealt with by 'on the spot fines' and require no court appearance unless referred to a court by the recipient. These offences correspond to Level 3 offences in Victoria. Unlike in Victoria, environmental matters are dealt with by a specialist court, the Land and Environment Court of New South Wales.

Directors or persons concerned in the management of a corporation are liable for offences committed by their corporations pursuant to s 10 of *EOPA*. The wording of this provision is not dissimilar to that of the Victorian provision. Section 10(1) provides that, where a corporation has contravened *EOPA*, each person who is a director or person concerned in the management of that corporation 'is to be taken to have contravened the same provision' unless that person satisfies the court that he or she has one of the defences provided in the subsection. The defences are: lack of knowledge of the contravention (actual, imputed or constructive); an inability to influence the conduct of the corporation; and proof of due diligence. Like the Victorian Act, a director or manager can be prosecuted whether or not the corporation is prosecuted.

Discretionary factors which may render a director or manager liable to be prosecuted in New South Wales bear, it is submitted, a considerable resemblance

[70] The *Protection of the Environment Operations Act 1997* (NSW) was, at the time of writing, still not in operation. This Act is intended to replace other environment protection legislation in NSW and environment protection offences are contained in ch 5.

[71] *EOPA* s 5(1).

[72] *EOPA* s 6.

[73] Unlike in Victoria, however, these offences have been consistently held to be offences of strict and not absolute liability: *Australian Iron & Steel Pty Ltd v EPA [No 2]* (1992) 79 LGERA 158.

to those discussed above. Likewise, there is a distinct similarity in the characteristics of the individual defendants.

In *State Pollution Control Commission v Kelly Pty Ltd*,[74] for instance, a company was prosecuted for using a waste disposal depot without appropriate registration under the *Waste Disposal Act 1970* (NSW), for polluting or causing waters to be polluted under the *Clean Waters Act 1970* (NSW) and, pursuant to s 6(1) of *EOPA*, for disposing of waste in a manner which harms or is likely to harm the environment. An accumulation of ammonia-charged water in an extracted area at the depot overflowed and polluted the waters of a nearby creek. The first two offences were Tier 2 matters, and the offence under *EOPA* was a Tier 1 offence.[75] Additionally, Mr Kelly, as a person who was a director and concerned in the management of the company, was prosecuted in connection with two offences under the *Clean Waters Act 1970* (NSW) and pursuant to s 10 of *EOPA*. Kelly was subsequently convicted pursuant to s 10 and fined $10,000.

In sentencing Kelly, Hemmings J expressly noted the factors which in his opinion had made it appropriate to prosecute him as an individual. On the issue of blameworthiness, it was pointed out that the offences had been 'wilful, and serious',[76] involving 'a large volume of [polluting] matter'.[77] Kelly was, for all intents and purposes, 'the company', as it was he who was the operator of the depot 'for all practical purposes'.[78] There were previous convictions against the company,[79] and no measures had been taken to prevent, abate or mitigate the harm with regard to the incident in question.[80] Kelly, Hemmings J said, had taken all the decisions leading up to the event, and those decisions had led to the contraventions by the company.[81]

State Pollution Control Commission v T J Bryant Pty Ltd[82] involved prosecution of a company for wilfully disposing of waste, without lawful authority, in a manner likely to harm the environment pursuant to s 5(1) of *EOPA*, and prosecution of Bryant as a director of the company. Both defendants pleaded guilty. The

[74] (Unreported, Land and Environment Court of New South Wales, Hemmings J, 26 June 1991) <http://austlii.edu.au/au/cases/nsw/landenv/194.html> at 14 September 1998 (copy on file with author).

[75] Tier 1 offences are the more serious offences concerning land, air and water pollution and are punishable with fines of up to $1 million for a corporation and $250,000 and imprisonment of up to seven years for an individual. They include, as mentioned above, wilfully or negligently disposing of waste, wilfully or negligently causing any substance to leak, spill or escape and a variety of other offences. They require proof that the conduct has been done 'in a manner which harms or is likely to harm the environment'. This is by comparison with s 59E of the Victorian legislation which requires serious damage to the environment or to public health or a substantial risk of serious damage to either.

[76] (Unreported, Land and Environment Court of New South Wales, Hemmings J, 26 June 1991) <http://austlii.edu.au/au/cases/nsw/landenv/194.html> at 14 September 1998 (copy on file with author) [9].

[77] Ibid [14].

[78] Ibid [23].

[79] Ibid [8].

[80] Ibid [17].

[81] Ibid [24].

[82] (Unreported, Land and Environment Court of New South Wales, Stein J, 11 June 1991) <http://austlii.edu.au/au/cases/nsw/landenv/578.html> at 14 September 1998 (copy on file with author) ('*Bryant*').

prosecution arose out of the discharge of waste from the company's site upon which it operated a business of screening materials to remove foreign matter and impurities so that clean sand and gravel could be obtained for the purpose of sale. The discharges took place into the Lachlan River at night, through the use of a timer device, and the amount and nature of discharge considerably exceeded the conditions of the company's pollution control licence.

In sentencing the company to a fine of $75,000 and Bryant to a fine of $15,000, Stein J took several factors into account. The offence had occurred in a 'blatant' fashion,[83] and the unlicensed discharging was carried on for economic reasons.[84] The company was experiencing difficulty operating at its site and had continued to discharge knowing that it was almost certainly in breach of its licence and despite earlier convictions and repeated warnings from EPA officers.[85] While the discharge was not toxic, it did have adverse effects on the aquatic life in the river. Bryant had 'complete control' over the causes which gave rise to the offence.[86] Bryant had become 'the controller' of the company in 1976 when he purchased shares in it from another family company.

VIII SIMILARITIES AND DIFFERENCES WITH VICTORIAN PROSECUTIONS

Clearly, the New South Wales EPA, like its Victorian counterpart, is now prepared to prosecute individual corporate actors who fit a very similar profile to the one described above.[87] Directors of individually or family-owned companies who have day-to-day on-site control will be targeted along with their companies where they make decisions which bring about a contravention of environmental laws. These decisions are not infrequently made because of economic factors, to save money or to allow a business that is not in financial good health to continue to operate. A history of non-compliance, elements of cover-up and/or a failure to mitigate harm will add to this prosecutable profile.

The New South Wales agency has, albeit not frequently, prosecuted directors for Tier 1 offences (ie fault-based offences), no doubt aided by the less strict and more clearly defined terms of the NSW legislation. As a result, in *Bryant* an individual director was fined as much as any corporation in Victoria had been fined prior to *Roda*, an amount of $15,000. The company itself was fined $75,000. Victorian prosecutors, until very recently, had pursued no-fault of-

[83] Ibid [45].
[84] Ibid [37].
[85] Ibid [46].
[86] Ibid [42].
[87] The *Prosecution Guidelines* formulated by the NSW agency make it clear that the decision to prosecute where there is apparent liability is 'not automatic': EPA, *Prosecution Guidelines*, Publication No 68 (1993) 4 As in Victoria, the ability to prosecute is part of a strategy for achieving compliance with the law. The NSW *Guidelines* clearly state that the decision to prosecute requires an evaluation of how strong the case is likely to be, and mere 'sufficiency of evidence' is not the sole criterion: at 4. Prosecution should only be undertaken where there is a 'reasonable prospect of a conviction being secured': at 4. The *Guidelines* set out some of the factors which are relevant, including the degree of culpability of the offender, the harm or potential harm caused and the availability and efficacy of alternatives to prosecution: at 5–6.

fences.[88] Fines ranging from $500 to $9,000 were imposed upon those directors or managers who were convicted. So, while the New South Wales fines were far from the maximum allowable, they were still considerably in excess of fines in Victoria.[89]

Prosecuting corporations and individual directors and managers for fault-based offences produces far more significant penalties as the NSW experience and *Roda* now demonstrate. As mentioned above, in that case the company was fined $25,000, which is by far the largest fine imposed in Victoria to date for an environmental offence. The director was fined $15,000, an amount at the top of the scale of fines previously imposed upon companies where no-fault offences have been proven. A wider ability to prosecute corporations and individual directors and managers for fault-based offences in Victoria, could, if utilised, produce more of these significant results. This would generate a much stronger message that corporate non-compliance will not be tolerated and that individual corporate actors will be held accountable.[90]

IX PROSECUTION IN OTHER JURISDICTIONS

A *Western Australia*

In Western Australia, where an offence has been proven against a corporation, s 118 of the *Environmental Protection Act 1986* (WA) imposes individual liability upon a director or manager where the corporation's offence was committed with the consent or connivance of, or is attributable to any neglect on the part of, that director or manager. The prosecution must prove consent, connivance or neglect, and the penalties which may be imposed upon directors or managers are the same as for any individual convicted of the same offence.[91]

The first and only director to so far receive a jail term in Australia was prosecuted pursuant to the legislation in Western Australia.[92] The facts reveal that the

88 A higher penalty under s 67AA is sometimes sought, although it would seem not frequently.

89 As David Mossop has pointed out, fines actually imposed in NSW do not appear to have kept pace with legislative increases in maximum penalties. He notes that before the *Environmental Offences and Penalties (Amendment) Act 1990* (NSW) raised fines, the average fine imposed by the Land and Environment Court was on average 40 per cent of the maximum. Since the amendments, the average is only 16 per cent: Mossop, above n 9, 427.

90 New South Wales has recently adopted innovative sentencing options which have long been advocated by some commentators, including the author, as an alternative means of punishing offenders and, most particularly, corporate offenders. They include provision for orders requiring an offender to take specified action to publicise their offence and its consequences: *Protection of the Environment Operations Act 1997* (NSW) s 250(1)(a). Also, an order can be made requiring offenders to notify specified persons or classes of persons (shareholders, for instance), including publication in an annual report: s 250(1)(b). The *Protection of the Environment Operations Act 1997* (NSW) will, when it comes into operation, also provide for orders requiring an offender to carry out a specified project for the restoration or enhancement of the environment in a public place, or orders to carry out a specified environmental audit: ss 250(1)(c) and (d). This move is to be applauded, as adverse publicity may shame a corporate offender and provide a greater general deterrent, if judiciously used, than relatively small fines.

91 The highest fine is $25,000 for an individual and the longest jail term is six months.

92 *EPA v McMurtry* (Unreported, Court of Petty Sessions of Western Australia, Stipendiary Magistrate Michelides, 9 March 1995).

defendant director fitted the prosecution profile discussed above. However, there were additional factors present in this case which persuaded the Court of Petty Sessions to impose a jail term. These factors would, it is suggested, be likely to be highly influential with regard to any decision to impose a custodial sentence.

The corporation, Gilfillan Pty Ltd, was prosecuted for causing pollution by discharging toxic waste from its premises into a storm-water drain. From there, the discharge went into a creek and then into the Canning River. The discharge had occurred because a director had instructed an employee to discharge into the storm-water drain as he did not want to pay the cost of having the waste disposed of lawfully. The 'dumping' occurred late at night, and the waste included arsenic, cyanide, lead, nickel and acid. Experts at the trial gave evidence that the discharge was likely to cause serious damage to the environment. The Stipendiary Magistrate who heard the matter said he was satisfied, upon the criminal standard of proof, that the director had 'consented' to the pollution. He sentenced the defendant to 12 weeks jail, a fact that caused very considerable shock waves throughout boardrooms in Australia.

In this case, all the factors required to fit the suggested prosecution profile were present. Solid evidence was available, including evidence from a company employee. There was little by way of a defence offered — the defendant claimed the waste would be diluted in the river and would therefore cause little damage. There was blameworthiness of a reprehensible kind. There was the likelihood of serious damage; the materials were, after all, toxic.

The case was an extreme one. Additional factors were present which were sufficient to result in a jail term for the director, despite the fact that he had no prior criminal record.[93] Not only did the defendant instruct his employees to dump the material, he also persisted in doing so even though one employee had apparently refused to take part in the task. The polluting was carried out in order to save money and under cover of darkness to avoid detection. Furthermore, there was evidence from a company employee that a meeting had been held after the event at a local hotel in order to formulate a plan to invent a story about a punctured tank as a means to 'explain' the incident.

B *Queensland, South Australia and Tasmania*

In Queensland, the *Environmental Protection Act 1994* (Qld) takes a slightly different approach to liability of individual corporate actors. It makes similar provision as those above in s 182 and also contains s 183 which provides:

> (1) The executive officers of a corporation must ensure that the corporation complies with this Act.

[93] As Smith relates, tough new sentencing guidelines in the federal United States system have resulted in environmental criminals being treated far less leniently than was previously the case. Nowadays, directors and managers, when convicted for intentional offences, 'frequently serve prison terms of two to three years and are fined tens of thousands of dollars' even for first offences: Smith, above n 3, 168.

(2) If a corporation commits an offence against a provision of this Act, each of the executive officers of the corporation also commits an offence, namely, the offence of failing to ensure the corporation complies with this Act.
(3) Evidence that the corporation committed an offence against this Act is evidence that each of the executive officers committed the offence of failing to ensure that the corporation complies with this Act.
(4) However, it is a defence for an executive officer to prove —
  (a) if the officer was in a position to influence the conduct of the corporation in relation to the offence — the officer took all reasonable steps to ensure the corporation complied with the provision; or
  (b) the officer was not in a position to influence the conduct of the corporation in relation to the offence.

Provisions for individual corporate officer liability are also to be found in both *Environment Protection Act 1993* (SA) s 129 and *Environmental Management and Pollution Control Act 1994* (Tas) s 60.

Despite the availability of these provisions for between three and five years in each of these jurisdictions, there have, as yet, been no prosecutions of directors or managers in Queensland, South Australia or Tasmania.[94] In light of the history of environmental agencies in these States, it is not necessarily surprising that prosecutions have not been forthcoming. Although pollution laws in all three jurisdictions have been significantly reformed in recent times (1993–94), regulators have traditionally preferred negotiation and conciliation to prosecution in these jurisdictions.[95] While the Victorian and New South Wales agencies have been, and still are, prepared to prosecute (albeit selectively), environmental agencies in other jurisdictions have usually employed 'manners gentle' and are further along Hawkins' continuum in their use of compliance strategies.

X CONCLUSION

While environmental agencies in some Australian jurisdictions have now begun to prosecute directors and managers for offences committed by corporations they control, it has been a cautious, rather than brave, beginning. Agencies in the past have not been eager to invoke their new legislative powers, preferring to tread old paths. The profile for prosecution is, even now, a narrow one, and usually those targeted will be on-site directors of smaller companies who have day-to-day management of the company and who are, in practical if not legal terms, the company itself. On-site managers in daily control of activities may also be vulnerable. Whether the successful prosecution of this small number of directors and managers in some Australian jurisdictions will encourage these agencies to greater boldness when dealing with major corporate players is yet to be seen. In some jurisdictions even this first cautious step is yet to be taken.

[94] The fact that most of the few prosecutions so far have occurred in New South Wales and Victoria is consistent with the findings of Grabovsky and Braithwaite. See further Grabovsky and Braithwaite, above n 2, 206.

[95] See further Jennifer Norberry, 'Australia' in Anna Alvazzi del Frate and Jennifer Norberry (eds), *Environmental Crime, Sanctioning Strategies and Sustainable Development* (1993) 27.