DETERRING POLLUTERS: THE SEARCH FOR EFFECTIVE STRATEGIES

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I. INTRODUCTION

The environment, including environmental pollution, is the subject of intense political debate in contemporary Australia. Yet despite this debate little attention has been given to developing comprehensive strategies for deterring polluters.

This article is concerned with corporate polluters. It embarks on a preliminary[1] and, we should stress, impressionistic account of Australian attitudes to pollution and polluters, deterrence theory, the need to devise effective sanctioning strategies, and the extra-legislative matters which must be

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1 The authors hope this work will be part of a wider examination of enforcement strategies and pollution conducted at the Australian Institute of Criminology. The law as stated is correct to September 1990.

addressed if sanctioning strategies are to succeed. Environmental pollution is the subject of a considerable amount, and diverse range of legislation in Australia. This article does not attempt an Australia-wide coverage, rather, it focuses on the response to polluters and pollution in the most populous and probably most heavily industrialised Australian State - New South Wales, with some reference to Victoria.

II. EXPRESSIONS OF PUBLIC CONCERN

There is little doubt that there is a widespread public concern about the environment. Public opinion, as reflected in opinion poll data, is one indicator. In 1986 the Australian Institute of Criminology commissioned a survey of attitudes to crime and sentencing in Australia. Approximately 2,500 Australians were questioned about their attitudes to thirteen offences, and asked to select appropriate sentences for each. Offences included murder, heroin trafficking, wife bashing and income tax evasion. Respondents were also given the example of a factory knowingly discharging polluted wastes in a way that contaminated a city's water supply, leading to the death of one person. Significantly, the pollution offence was ranked the third most serious crime. When asked about appropriate punishments for the fictional polluter, the most commonly suggested penalty was a fine of at least $50,000, while one in three of those surveyed opted for a prison sentence where a death had occurred as a result of the pollution.[2]

Other national polls have highlighted significant concern about the environment in general, and pollution in particular. In a number of polls conducted in 1989 and 1990 those surveyed were asked about environmental matters. When polled in January and February 1989 about water pollution, a total of 71% of the 1000 people interviewed believed that beach pollution had worsened in recent years, and 67% believed that rivers and lakes were more polluted.[3] Sixty-six per cent of those taking part in the poll were prepared to pay more taxes to prevent pollution. Eighty-one percent of respondents to another national Saulwick Opinion Poll conducted in May 1990 viewed the threat to the environment as one which was real and must be taken seriously.[4] In the same poll, respondents were asked whether Australia should concentrate on environmental protection even if it meant a reduction in economic growth;

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2 P.Wilson, J.Walker & S.Mukherjee, "How the Public Sees Crime: an Australian Survey", *Trends and Issues in Crime and Criminal Justice* No.2, October 1986, Australian Institute of Criminology; J.Walker, M.Collins & P.Wilson, "How the Public Sees Sentencing: An Australian Survey", *Trends and Issues in Crime and Criminal Justice* No. 4, April 1987, Australian Institute of Criminology.

3 Saulwick Opinion Poll, *The Age (Melbourne)*, 13 February 1989.

4 *The Age (Melbourne)*, 15 June 1990.

or economic growth, even if it meant environmental damage. Sixty-seven percent of those participating in the survey opted for environmental protection.

A MORI (Market & Opinion Research International) poll conducted in March and April 1990 asked nearly 1200 Australians to score a number of issues. Sixty-four percent ranked the environment first, compared to fifty-three percent who ranked the economy first.[5] Respondents to this poll identified pollution as the major environmental issue. Four out of five respondents believed penalties for causing pollution were too lenient and that corporations were not sufficiently environmentally aware.[6] Finally, of approximately 1300 Australians surveyed in all mainland State capitals except Darwin in April 1990, 58% expressed extreme concern about water and beach pollution, and 57% were extremely concerned about air pollution.[7]

Politicians have recognised these concerns and espoused environmental causes - at least at a rhetorical level. Green issues are now regarded as vote winners. At Federal level, the Australian Labor Party has claimed recently that "If Mother Nature could vote - she'd vote ALP".[8] And the Federal Minister for the Arts, Sport, Environment, Tourism and Territories has commented on the need for the implementation of strict uniform pollution standards in co-operation with the States.[9] She added, "we expect industry to adopt whatever developments are available through modern technology to improve pollution levels. Such standards are demanded by the community..."[10]

At State level - in New South Wales and Victoria - new environmental legislation was proclaimed in 1989. Introducing the Environmental Offences and Penalties Bill, the New South Wales Minister for the Environment, Tim Moore, referred to:

> broad concern in the community at the failure of government over many years to address adequately the level of penalties available to prosecuting authorities, and other measures for environmental protection that are available to the Government and to various instrumentalities, primarily the State Pollution Control Commission.[11]

Similarly, in his Second Reading Speech on the Environment Protection (General Amendment) Bill, the then Victorian Minister for Planning and Environment, Tom Roper, stated that "[t]he proposed [legislative] changes will

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5 *The Australian*, 20 July 1990.

6 *The Sunday Telegraph*, 8 July 1990.

7 D.Collins, *Australian Consumers' Response to Environmental Issues.* Paper presented to the World Association of Public Opinion Research Conference, Lancaster, Pennsylvania, USA, 17 May 1990.

8 The Australian Labor Party, *The ALP: The Environment. Securing a Better Future*, undated.

9 The Hon. Mrs Ros Kelly, *World Environment Day: A Day for Defining our Goals*, Statement for World Environment Day, 5 June 1990, 4.

10 *Ibid.*

11 New South Wales Legislative Assembly, *Parliamentary Debates*, 1 August 1989, 8814.

enable the EPA to respond more efficiently and effectively to increasing community concerns over environmental protection issues..."[12]

Our impressionistic view is that the media, too, has demonstrated a high level of interest in the environment and in pollution. During the first half of 1990, for example, the columns of the *Sydney Morning Herald* contained frequent coverage of pollution incidents - reporting dumping, water and air pollution from major industries, detailing pollution prosecutions, and reporting criticisms of the State Pollution Control Commission, and the Environmental Offences and Penalties Act 1989 (N.S.W.).

Lastly, breaches of pollution licences and standards, and the response of regulatory agencies have been kept in public view by the activities of groups such as Greenpeace and its Clean Waters Campaign. For example, between November 1989 and June 1990, Greenpeace targeted the Apcel paper mill and Broken Hill Associated Smelters in South Australia, the Altona Petrochemical Complex and the Nufarm chemical company in Victoria, Caltex and BHP in NSW, and the Electrolytic Zinc Co of Australasia in Tasmania. In most of these cases, under the spotlight of media publicity, discharge pipes were blocked by Greenpeace.[13]

III. JUDICIAL VIEWS: THE CASE OF THE NSW LAND AND ENVIRONMENT COURT

There are indications, too, that some of the judiciary are acknowledging perceived changes in public opinion. The specialist New South Wales Land and Environment Court is a case in point. The Court is established under the Land and Environment Court Act 1979 (N.S.W.) to hear and determine appeals under specified environmental statutes, and has inherited the civil jurisdiction of the Supreme Court in regard to environment and planning laws.[14] In its Class 5 jurisdiction, the Court deals with environmental offences. An increasing number of Class 5 actions involve pollution offences under legislation such as the Clean Air Act 1961 (N.S.W.), the Clean Waters Act 1970 (N.S.W.) and the State Pollution Control Commission Act 1970 (N.S.W.).

Recently, the Court's judges have spoken out about community concern, the seriousness of pollution offences, and penalty structures. In August 1990, Bignold J. remarked, "[i]ncreasingly nowadays offences involving environmental pollution are regarded seriously by the community..."[15] And the

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12 Victoria, Legislative Assembly, *Parliamentary Debates*, 12 October 1989, 1485.

13 "Clean Waters Campaign. We have only just begun" (1990) 1 *Greenpeace, Australianews*, 4.

14 ss 16-21.

15 *Brimble v. Epping Rubber Co. Pty Ltd*, unreported, Land and Environment Court of New South Wales, 17 August 1990.

Chief Judge of the Court commented late last year, "the penalty for breach should reflect the community's displeasure towards companies licensed to pollute but breaching the conditions of their licence."[16] In *State Pollution Control Commission v. Shoalhaven Starches Pty Ltd*[17] the court criticised the small range of penalties available under clean waters, SPCC and allied legislation as providing "insufficient flexibility to enable the Court to adequately distinguish between varying degrees of culpability which may vary from accidental pollution, negligence, through to wilful and deliberate acts causing extensive degradation."[18]

There is also evidence that the Court now regards pollution licences as carrying with them concomitant and weighty societal responsibilities, and views nominal penalties for licence breaches as no longer appropriate. In the words of the Chief Judge of the Court, "[The defendant's] licence placed it in a special category over and above other persons and corporations and consequently imposed on it certain obligations."[19] In a subsequent case he said, "[The defendant's] breach of its licence is a breach of the public trust reposed in it."[20]

IV. PROSECUTIONS OF ENVIRONMENTAL OFFENCES

In very recent times, too, there has been an increasing, although some would argue still inadequate, use of criminal prosecutions in environmental matters in New South Wales. The growth of cases in the Class 5 jurisdiction of the NSW Land and Environment Court illustrates this phenomenon:

Class 5 Prosecutions lodged in the Land and Environment Court

1980	1	1986	35
1981	12	1987	23
1982	11	1988	40
1983	17	1989	193
1984	15	1990	241
1985	19		(Jan-Sept inclusive)

(*Source*: Land and Environment Court of New South Wales. These prosecutions are not confined to pollution offences.)

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16 *State Pollution Control Commission v. Incitec Ltd,* unreported, Land and Environment Court, 25 October 1989.

17 Unreported, Land and Environment Court, 4 April 1990.

18 *Ibid.*

19 *State Pollution Control Commission v. CSR Ltd,* unreported Land and Environment Court, 7 July 1989.

20 *State Pollution Control Commission v. Shell Refining (Australia) Pty Ltd,* unreported, Land and Environment Court, 20 July 1990.

Our impressionistic conclusion is that there is widespread social concern about environmental pollution, and support for the use of sanctioning strategies. In the light of these attitudes, we need to explore the rationale for the use of penalties, and what sort of penalties are likely to be effective.

V. SANCTIONING STRATEGIES: A BELIEF IN DETERRENCE

Sanctioning strategies reflect a belief in the efficacy of deterrence. Deterrence has two components - general and special. The former is concerned with preventing criminal behaviour, the latter in dealing with an individual who has already offended.[21]

Belief in deterrence underlies political and judicial, as well as public, approaches to pollution offences. For example, during his Second Reading Speech on the Environmental Protection (General Amendment) Bill 1989, the Victorian Minister for Planning and Environment spoke of the need to introduce minimum penalties in certain circumstances. He commented on the failure of magistrates to impose fines and their tendency to opt for bonds for corporate polluters. He continued, "One large company has received five bonds and one trivial fine since 1984, totally negating the deterrent effect Parliament had intended when setting the maximum penalties for offences".[22]

Similar attitudes may be found among members of the judiciary. One NSW judge has remarked that penalties should not only reflect the seriousness of an offence but "what Brennan J. ... described as the 'secondary deterrent purpose' of the criminal law namely 'the purpose of educating both the offender and the community in the law's proscriptions so that the law will come to be known and obeyed'".[23]

General deterrence proceeds from the view that incentives influence human behaviour and predicts that "increases in the severity of penalties or the certainty of their imposition on offenders who are detected will reduce crime by those who are not directly sanctioned".[24] Since the 1970s, social scientists have attempted to test the deterrence hypothesis by searching for "a negative association between aggregate crime rates and sanction levels".[25] To date, there has been weak but supporting evidence that under limited conditions the threat of punishment may be effective in preventing or reducing certain undesirable

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21 H.L.Packer, *The Limits of the Criminal Sanction* (1968), 39.

22 Note 12 *supra*, 1488.

23 *State Pollution Control Commission v. Quality River Sand Pty Ltd*, unreported, Land and Envioronment Court, 28 June 1989.

24 A.Blumstein, J.Cohen & D.Nagin (eds), *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (1978), 19.

25 *Ibid.*

behaviours.[26] There is evidence, too, that the certainty of punishment and, to some extent, its severity, contribute to a deterrent effect.[27]

However, deterrence may not work equally for all populations and offences. For example, in a much cited article written over two decades ago, Chambliss suggested that the criminal justice system punished most severely those offences and offenders least likely to be deterred.[28] He distinguished between acts which were "expressive"; and those which were "instrumental"; those perpetrated by people with a high commitment to criminal activity; and those carried out by people with a low commitment to crime. Chambliss theorised that instrumental criminal acts, especially when committed by those with a low commitment to crime, are most susceptible to deterrence. According to Chambliss, white collar crimes were, typically, such acts. He also hypothesised that while white collar criminals were most likely to be effectively deterred by sanctioning strategies, they were most likely to escape sanction.

Braithwaite and Geis[29] argue persuasively that the traditional objectives of the criminal law, including deterrence, can succeed with corporate offenders and their officials, despite being found wanting with "traditional" crimes and criminals. They contend that corporate officials stand to lose considerably as the result of a criminal conviction - in terms of social status, respectability, material possessions and livelihood; they are future-oriented and rational. Braithwaite and Geis maintain that:

> [c]orporate crimes are almost never crimes of passion; they are not spontaneous or emotional, but calculated risks taken by rational actors. As such they should be more amenable to control by policies based on the utilitarian assumptions of the deterrence doctrine.[30]

Braithwaite and Geis consider corporations to be similarly deterrable and express optimism not only about the efficacy of special deterrence in the context of corporate offenders, but some cautious hope about general deterrence. In particular, they cite a study on coal mine safety enforcement in the United States which demonstrated that tougher coal mine safety laws and increased expenditure on enforcement "were both associated with dramatic reductions in coal mine fatality rates".[31]

Although there is support for the view that corporations and their officials may be susceptible, perhaps peculiarly susceptible to deterrence, there is no consensus about whether criminal or civil law is the more appropriate vehicle, nor about which types of sanctioning strategy are most efficacious.

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26 H.N. Pontell, *A Capacity to Punish. The Ecology of Crime and Punishment* (1984), 9.

27 *Ibid.*

28 W.J.Chambliss, "Types of Deviance and the Effectiveness of Legal Sanctions" (1967) *Wisconsin L Rev* 703.

29 J.Braithwaite & G.Geis, "On Theory and Action for Corporate Crime Control" (1982) 28 *Crime & Delinquency* 292.

30 *Id.*, 302.

31 *Id.*, 305.

VI. CRIMINAL SANCTIONS

Turning to the criminal law first, conventional wisdom is that much of the economic conduct of business which is the subject of regulatory laws is "morally neutral". Indeed, Kadish[32] argues that the corporate activities prohibited by regulatory laws are not immediately distinguishable from business activities regarded as acceptable, and even laudable, by the community. Scholars such as Kadish would assert that criminal sanctions are inappropriate tools for regulating such corporate behaviour because the criminal law should be reserved for morally reprehensible offences and offenders. Our conclusion, however, is that society's perceptions about the environment and pollution have changed in recent times and that polluting behaviours are no longer regarded as value neutral. It may be, therefore, that the Kadish approach requires modification in the light of these changes.

Other commentators believe that criminal sanctions can, by their very nature, play a pivotal role in deterring corporate polluters. They consider that "the stigma of criminal conviction and punishment"[33] has a deterrent value; in particular, because if affects corporate prestige, one of the motivating forces in corporate behaviour.

Yet other scholars have questioned the effectiveness of criminal sanctions against corporate polluters[34] for evidentiary and practical reasons. Even those pollution offences which are strict liability offences, require the Court to be satisfied of the prosecution's case beyond reasonable doubt. "True" criminal offences carry with them not only a criminal standard of proof, but a requirement of mens rea, something that may be especially difficult to prove when allegations of corporate wrongdoing are in issue. For those who believe that certainty of punishment contributes to a deterrent effect, the commonly identified impediments to a successful prosecution, and the belief that defendants in criminal cases will fight charges vigorously, are yet other indications that the criminal law is an ineffective mechanism for pollution control.

Perceived deficiencies in existing ideas of corporate mens rea have lead commentators such as Fisse to develop new concepts of corporate fault.[35] Fisse promoted the idea of reactive corporate fault which he defined as "a corporation's fault in failing to undertake satisfactory preventive or corrective

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32 S.H.Kadish, "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations" (1963) 30 *University of Chicago L Rev* 423.

33 B.Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 *Southern California L Rev* 1141, 1147.

34 See generally, the discussion of this topic in "Developments in the Law. Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions" (1979) 92 *Harvard L Rev* 1227.

35 Note 33 *supra*, 1185-1213.

measures in response to the commission of the *actus reus* of an offence by personnel acting on behalf of the organization".[36]

Criminal sanctions against corporate officials either in addition, or in preference to, sanctions against corporations themselves, have also been the subject of debate.

While United States experience has shown that such sanctioning is not an impossible task, some concern has been expressed that there may be particular problems in sheeting home responsibility to corporate officials.[37] Consider the following scenario outlined by a senior officer of the New South Wales State Pollution Control Commission. He remarked on "a [past] tendency, particularly with large organisations, for top management to issue instructions for all pollution and environmental requirements to be met while at the same time placing conflicting demands upon their middle management to meet costs and production targets ... middle management have been forced into a position of complying with environmental requirements either incompletely or not at all. In many cases the most senior management in the organisation have professed ignorance of the situation".[38]

It has also been suggested that some corporations have designated junior managers as vice-presidents responsible for going to gaol to protect their more senior counterparts.[39]

On the other hand, it may be difficult to identify the responsible individual, especially in large or multinational corporations where decision-making may be delegated from corporate headquarters to branch plant managers or where, unknown to corporate headquarters, local managers have set production goals which can only be achieved by breaching local environmental regulations.

VII. CIVIL SANCTIONS

For some commentators, the special institutional features of business corporations are such that civil rather than criminal sanctions represent the most effective way of achieving a deterrent impact.[40] Those who extol the benefits

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36 *Id.*, 1196-7.

37 Both the Environmental Offences and Penalties Act 1989 (N.S.W.) and the Environment Protection Act 1970 (Vic.) attempt to address these problems. They provide that if a company contravenes relevant legislative provisions, then each director or manager of the company is also guilty of the offence. Defences are then provided. Under both pieces of legislation, company officials are liable to fines and/or imprisonment. The relevant sections are s.10 in the New South Wales Act and s.66B and s.66B(1A) in the Victorian Act.

38 J.Court, "Government Environmental Initiatives in New South Wales" *TRR Seminar, Environmental and Pollution Law*, Sydney, 16 August 1990, 6.

39 J.Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (1984).

40 Note 34 *supra*.

of the civil law point to the range of available remedies - such as injunctions, damages, and fines - and a less onerous burden of proof, making civil action less complex, time-consuming and costly.

In *Farrell v. Dayban Pty Ltd,* the Land and Environment Court of New South Wales held that a statutory authority has standing to institute proceedings to restrain breaches of environmental laws.[41] Civil remedies have recently been commended by two judges of the Land and Environment Court of New South Wales.[42] In a recent address, the Chief Judge of the Court remarked,

> There are, in my opinion, good reasons why, where possible, civil enforcement mechanisms ought to be used to enforce obligations imposed under environmental laws. It is clear from recent events in this country and throughout the world that breaches of environmental laws can have catastrophic consequences. Regulatory agencies should not be forced to wait until environmental damage has been done before they can act.[43]

His brother judge, Mr Justice Hemmings, expressed some puzzlement that regulatory agencies "rarely institute civil proceedings in the Land and Environment Court to obtain orders to restrain a breach or apprehended breach of a pollution law".[44] He continued,

> The obvious utility of orders in Class 4 is also as a deterrent to actual or potential polluters who are otherwise liable only to the inadequate penalties under existing legislation. For reasons already given, the unreasonably low penalties that are allowed to be imposed by the Court under many pollution Statutes, and the usual delays between offence and imposition of penalty, often appear to remove the deterrent element of prosecution. On the other hand, if orders were made in Class 4 and a person failed to comply with such orders, further proceedings could be instituted in the Land & Environment Court for the alleged contempt of the order. The Court's jurisdiction to punish such contempt is very wide and may be formulated *"as the Court thinks just"* in the circumstances.[45]

On the other hand, those who support the use of criminal sanctions for polluting behaviour would argue that there is no reason to assume that the spectre of huge fines in a civil action would not result in a vigorous defence being mounted. The question whether recourse to civil penalties may, additionally, serve to marginalise pollution offences even further, must also be answered.[46]

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41 Unreported, Land and Environment Court, 7 June 1989.

42 The Honourable Mr Justice J.S.Cripps, "The Administration of Social Justice in Public Interest Litigation" in *Proceedings of the International Conference on Environmental Law* 14-18 June 1989. Mr Justice N.A.Hemmings, "The Role of the Land and Environment Court in Pollution Control" *National Environmental Law Association (NSW), Pollution Conference,* 15 June 1990.

43 Cripps, note 42 *supra,* 92.

44 Hemmings, note 42 *supra,* 16.

45 *Id.,* 17-18.

46 N.Franklin, "Environmental Pollution Control. The Limits of the Criminal Law" (1990) 2 *Current Issues in Criminal Justice* 81, 91.

VIII. THE USE OF FINANCIAL PENALTIES

Sanctioning strategies for polluters have, traditionally, been fine-based. Those who continue to support the use of cash penalties would argue that deterrence of corporate wrongdoing by such means will be more effective through the civil law than through the criminal law because the courts will be more willing to impose large fines in civil cases. Certainly, small fines (whether civil or criminal) may be regarded by corporations as "merely additional licence fees ...[and] a necessary and budgetable cost of production".[47]

It should not be thought, however, that there is unanimous agreement that substantial cash penalties, whether imposed by either the civil or criminal law, are effective. For some commentators, reliance on cash fines is based on a misunderstanding of corporate motivation. They contend that it would be unwise to assume that "monetary gain is the only significant value in organizational decisionmaking..."[48] It has been argued, too, that for financial penalties to be high enough to deter a corporation, a fine may have severe side effects such as the closure of a plant, industrial action, unemployment, and injuries to creditors and shareholders.

The possibility of plant closures may be especially acute with multinational corporations which lack regional loyalties. It may be perceived as more likely, too, in a federal political system such as Australia where no uniform penalty regime exists. This latter concern was referred to specifically by the New South Wales Minister for the Environment when introducing the Environmental Offences and Penalties Bill 1989,

> [t]here is little point in the Greiner Government seeking to lead the way with what is possibly the most comprehensive environmental penalties legislation contemplated in one enactment if at the same time industry is able to shop around and have other jurisdictions with different attitudes.[49]

Judges, too, occasionally take economic factors into account. In one New South Wales decision, when considering the appropriate penalty, the judge remarked that a substantial penalty for the particular defendant could create "undue hardship on the company and could cause employment problems".[50]

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47 The Honourable Tim Moore M.P., "The Getting of Wisdom' - Towards Truly National Environmental Law Enforcement and Operational Standards" *Ninth Annual National Conference of the National Environmental Law Association* 27 August 1990, 3.

48 Note 33 *supra*, 1154.

49 Note 11 *supra*, 8817.

50 *Smith v. Cnizonom*, unreported, Land and Environment Court, 25 March 1982.

IX. SPECIAL SANCTIONS FOR CORPORATIONS

Whether the civil or criminal law is used, traditional penalties may have only a limited impact on corporate misbehaviour. According to C.D. Stone, the law

> [o]ught constantly to be searching out and taking into account the special institutional features of business corporations that make the problems of controlling them (and of controlling men in them) a problem distinct from that of controlling human beings in ordinary situations.[51]

As we pointed out earlier, Fisse argues that nonmonetary considerations are important, and often overlooked, corporate motivators. Nonmonetary factors influencing managers include "the urge for power, the desire for prestige, the creative urge, the need to identify with a group, the desire for security, the urge for adventure, and the desire to serve others".[52]

One possible nonmonetary-based deterrent is the use of publicity. Fisse and Braithwaite[53] have looked in detail at the value of publicity as a method of controlling harmful business behaviour, including pollution. Their study examined seventeen large transnational companies which had been the subject of significant adverse publicity. They concluded that prestige is an important motivator of corporations, and suggested a variety of formal and informal publicity devices to exploit this concern. With regard to the former, they recommended that

> publication of the details about an offence be made available as a court-ordered sentence ... [and that] pre-sentence or probation orders against corporate offenders should be used to require the disclosure of organizational reforms and any disciplinary action undertaken as a result of an offence.[54]

With regard to the latter, they suggested investigative media reporting, official inquiries, corporate disclosure, and international exposure.[55]

Equity fines have found favour among some scholars, on the basis that they avoid the drastic financial impact that cash fines may have. First proposed by Coffee,[56] the equity fine would involve a convicted corporation being required to authorise and issue shares to a crime victim compensation fund of a market value equal to that of a cash fine. This fund could then liquidate the securities at will, avoiding for the corporation those liquidity and associated problems involved with cash fines.

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51 C.D. Stone, *Where the Law Ends: The Social Control of Corporate Behaviour* (1975), 7.

52 Note 33 *supra*, 1155.

53 B.Fisse & J.Braithwaite, *The Impact of Publicity on Corporate Offenders* (1983).

54 *Id.*, 312.

55 *Id.*, 250-284.

56 J.C.Coffee, "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) 79 *Michigan L Rev* 386, 413-424.

Community service orders are another possibility. According to Fisse,[57] such orders effectively target corporations and fulfil the objectives of the criminal law. As examples, he suggests that corporations could be required to retrain the unemployed, devise better methods of cleaning up toxic spills, manufacture improved pollution control devices, or participate in urban renewal.[58] A deterrent impact would be achieved by providing "a stronger catalyst to internal discipline. In being forced to allocate personnel to a required project of community service, a corporate offender would be encouraged to ask those responsible for subjecting it to that requirement to extricate the organization from the problem they created".[59]

X. THE NULLIFICATION PROBLEM

But legislative changes alone, whether involving harsh civil or criminal sanctions, may be insufficient to deter corporate polluters. "[F]ew phenomena are better established and more easily observed in the administration of the criminal law than the nullification of severe penalties".[60] The problem of nullification applies no less to civil than it does to criminal sanctions. It occurs for a variety of reasons, the more important of which are discussed below.

A. GOVERNMENT RESOLVE

Even if Government anti-pollution rhetoric is strong, countervailing influences exist. The need to attract and retain industry in the electorate is an important political and economic imperative. In New South Wales, for instance, a Department of State Development was established in 1988 "to facilitate and co-ordinate the private and public sector interface, with the aim of making New South Wales a better place to do business and a leading economic force in the Asia-Pacific region".[61]

The pressures of economic development on the one hand, and pollution control on the other were reflected in an industry incentive package launched by the New South Wales Government in August 1989. The Strategic Economic Development Package was designed to "enable NSW to compete aggressively for national and international business and industrial projects".[62] It offered the prospect of financial assistance to industry including "[a]ssistance with

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57 B.Fisse, "Community Service as a Sanction Against Corporations" (1981) *Wisconsin L Rev 970.*

58 *Id.*, 1001-1003.

59 *Id.*, 1004.

60 Note 56 *supra*, 406.

61 State Development, *1988/89 Annual Report*, 10.

62 Premier of New South Wales, "State Gov't Unveils Industry Incentive Package" *News Release, 30 August 1989.*

Regulatory costs where new regulations impose onerous costs on new investments (eg pollution control)".[63] Government is thus involved in juggling environmental and economic interests.

Its attitudes to polluters are further complicated because large and otherwise "respectable" corporations are involved in polluting behaviours. Government ambivalence to sanctioning strategies was highlighted recently by the New South Wales Minister for the Environment in his Second Reading Speech on the Environmental Offences and Penalties Bill. While remarking that the law would apply to all polluters, he was careful to distinguish between generally responsible corporate citizens and those operating at "the sleazy end of the environmental market-place...[64]

Large corporations retain considerable power and influence over governments, especially in those parts of the country dependent on a single industry for employment, prosperity, or the supply of particular goods. Industry may threaten to close-down or relocate if penalties are regarded as too draconian, or standards or licence conditions as too onerous. A plant closure could impact on economic prosperity, Government revenue, employment and, where a monopoly or near monopoly situation obtains, may threaten the availability and supply of particular goods or services.

The New South Wales Minister for the Environment expressed these sorts of concerns when commenting on a State Pollution Control Commission decision to grant Caltex an interim three month licence to operate its oil refinery at Kurnell while a new and tighter licence agreement was being drawn up. The *Sydney Morning Herald* estimated that Caltex's oil refinery at Kurnell supplies about 40 per cent of the State's petrol.[65] Mr Moore was reported by the newspaper as saying that the Commission's decision was a compromise. The alternative of plant closure could have had serious repercussions - "We have to balance the social responsibility we have to the working men and women of Sydney's western suburbs and their ability to get to and from work."[66]

B. RESOURCE ALLOCATION

Government resolve impinges not only upon creating an effective legislative framework for pollution control but allocating adequate resources so that regulations can be policed and breaches prosecuted. A desire to stay "onside" with business may militate against the commitment of adequate resources. And, in times of economic stringency and public sector shrinkage, the Government may be unwilling or unable to commit such resources. In its 1988-89 Annual Report, the State Pollution Control Commission commented on "reductions in

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63 *Ibid.*

64 Note 11 *supra*, 8814.

65 "Govt will tighten refinery's licence to pollute", *Sydney Morning Herald*, 3 February 1990.

66 *Ibid.*

real levels of funding in recent years, together with the steady expansion and diversification of its responsibilities ...[67]

If enforcement is inadequate then not only will public confidence in pollution control be shaken, but the deterrent effect of sanctions is likely to be undermined.

C. REGULATORY AGENCIES - STAFFING, ATTITUDES AND POLICIES

A further requirement of effective pollution laws is the recruitment and training of properly qualified staff able to conduct inquiries, obtain evidence and testify in court, especially where a criminal prosecution is involved. United States experience suggests that criminal investigations are extremely complex, intensive and expensive.[68]

Nullification of penalties may also result from staff attitudes. A number of factors predispose the staff of regulatory agencies against the use of sanctioning strategies. In 1984 Hawkins published a study of the administration of English water pollution laws.[69] He found that regulatory agencies and their staff lack the relatively firm moral mandate possessed by the police. Hawkins characterised the attitudes of agencies and their staff towards enforcement as ambivalent.[70] Agency staff tended to display tolerance towards polluters, adopted compliance strategies where possible, and viewed prosecution as an avenue of last resort.

Hawkins' findings are supported by research conducted by Hutter[71] on law enforcement by environmental health officers in Britain, and by Huestis in Canada. Operational staff surveyed by Huestis in fact commonly regarded prosecution as a failure on their part to find "an economic engineering solution"[72] to environmental problems. Where staff are involved in enforcement activity, Braithwaite has observed that "a proliferation of studies since 1970 tend to show that from the top administrator to the junior inspector, most officers of regulatory agencies never [see] themselves as law enforcers."[73]

Such attitudes may reflect the professional backgrounds of agency field workers. They are likely, too, to be the result of organisational philosophies and policies - perhaps held for long periods of time. Traditionally, Australian

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67 *State Pollution Control Commission Annual Report 1988-89*, 5.

68 See generally, M.M. Mustokoff, *Hazardous Waste Violations: A Guide to their Detection, Investigation, and Prosecution* (1981).

69 K. Hawkins, *Environment and Enforcement: Regulation and the Social Definition of Pollution* (1984).

70 *Ibid.*, 8-13.

71 B.M. Hutter, *The Reasonable Arm of the Law? The Law Enforcement Procedures of Environmental Health Officers* (1988).

72 L. Huestis, *Policing Pollution. The Prosecution of Environmental Offences* (1984) 43 [unpublished].

73 J. Braithwaite, "White Collar Crime" (1985) 11 *Annual Review of Sociology* 1, 9-10.

environmental regulatory agencies "despite... wide variations... in policies relating to prosecution, ...invariably seek co-operative relationships with industry."[74]

In the early 1970s the New South Wales State Pollution Control Commission avowedly relied on conciliation and education to achieve its goals, and regarded prosecution as a last resort.[75] Commenting on this approach, the Commission stated,

> The basis for this policy was the view that the issue of environmental protection needed to be `eased into the system'. The Commission sought to avoid provoking antagonism from industry and others and to disprove criticism that the new pollution-control laws would fetter progress.[76]

At the time of their study into regulatory agency enforcement strategies, Grabosky and Braithwaite identified only two environmental regulatory agencies as having strategies of moderately strict enforcement.[77] They commented,

> of all environmental regulators interviewed, only the Victorian EPA chairman said that he placed a great degree of importance of enforcement as part of overall pollution control strategy... and that he would be concerned if the number of prosecutions brought by EPA were to decline.[78]

And, despite statements to the contrary in the SPCC's 1983-84 *Annual Report*,[79] when interviewed by Grabosky and Braithwaite, the director of the SPCC "told us that conciliation took precedence, `We are not basically a prosecuting organization.'"[80]

A further influence on the attitudes of regulatory agency staff is the close and continuing relationship which exists between them and industry. The nature of this relationship derives in part from the close contact between regulator and regulated during licensing negotiations, the exchange of technical information, and compliance monitoring. Links may be established and maintained because the regulated population does not conform to criminal stereotypes, and because agency staff take the view that maintaining good relationships will encourage communication about, and reporting of, pollution incidents and problems. It may also be the case that agency staff have career histories in, or even career prospects with, industry. Industry representatives may sit on regulatory

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74 P. Grabosky & J. Braithwaite, *Of Manners Gentle, Enforcement Strategies of Australian Business Regulatory Agencies* (1986), 47.

75 New South Wales State Pollution Control Commission, *1983-84 Annual Report*, 218.

76 *Ibid.*

77 Note 74 *supra*, 38.

78 *Ibid.*

79 The Commission stated in the Report that its "policy has been changing in recent times. Whereas many detected breaches of the pollution-control Acts might not previously have resulted in prosecution, they will now do so alsmost without exception if sufficient evidence to support a prosecution can be obtained." Note 75 *supra*, 218.

80 Note 74 *supra*, 40.

agencies' boards or advisory committees. In such circumstances it is not surprising that neither group wishes to "rock the boat". Desire to maintain good relations is demonstrated not only by regulatory agencies but by the regulated population.

In a recent address, Mr Justice Hemmings of the New South Wales Land and Environment Court, remarked on the lack of use of the Court's Class 1 jurisdiction - in which appeals may be instituted against licence and approval decisions. Speculating on the reasons for this situation, the Judge remarked that

> licensees were said to be reluctant to get `offside' with regulatory bodies. Licensees apparently were more likely to `negotiate' with the consent authority rather than seek a review by the Court of the approval or its conditions.[81]

D. THE PROCESS OF PROSECUTION

Nullification may also be brought about through the prosecutorial process. How prosecutorial discretion is exercised is especially important when restrictions on standing exist which prevent or restrict legal action by members of the public. If the final decision to prosecute rests with the Executive, then political considerations, and economic factors may influence decision making.

Difficulties in making "independent" decisions may also affect or be seen to affect regulatory authorities. In New South Wales recently controversy was sparked when the Water Board sought State Pollution Control Commission permission to prosecute the chemical company, ICI, under the Environmental Offences and Penalties Act 1989 (N.S.W.). Public protests occurred because one of the Commission's members was managing director of a company reportedly partly owned by ICI.[82]

How prosecutorial discretion is exercised is also crucial if choices exist between what statutes to prosecute under, and what courts to prosecute in. New South Wales is a case in point. An action may be brought under the Environmental Offences and Penalties Act 1989 (N.S.W.) where the maximum fine is $1 million for a corporation and $150 000 in any other case, and where imprisonment is provided for.[83] Or the offender may be prosecuted under clean air, clean waters or State Pollution Control Commission legislation where the maximum penalties are, at present, a very modest $40 000 for a corporation and $20 000 for any other person.[84]

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81 Hemmings, note 42 *supra*, 16.

82 The Chairman and Director of the State Pollution Control Commission, Professor John Niland, commented that Mr Donovan had declared his interest and absented himself before matters of substance were discussed. "Water Board gets OK to charge ICI" *Sydney Morning Herald*, 1 September 1990.

83 Environmental Offences and Penalties Act 1989 (N.S.W.) s.8.

84 Clean Air Act 1961 (N.S.W.) s.32; Clean Waters Act 1970 (N.S.W.) s.16; State Pollution Control Commission Act 1970 (N.S.W.) ss.17D and 17K. There are also penalties for continuing offences. A review has been foreshadowed.

Apart from electing appropriate legislation under which to prosecute, the prosecutor may also have to choose which court prosecute in. Once again, taking New South Wales as an example, the prosecutor can choose to bring some cases in a Local Court where the maximum penalty which can be imposed is $4 000, instead of in the Land and Environment Court. The disadvantage of inappropriate legislation or venues being chosen is that "the Court may be deprived of the opportunity to impose real or significant penalties."[85]

The policies of the regulatory agency will influence such choices. The Chief of the New South Wales State Pollution Control Commission's Water and Chemicals Division recently contrasted past and present Commission approaches. He commented that the Commission

> is adopting a stricter approach to compliance and legal accountability than it has in the past. It will examine each apparant infraction it detects, whether of an act, a regulation or a licence condition, with a view to the appropriate penalty... it will tend to start at the highest end of the penalty scale and to work down, depending on the circumstances of the case, in determining which legislative provision to use for the action. It has in the past, by contrast, tended to start at the bottom end of the scale and work up.[86]

E. SENTENCING

Even if sanctioning strategies overcome the obstacles we have described, there remains the barrier of sentencing. Sentencing imposed by the courts play a vital role in deterrence, punishment, and retaining public confidence in the overall pollution control apparatus. Sentencing in environmental cases may involve consideration of complex technical information, and balancing conflicting interests and demands in an area that covers the spectrum from minimal to catastrophic damage, from simple errors of judgment to negligent or deliberate conduct. Little is known about the sentencing practices of Australian courts in relation to pollution offences. However, the use of statutory criteria to assist the courts in making sentencing decisions in this relatively new and difficult area of the law is one possibility - and one which was adopted in the Environmental Offences and Penalties Act 1989 (N.S.W.).[87] While judicial opinion about the appropriateness and merits of statutory criteria may well be divided, one member of the NSW Land and Environment Court has lamented the general absence of such statutory criteria.[88]

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85 Hemmings, note 42 *supra*, 5.

86 Note 38 *supra*, 7.

87 s.9.

88 Hemmings, note 42 *supra*, 6.

XI. STANDING

Standing before the courts is another important matter which needs to be addressed. In the United States, citizen suits are specifically provided for in most environmental statutes. However, in Australia, in general,

> a plaintiff has no standing to bring an action to prevent the violation of a public right if he has no interest in the subject matter beyond that of any other member of the public; if no private right of his is interfered with he has standing to sue only if he has a special interest in the subject matter of the action.[89]

Present standing rules have been criticised on a number of counts. Their applicability in environmental cases where many people may be affected in similar ways by, for example, a pollution incident, is questionable. It cannot be assumed that regulatory agencies will always be "autonomous, expert, public-interested"[90] decision makers, or that they will have the resources to take legal action in all worthy cases. Provisions enabling citizen suits against polluters in order to enforce environmental laws can help circumvent, and guard against agency capture, encourage agency vigilance, and keep pollution on the political agenda.

Consideration should be given to expanding access to the courts in pollution matters.[91] For those who fear the floodgates would thus be opened, the experience of the New South Wales Land and Environment Court is, once again, instructive. Under the Environmental Planning and Assessment Act 1979 (N.S.W.) "[a]ny person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach."[92] On the matter of standing, Cripps J. said recently,

> since 1980 I have heard complaints that s.123 would lead to floodgates being opened and to a torrent of litigation. This has not occurred. The fact that proceedings can be heard quickly and that unmeritorious applicants pay the substantial costs involved is, apparently, a sufficient deterrent.[93]

In order to make changes to standing rules meaningful, consideration will also have to be given to the funding of private litigants. Reconsideration of the principle that unsuccessful parties to legal actions usually bear their own costs, will also be necessary.

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89 *Onus* v. *Alcoa of Australia Ltd* (1981) 149 CLR 27, 35-36.

90 A.D. Sarat, "Access to Justice: Citizen Participation and the American Legal Order" in L. Lipson & S. Wheeler (eds), *Law and the Social Sciences* (1986) 519, 554.

91 Section 25 of the Environmental Offences and Penalties Act 1989 (N.S.W.) enables "any other person" to bring civil enforcement proceedings. However, the requirement that the prior consent of the State Pollution Control Commission is necessary is severely limiting.

92 s. 123(1).

93 Cripps, note 42 *supra*, 92.

XII. NATIONAL APPROACHES

The part the Federal Government could play in enacting pollution control laws, and associated constitutional and political questions are beyond the scope of this paper. So, too, is an examination of possible co-operative Federal-State approaches. However, it is apparent that a national approach of some kind to pollution control is necessary in Australia.

It has often been said that pollution is no respecter of political boundaries. Concern has been expressed, too, by politicians that the introduction of tough pollution legislation may serve to deprive their particular jurisdiction of industry and investment, if pollution havens flourish elsewhere in Australia. Apart from the considerations there are advantages, from an industry point of view, of consistent and predictable regulatory systems. At the time of writing (September 1990), the need for a national approach had been commended by politicians at both State and Federal level.

For example, in a recent speech, the New South Wales Minister for the Environment endorsed a national approach to water and air discharge standards and quality assurance, environmental offences legislation and co-operative cross-border policing.[94] He stated that some preliminary steps in this direction had been taken at Environmental Ministers meetings and at a meeting of the Australian and New Zealand Environment Council in June 1990.[95]

A co-ordinated national approach, and in its absence or unworkability, an examination of the possible role of the Federal Government in enacting pollution control laws, should be further investigated.

XIII. DETERRING POLLUTERS: SOME TENTATIVE CONCLUSIONS

What tentative conclusions can be drawn about the state of the search for effective sanctioning strategies to deter corporate polluters? First, there is evidence that deterrence, both general and special, can be effective in the context of corporations and their officials. Second, there is substantial evidence of public concern about the environment and pollution. Third, there is evidence that a firm public mandate exists for the adoption of sanctioning strategies against polluters. Fourth, although the verdict on criminal versus civil sanctions is very much an open one, the literature on white collar crime has much to offer legislators in their search for effective strategies.

Government is, therefore, in a good position, through thorough inquiry and consultation, to formulate effective sanctioning strategies. The "downside" of the situation is that the urgency of the task, in both political and environmental

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94 Note 47 *supra*, 2.

95 *Id.*, 4.

terms, may result in simplistic, ineffective and counter-productive Government responses.

If national, uniform pollution laws are, indeed, a possibility, then we are presented with a valuable opportunity to consider innovative approaches, and review sanctioning strategies, standing rules, and troublesome legal concepts - such as corporate mens rea - so that effective sanctioning strategies can be devised.

Our brief look at the debate over criminal versus civil sanctions, and the relative effectiveness of different types of sanction, suggests that a diversity of approaches is required to cater for different types of pollution incident and different types of polluter.

The potential for nullification must also be recognised and addressed so that sanctioning strategies are not undermined by lack of government or regulatory agency commitment, the prosecutorial or the judicial process.