

PROBLEMS WITH DEFENDING CRIMES AGAINST THE ENVIRONMENT

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THE ENVIRONMENT WE LIVE IN IS OUR MOST PRECIOUS RESOURCE—OUR key to the future. Individuals or companies who wantonly and wilfully damage the environment or who are grossly negligent ought to be punished. Those are propositions which are unlikely to meet with much resistance. Like other areas of law which affect public health and safety, the environment ought to be subject to regulatory control. The question of how to police and enforce the protection of the environment reasonably and effectively, however, is a complex one. Certain basic principles of the common law protect a defendant facing criminal prosecution, including: the requirement of intention to commit a crime (*mens rea*); the presumption of innocence until proof of guilt beyond reasonable doubt in a court of law; the requirement that the prosecution carry the burden of proving all of the elements of an alleged offence beyond reasonable doubt; the privilege against self-incrimination and legal professional privilege. How far should "public welfare" legislation go in abrogating some or all of those basic principles in order to ensure that those who offend against regulatory statutes do not escape with impunity? What role should prosecutions and penalties play in prevention and deterrence in the area of environmental law? Should that role be different where companies or company officers are involved? When should an offender be sent to gaol for a crime against the environment? Is cooperation more important than coercion? These are hard questions which have been dealt with in different ways in different Australian and overseas jurisdictions.

Under the common law there were (and are) certain remedies against harming the environment—for example: negligence, nuisance, trespass and liability under the *Rylands v. Fletcher* (1868) LR 3 HL 330 rule for dangerous substances, which following *Burnie Port Authority v. General Jones Pty Ltd* (1994) 120 ALR 42 has been absorbed into general principles of negligence (*see* Bates 1992, pp. 36-46). There is now in addition to those civil causes of action a proliferation of State and federal legislation. In Western Australia alone there are over twenty statutes dealing with the environment, including the *Environmental Protection Act 1986* (WA) (referred to hereafter as the EPA). Each State in Australia has a similar range of statutes and

there are at least twenty-five Commonwealth statutes dealing with air quality, water quality, hazardous substances, pollution, land use and various other environmental issues. The requirements differ (sometimes markedly) according to the jurisdiction, as do the penalties. Grabosky and Braithwaite (1986, p. 38) found that environmental regulation was marked by a greater diversity of regulatory behaviour than any other area reviewed in the course of their research.

The recent proliferation of such legislation reflects modern public concern for the environment, which must certainly be viewed in a positive light. The negative aspect of the legislation explosion can be seen, however, in the difficulties faced by the lay person in assimilating the changes and complying with such multifaceted legislation. It is a well-known adage that ignorance of the law is no excuse and it is clear that today's individuals and corporations must acquire an awareness and understanding of the requirements of a myriad of environmental and health-related legislation if they are to avoid (or at least minimise their chances of) prosecution. Once the requisite knowledge is acquired, the changing face of the law must be monitored continually. There is a time and monetary cost to such an education process (*see* Kube & Marr 1990, p. 4) and in today's economic climate the major concern for many businesses is mere survival.

That is not to say that the cost ought not to be borne or that the guilty ought not to be punished. However, while it is of vital importance that offenders be prosecuted, it is of equal importance that the laws governing such prosecutions be both fair and perceived as fair (*see* Ipp J in *Mallesons Stephen Jaques v. KPMG Peat Marwick* (1990) WAR 357 at 374). This paper will canvass some of the problems faced by defendants, especially corporate defendants, when prosecuted for alleged breaches of regulatory "public welfare" legislation and the effect of those problems on the public perception of the criminal justice system. The focus of the paper will be on the need for clarity, certainty, consistency and cooperation in environmental law.

Difficulties in Defending Prosecutions from a Western Australian Perspective

Mens rea v. strict/absolute liability

In the American case of *Morissette v. United States* 342 US 246 (1952) (at 250-1), the United States Supreme Court reaffirmed the importance of mens rea in criminal law:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to", and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecutions.

The doctrine of the guilty mind expressed in terms of intention or recklessness is at the foundation of criminal law in common law countries (*see* *R v. City of Sault Ste Marie* (1978) 85 DLR (3rd) 161 at 165 and Blackstone's *Commentaries on the Laws of England* (Blackstone 1809, p. 21)). However, the elimination of the common law requirement of mens rea in certain English, Canadian and various Australian State and

Commonwealth "public welfare" statutes has been justified by the alleged difficulties faced by the prosecution in proving fault and the need to protect community interests by enforcing a high standard of care (*see, for example: Fisher 1981, pp. 194-9 and 207-208; Lipman 1991, p. 333; Alphacell Ltd v. Woodward [1972] AC 824 and R v. City of Sault Ste Marie (1978) 85 DLR (3rd) 161 at 171*).

Although the US Congress (like the Australian Commonwealth and State Parliaments) can create strict liability offences, there is a strong presumption in common law countries that some level of mental culpability is required for a criminal offence (*Morissette v. United States; Harris, Cavanaugh & Zisk 1988, p. 215*). The element of mens rea is considered to be an element which the prosecution must prove in any alleged criminal offence unless that requirement is expressly or by clear implication abrogated by the relevant statute. The American federal government has argued that the presumption applies with substantially less force in the context of "public welfare" offences and that such statutes ought to be construed in a manner that will effectuate their regulatory purpose (*see United States v. Johnston & Towers Inc 741 FC 2d 662, 666 (3rd Cir 1984)*). Nevertheless, Congress has generally elected not to make environmental crimes strict liability offences. No American environmental statute imposes criminal liability absent proof of a particular state of mind (*see Harris, Cavanaugh & Zisk 1988, p. 219*).

The three approaches to the state of mind requirement in statutory offences set out by the High Court of Australia in *He Kaw Teh v. The Queen (1985) 157 CLR 523* are: (a) mens rea; (b) strict liability (that is no need to prove intent but the defence of honest and reasonable mistake is available); and (c) absolute liability. The United States has generally followed the approach in (a). Canada has wavered between (a) and (b) and England has followed the approach in (c) (*see Alphacell Ltd v. Woodward [1972] 2 All ER 475 and the discussion of that case in Fisher 1981, pp. 192-201*). Australia has hovered between (b) and (c), depending on the legislation in question and the jurisdiction (*see, for example, the conflicting views for NSW and Victoria expressed in Cooper v. ICI Australia Operations Pty Ltd (1987) 64 LGRA 58 and Allen v. United Carpet Mills Pty Ltd [1989] VR 323 respectively*). *Cooper* held that the defence of honest and reasonable mistake applied at least to an offence of causing pollution under s. 16 of the *Clean Waters Act 1970 (NSW)*, while *Allen* held that it did not apply to s. 39(i) of the *Environmental Protection Act 1970 (Vic)*. A discussion of those cases can be found in *Bates 1992, pp. 315-16*.

While the English and Australian Parliaments have been less reluctant to dispose with the requirement of intention (wilfulness, recklessness) in "public welfare" statutes setting out specific requirements for the public good, in each country there has been some reluctance to abandon fault entirely (*see, for example, the discussion of causation in Alphacell in Fisher 1981, pp. 196-201*). The realisation that strict or absolute liability offences imposing large penalties should not be brought lightly has been reflected in certain protective provisions and policies such as:

- tiered offences requiring differing degrees of mens rea (for example the three tiered system in the *Environmental Offences and Penalties Act 1989 (NSW)* (EOPA) where proof of intention or negligence is required for the offences with the most severe penalties);
- a requirement that the minister or some other high ranking individual must approve all prosecutions;

- systems of warning notices;
- policies supporting prosecution as a last resort.

The width and vagueness of pollution provisions

Environmental offences are generally expressed in broad terms and are thus difficult to defend (*see* Hemmings 1992, pp. 1, 5-8). In the case of s. 49(1) of the EPA, for example, if the Full Court had not decided to read down the provisions of the legislation in *Palos Verdes Estates Pty Ltd v. Carbon* (1991) 72 LGRA 414, the pollution provision would have been effectively undefendable.

Section 49(1) of the EPA makes it an offence to cause (or allow to be caused) pollution. The term "pollution" is defined in the EPA as "a direct or indirect alteration of the environment: to its detriment or degradation; to the detriment of any beneficial use; or of a prescribed kind". The term "environment" is defined to mean "living things, their physical, biological and social surroundings, and interaction between all of these; . . .". The pollution offence is so broadly defined it covers almost any act associated with the environment, including: treading on an ant or pulling out a flower (Rowland J in *Palos Verdes* at 442), cutting a lawn, pruning roses, cutting down a tree, clearing a housing block to create access, driving a motor vehicle, lighting a fire or burning rubbish (Malcolm CJ in *Palos Verdes* at 427 & 428).

Mr Justice Wallace, referring to the breadth of the pollution provision in the *Palos Verdes* case, said (at 433) that "a breach of the section, as framed in the legislation, can only be in the eye of the beholder". Chief Justice Malcolm found in the same case (at 428) that, if the words of the provision were given a literal interpretation, the legislation would be ambiguous and uncertain and have an absurd and capricious operation by creating such a wide class of offenders who would be guilty of an absolute liability offence. For that reason, the Full Court took a purposive approach to the interpretation of the provision, finding (at 429) that the words "detriment" and "degradation" in the definition of "pollution" in s. 3(1) must take their colour from the ordinary meaning of "pollution" which was said to be consistent with the purposes of the EPA, the objectives of the Authority (s. 15) and the functions of the Authority (ss. 16(b),(c),(d),&(e)). On that approach, unauthorised bulldozing of a track (to which access had been granted) through Crown bush to obtain access to the defendant's land did not constitute pollution (*see* the discussion in Hemmings 1992 of the approaches taken by courts to broad environmental provisions, pp. 5-8).

An offence which is drawn so widely does not provide much in the way of guidance to industry as to what constitutes unlawful conduct and thus cannot be seen as a deterrent. Where a standard is not capable of being met, a penalty, regardless of its severity, will not have a deterrent effect.

Possible defences under the EPA

An individual or corporation faced with prosecution under s. 49(1) of the EPA would appear to have three possible defences:

- compliance with any of the standards, notices and so on set out in s. 74(3)(a) or in the exercise of any power conferred by the EPA (s. 74(3)(b));

- accident or emergency combined with due diligence and early reporting to the Environmental Protection Authority (s. 74(1)); and perhaps
- honest and reasonable mistake of fact (s. 24 of the Criminal Code (WA)), provided that the pollution offence is a strict liability, not an absolute liability, offence.

The defences under s. 74(1) of the EPA are tightly worded. They rule out negligence in cases of accident. They confine emergency situations which will serve as a defence to a discharge or emission which occurred "for the purpose of preventing danger to human life or health or irreversible damage to a significant portion of the environment". In both cases they apply only where the occupier took "all responsible precautions to prevent that discharge or emission" and notified the Authority in writing "as soon as was reasonably practicable" after the event. The term "significant portion" is not defined in the legislation and must therefore be decided by a court of law in the circumstances of each case.

Section 36 of the Criminal Code states that the provisions of Chapter V of the Code apply to all persons charged with any WA statutory offence. Despite s. 36, it appears that the Chapter V defences of due diligence, accident and emergency have been overridden by the specific requirements of s. 74 of the EPA. It is also unlikely, as a matter of public policy, that the Chapter V defence of honest and reasonable mistake will be successful in prosecutions in WA involving health and safety or the environment in any but the most exceptional cases, at least in courts of first instance.

The Role of Common Law Privileges

Privilege against self-incrimination

The privilege against self-incrimination, which can be excluded expressly or by clear implication by statute, is not expressly excluded by the EPA. The privilege has been affirmed as an important principle of the common law by the High Court on various occasions (for example *Petty v. The Queen* (1991) 173 CLR 95) and very recently in *Environment Protection Authority v. Caltex Refining Co Pty Ltd* (1993) 118 ALR 392). The privilege was confirmed for corporations in environmental cases by the New South Wales Court of Criminal Appeal in *Caltex Refining Co Pty Ltd v. State Pollution Control Commission* (1991) 74 LGRA 46. However, that decision was overturned by the High Court in a 4:3 decision in *EPA v. Caltex*. The privilege against self-incrimination was found by a narrow majority of the High Court (Mason CJ, Toohey, Brennan and McHugh JJ) not to apply to corporations, although the related privilege against self-exposure to a penalty was held by Brennan J to apply to corporations and Deane, Dawson and Gaudron JJ, in a strong minority judgment, found that the privilege against self-incrimination applied to corporations (*see also Trade Practices Commission v. Abbco Ice Works Pty Ltd*, unreported, Full Court Federal Court, 19 August 1994).

The EPA contains certain self-reporting requirements which have the effect of overriding at least some of the protection offered by the privilege against self-incrimination or the privilege against self-exposure to a penalty. Section 72(1), for example, requires that (subject to s. 72(2)) where a discharge of waste occurs as a result of an emergency, accident or malfunction or otherwise than in accordance with a works approval licence or an abatement notice requirement, or is of a "prescribed

kind" and has caused (or is likely to cause) pollution, the occupier of the relevant premises must notify the Environmental Protection Authority as soon as practicable after the discharge. The accident or emergency defence under s. 74(1) of the EPA also requires any person who may wish to rely on that defence to have reported themselves in a timely fashion—that is before knowing whether or not they will be prosecuted and probably before having access to legal advice. Those disclosure requirements, combined with the wide powers of entry, inspection and production allowed to authorised persons or police under ss. 81-83 of the EPA and to inspectors under ss. 88-93 of the EPA (and the heavy penalties for obstructing inspectors) add to the difficulties of defending an allegation under the EPA.

Legal professional privilege

While legal professional privilege is firmly established at common law (*see*, for example, *Baker v. Campbell* (1983) 153 CLR 52 and *Grant v. Downs* (1976) 135 CLR 674), that privilege is being continually eroded by legislation aimed at regulatory enforcement, despite criticisms by various commentators (for example, *see Corporate Affairs Commission of NSW v. Yuill* (1991) 100 ALR 609 and Longo 1993 in regard to the Companies Code). Currently, it would appear that although a report prepared for the purpose of legal advice or pending litigation will receive the protection of legal professional privilege, a report or environmental audit prepared for internal use to assess and improve compliance with environmental legislation may not (*see* Hemmings 1992, p. 4; Lipman 1991, p. 324; & Buckley 1991). Given the fact that such audits may be used against the defendant during a prosecution, companies are unlikely (or less likely) to pursue an active and open policy of environmental audits.

Certain Australian commentators have endorsed the American Environmental Protection Authority's willingness to allow voluntary environmental audits to be exempt from disclosure requirements in order to encourage such audits and the improved pollution control which may result (*see*, for example, Bisits & Jamieson 1990, pp. 30-1). New South Wales has indicated an intention to guarantee confidentiality for voluntary audits and to exempt them from the court process, including discovery (*see* Ministry for the Environment 1991, p. 8 and para. 19.1 of the recently published *EPA Protection Guidelines* 1993). Victoria has also published an enforcement policy indicating a similar intention (*see* Environment Protection Authority (Vic.) 1993, p. 10). This practice was encouraged in a paper presented by Brennan and Garrett (1990, pp. 17-18). It is evident that requiring disclosure of audit reports forces firms to protect themselves by adopting an approach based on minimal cooperation (Farrier 1992, p. 108).

We recommend the non-disclosure of voluntary audits for other Australian jurisdictions in order to encourage, rather than punish, individuals and corporations who wish to take active steps to improve pollution control. However, we note that it would be preferable to set out such guarantees more clearly in the legislation itself. Guidelines tend to be more loosely drafted than statutes or regulations and are not legally binding (*see* para. 2.2, *EPA Protection Guidelines* 1993 and the comments by Technical Support on p. ii, Environment Protection Authority (Vic.) 1993). A few Australian jurisdictions (South Australia, Tasmania and Queensland) are in the process of introducing legislation to remedy the problem—an approach which is to be commended.

Multiple Charges arising out of One Incident

Increasingly it is becoming the practice for complainants bringing prosecutions under regulatory legislation, such as the EPA, to charge the defendant with a series of offences arising out of the same incident. While this practice has often been criticised by the courts, the approach adopted by them has generally been to leave such decisions in the hands of the prosecuting authority (*see* the discussion in Hemmings 1992, pp. 4-5 and in Farrier 1992, p. 102, note 72 and the cases cited therein). This practice is especially unfair where the defendant is a first offender who has exercised due diligence, but who does not fit into the narrow statutory defences and where little harm was done. In such a case, the defendant is likely to feel victimised and may well be reluctant to pursue a close cooperative relationship with the regulatory body in the future.

An act by an individual or corporation causing pollution may breach more than one statute in a particular jurisdiction. If the pollution moves through the air or water into another jurisdiction, it may also breach one or more statutes in a second jurisdiction and/or activate liability under Commonwealth legislation (*see* Bates 1992, pp. 312-13). While prosecution in more than one jurisdiction may be a just result in cases of wanton or grossly negligent harm to the environment, it may not be warranted in a case where the breach is minor and little harm was done.

The Cost of Defending Prosecutions

Defending prosecutions under regulatory enforcement legislation is expensive, often running into thousands or even tens of thousands of dollars. Such costs are not generally recoverable even if the defendant is acquitted, although a small proportion of the costs may be allowed in the judge's discretion where statutory provision is made for costs orders. While convictions can be appealed, the defendant may be reluctant or unable to expend further sums on the possibility that the finding may be overturned on appeal.

Special Problems for Corporate Defendants

Corporations

According to common law principles of corporate liability most widely accepted in Australia today, a corporation will only be liable for negligence or wilful default if top end management (the guiding mind of the corporation) has exhibited the required degree of fault (*see* *Tesco Supermarkets Ltd v. Natrass* [1972] AC 153; *G J Coles & Co Ltd v. Goldsworthy* [1985] WAR 183; and Thomson 1992, p. 112). The confusion engendered by the various approaches taken by the courts in tracing corporate responsibility makes it difficult for defendants and prosecutors alike to know with any precision when a corporation will be found guilty of the conduct of an officer or employee.

The difficulties experienced in successfully prosecuting corporations, combined with the doubts expressed by some commentators about the effect of fines on corporations, has led to:

- legislative provisions imposing vicarious liability on companies for acts done by officers and managers; and
- an increasing willingness on the part of government agencies to pursue prosecutions against senior individuals within the corporate structure as well as, or instead of, the offending corporation.

This approach has been criticised as focussing away from organisational blameworthiness and discarding the elements of rehabilitation and deterrence in favour of retribution (Lipman 1991, p. 334).

Company officers and managers

Company officers and managers bear an especially onerous burden under the new legislative schemes, due to the growing trend in Australia and elsewhere of holding company officers liable for the acts or omissions of employees of the company or of the company itself, in some cases whether or not the officers have knowledge of such acts or omissions (*see* McDonald 1992, p. 9 & footnote 54).

Some recent Australian statutes have abandoned the *Tesco* principle (that is, that vicarious liability has no place in criminal law) in favour of vicarious criminal liability for corporate officers and managers. Under s. 10 of the New South Wales EOPA, for example, every director or manager of a corporation is deemed to have contravened the same provision as the corporation regardless of whether the corporation is prosecuted, subject to three possible defences:

- due diligence;
- no knowledge of the contravention; or
- not having been in a position to influence the conduct of the corporation

(*see* the discussion in Lipman 1991, p. 332; *see also* s. 118 of the EPA which imposes derivative liability on officers or managers in respect of a Part V offence by the company). The effect of such deeming provisions is to force the onus of proving those matters onto the defendant. Fisse (1990, p. 5) has criticised the liability imposed on officers and managers in s. 10 of the EOPA, where the stakes are very high (seven years in prison and/or a heavy fine for Tier 1 offences), as "an extreme and unjustified form of rugged individualism"—a view which we share.

In the United States, the developing doctrine of the "responsible corporate officer" (originally developed for strict liability offences such as those under the Food and Drug Act and being expanded in the Federal Courts to environmental offences which include a *mens rea* element) allows for corporate officers to be held vicariously liable for violations of statutes without regard to their intent only where they are "vested with the responsibility, and power commensurate with that responsibility, to devise whatever means are necessary to ensure compliance with the Act" (*United States v. Park* 421 US at 672 (1975) & note 14; Harris, Cavanaugh & Zisk 1988, pp. 228-33; Celebrezze, Jr, Muchnicki, Marous and Jenkins-Smith 1990, p. 230). More than mere corporate position is necessary to impose vicarious liability on an officer (*United States v. Park* 421 US 458, 674 (1975)). The "responsible corporate officer" approach appears to be a more accurate approach to the analysis of individual fault within corporations and was applied recently in the Canadian case of *R v. Bata Industries Ltd* (1992) 9 OR (3rd) 329 at 365.

Are Higher Penalties the Answer?

At a time when many are questioning whether incarceration really fulfils the intended purposes of rehabilitation or deterrence in regard to minor crimes against the person and property, more and more regulatory legislation is imposing imprisonment as a possible sanction against company officers and managers for "public welfare" offences. In our experience, prosecutions in the areas of health and safety and the environment are taken very seriously by corporations and their corporate officers and managers, regardless of the severity of the penalty. The very idea of being found to have committed a criminal offence is generally repugnant and frightening to upper management. As stated by Frederick Barnes (1986, p. 5, note 18):

As one commentator has put it:

Industrial corporations (and their actors), like anyone else, want to be regarded as responsible members of the community in which they operate, and a criminal conviction for pollution is not a highly valued mark of good citizenship.

Within a corporation or firm, such prosecutions cause repercussions against those seen to be responsible. Externally, publicity associated with such prosecutions is a source of embarrassment and often loss of business (for example, due to union unrest and/or lost contracts) for the firm or company in question. While the imposition of penalties against corporate officers is not objectionable per se, the problem arises from the combination of severe penalties with strict liability offences not requiring intent, negligence or even knowledge. The concept of intent (*mens rea*) is an important one at common law. Society ought to be very careful when imposing a last resort penalty like incarceration as a punishment for strict or absolute liability offences.

Various commentators have emphasised the importance of cooperation between government and industry (for example, Farrier 1992, pp. 86-94 & 108ff) and suggested that more appropriate sanctions than fines ought to be levied against corporations, including: corporate probation; punitive injunctions; community service orders; equity fines (stock dilution); adverse publicity; managerial intervention and/or a system of enforced internal accountability (*see* Fowler 1990, at p. 273 and the articles cited in note 17; Fisse 1990, p. 911; Barker 1984; and Lipman 1991, pp. 334-8). The US Sentencing Commission's *Draft Guidelines for Organizational Defendants* (1990) have adopted such an approach in combination with more traditional penalties such as fines. In our view, some or all of the above approaches ought to be pursued in regard to strict liability offences, whereas offences of dishonesty and intent (such as wanton or wilful damage to the environment) ought to retain the possibility of more punitive penalties (*see* Farrier 1992, pp. 123-4).

The Need for Clarity, Certainty, Consistency and Cooperation

The recent rapid proliferation of State and federal environmental legislation, combined with a dilution of certain basic tenets of the criminal law to facilitate prosecutions under such legislation, has complicated the law unnecessarily and rendered the requirements for compliance less than clear. Clarity, certainty and consistency in the law is necessary to encourage compliance and to ensure fairness to defendants accused of criminal conduct. We would encourage the Commonwealth and State governments to move toward a more unified national approach to environmental law to simplify and

assist compliance. The input of various interest groups, including State Law Societies, could prove very useful in that regard.

In order to encourage industry cooperation and maximum compliance, it is important that regulatory standards be seen as achievable, that offences be seen as defensible and that:

- regulation not be used to take the place of communication and cooperation between industry and government;
- strict liability offences be expressed as narrowly as possible;
- minor or accidental breaches not be prosecuted where to do so would be unjust in the circumstances;
- large fines or imprisonment be seen as a last resort for serious or repeat offenders;
- legal protection, rewards and incentives be offered for initiatives shown by individuals and companies to ensure compliance;
- creative alternatives to fines be instigated in relation to corporations;
- the approach to corporate liability be clarified;
- where large maximum fines or terms of imprisonment are imposed as penalties by the legislation (for example, Tier 1 offences), the requirement of mens rea (in the form of at least criminal negligence and preferably with a minimum standard of recklessness) be retained; and
- Tier 2 and Tier 3 offences be distinguished clearly from Tier 1 offences both from the point of view of mens rea (for example, negligence or strict liability as opposed to mens rea) and penalties.

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