IMPACT

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ENVIRONMENTAL OFFENCES AND PENALTIES BILL

By Angus Martyn
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The Greiner Government recently introduced the Environmental Offences and Penalties Bill into the Lower House with reformist zeal. In this article, Angus Martyn reviews the Bill and makes some personal suggestions for reform. One of his suggestions, the widening of the class of persons who ought to have standing to bring criminal prosecutions and civil actions, was independently proposed by the Opposition and Democrats as an amendment. In a fit of pique, the Government withdrew the Bill rather than accept amendment in the manner suggested. This action is quite myopic and brings into question the Government's commitment to upgrading the State's out-dated pollution laws. Open-standing provisions are well-accepted throughout the world and indeed New South Wales already allows any person to bring civil proceedings under the Environmental Planning and Assessment Act 1979, Heritage Act 1977, Environmentally Hazardous Chemicals Act 1985, National Parks and Wildlife Act 1974 and Wilderness Act 1987. Why shouldn't the Environmental Offences and Penalties Bill be added to the list? As to allowing citizens to bring criminal prosecutions, there is nothing novel or revolutionary about this suggestion. The right has existed for centuries in England and Australia: see Phelps v Western Mining Corp. Ltd (1978) 33 FLR 327 at 333-334 per Deane J and the Crimes Act 1914 (Cth), S.13. It is to be hoped that the Government will pursue their otherwise commendable legislative initiative (Editor).

Environmentalism: A New Approach ?

In introducing the **Environmental Offences and Penalties Bill (EOPB)** to Parliament, Tim Moore attempted to characterise it as being a major environmental initiative, both in symbolic and practical effect. Using this opportunity to signal a move away from rather localised and ad-hoc legislation, the **EOPB** was, he said, indicative of the Greiner government's commitment to a broad range of environmental issues. Part of this commitment was a recognition of the need for a real and positive change by all governments in their attitude to environment regulation. The Environment Minister stated that the "political stewards of [this] nation" could no longer afford to consider the environment as a statistic thing that could indefinitely continue to absorb the damaging practices of the past.

In line with this "stewardship" philosophy the Minister emphasises the need for bi-partisan support of legislation of the type of the **EOPB** at both State and Federal level. Although "setting the pace" by the **EOPB**, what was needed was a co-operative approach by governments to avoid forum shopping: there must be no place for "sleazy end of the environmental market-place" to operate with relative impunity.

Impressive rhetoric indeed. It is certainly true that this country requires a major reversal in its politicians' attitude towards the environment. It is less certain that the **EOPB** provides tangible evidence of this in spite of the Minister's protestations. Governments often find it expedient to ignore the supposed spirit of their own legislation – the Parliamentary intervention in the Cumberland Oval case being a prime example. As a weapon against the environmentally irresponsible the **EOPB** may well prove effective in some areas if it is allowed to operate its fullest extent. However, as will become obvious, it is a piece of legislation that confers a good deal of discretion on both the court and the government. Just how this discretion is used may well determine whether or not Mr Moore's words ring true.

Principal Clauses

In essence the **EOPB** allows, in cases of unlawful disposal or escape of substances harmful to the environment, a range of sanctions far more severe and financially effective than exists under current law. It does this by:–

- allowing a person who are perhaps only indirectly responsible for the commission of an offence to be prosecuted **SS. 5,6 and 10.**
- massively increasing the upper limit on fines for individuals to $150,000, and corporations, $1,000,000 **S.8**
- introducing significant gaol terms – up to seven years – for persons convicted under any provision, whether in their capacities as individuals or as managers/directors of corporations **S.8**
- giving the court power to compel persons to mitigate environmental damage, and to reimburse or compensate persons out of pocket as a result of the offences **S.14 and 15**
- empowering the court to issue restraining orders over the property of the party being prosecuted so as to prevent asset striping by a person/corporation in an attempt to avoid the financial consequences of the offence by that party **S.16**
- enabling the State Government to take control over certain functions of non-accountable

public bodies if they act in an environmentally harmful way **S.26**

- allowing the court to issue orders to prevent anticipated contraventions **S.26**

The Disposal of Waste

S.5 deals with the disposal of waste, which encompasses such things as effluent, trade and domestic refuse/garbage. If such disposal "harms", or is likely to harm" the environment (1) it must be authorised by some public body. If it is not, an individual is guilty of an offence. This is so whether they actually dispose of the waste themselves or direct or help another person in some way to do so.

In this way the net of legal responsibility for an unlawful act may be considerably wider than under previous legislation. Just how far this liability will extend – whether to the case of supplying the means of an unlawful disposal, for example – may depend on judicial interpretation of the defence contained in **S.7(b)** (offence beyond the control of person). This will be looked at shortly.

The normal burden of proof is reversed, with the defendant having the onus of demonstrating that the disposal was properly authorised. Given this, it appears that a person more indirectly involved with disposal must be sure of its legality and be able to prove this in court. This should lead to a greater degree of self-regulation within the relevant industries, since both individuals and corporations will leave themselves open to prosecution if they deal with parties who do not operate within the law.

Responsibility for Escapes and Spillages

It is also an offence to wilfully or negligently cause an escape of a substance harmful to the environment. More significantly, a duty of quasi-strict liability (2) is assigned to the possessor/owner of the substance, owner of the storage vessel, or owner/occupier of relevant land. Thus the lessor of a leading chemical storage site or the owner of a ruptured oil pipeline would be liable.

The main limiting factor to such liability are the defenses of **S.7**. This provides that a person can escape liability **if they can prove** (thus again reversing the normal onus of proof): it was impractical to comply with the provision, or; the contravention was beyond their control and not reasonably practicable to bring under control. It is of crucial importance to the effectiveness of the **EOPB** that these escape provisions are not read too widely. If judicial interpretation of the "impracticality" defence is overly generous to a polluter, what is the point in the introduction of the **EOPB** at all? If this is to be a genuine attempt by the NSW government to reverse the downward slide of our environment, impracticality must not be defined to mean a mere procedural or economic conflict with current commercial practice but rather some (short-term) set of very difficult circumstances – eg extreme weather conditions.

It is suggested that the second defence under **S.7** contemplates:

(a) the action of outside forces, of human or natural origin, against which it is not practical to effectively guard against, due to improbability and/or cost factors. Again it is important that industry is not permitted to dictate what these are in practice.

(b) where those who seek to invoke the defence are only indirectly involved in the commission in the offence. For example in cases where equipment or storage facilities are provided for another party. In these cases the courts should be satisfied that the party has ensured, as far as it is possible, that they involve themselves with only environmentally reputable persons and/or corporations with responsible work practices.

Financial Penalties

Under the **EOPB** the maximum financial penalties for an offence will stand at $150,000 in the case of an individual, or $1,000,000 for an incorporated body. Providing that the courts are prepared to order fines in the upper ranges in appropriate cases, these should be of significant deterrent value when used in conjunction with other provisions of the **EOPB.** The income from such fines will be directed into Consolidated Revenue.

We suggest that there is a strong case for at least a percentage of this effective revenue to go into some sort of funding pool expressly for pollution control. The fines are, after all, primarily deterrents to the commission of offences: that is, means to an end (the "end" being the protection of the environment). However this end cannot be served without considerable expenditure on enforcement and research. A significant measure of "self-financing" might well be a more reliable source of funds than a discretionary allocation from Consolidated Revenue in an era of fiscal restraint.

Gaol: The Big Stick

One of the most significant aspects of the **EOPB** is the move to make gaol terms for individuals a practical option upon contravention of its provisions. Previously the only way a person could be sent to gaol for an "environmental" offence was upon conviction of criminal conspiracy. This was both difficult to prove and rather unsatisfactory since the charge was inapplicable to an individual acting alone.

Under the **EOPB** if the offender is brought before a Local Court or the Land and Environment Court they face a maximum gaol term of 2 years; before the Supreme Court, seven years. It is to be expected where there is a real possibility of imprisonment the charge will be hotly contested. Perhaps this will lead the Land and Environment Court away from environmentally-orientated concerns towards protracted legal argument over proofs of individual criminal culpability. Such an event would certainly not be desirable in such a "specialist" court.

In addition gaol sentences would inevitably increase appeal activity. At present, the finding of a Judge (as opposed to an Assessor) in the Land and Environment Court is rarely take to the Court of Appeal. Of course it would be easy to exaggerate these potential complications. We may simply have to make judgement over the desirability of a trade-off between increased deterrent value on the one hand and the problems of more intense criminal litigation on the other.

Guidelines for the Imposition of Penalties

Where the Court considers the severity of the penalty it is to impose on a guilty party, **S.9** provides a number of guidelines to this effect. The content of these provisions reflect two main concerns: the magnitude of harm the offence causes (or is likely to cause) to the environment, and the culpability of the individual in its commission.

Thus where the effect of, say, a chemical spill is not particularly great and the offender can (and presumably does) take steps to minimise this further, the Court might consider a moderate penalty appropriate. In contrast, if the spill caused irreparable damage to an entire ecosystem the guilty should not expect leniency.

As to the culpability question, the Court will look to whether the causes of the offence were under the independent control of that person, or whether they were acting in pursuance or directives given by superiors in the work or business place.

Of course, from the perspective of public policy, these factors are not completely independent of one another. One cannot totally abdicate ones social responsibilities to the environment merely by claiming some form of coercion in the workplace. In practical terms, where an individual commits an offence that has very serious ecological consequences, it should be the case that the Court should be less than sympathetic with regard to any plea in mitigation.

The Liability of Management Personnel

In cases where a corporation contravenes the **EOPB** directors and management personnel also become prima facie liable: **S.10.** This is irrespective of whether the corporation itself is proceeded against, or where it is, whether it is found guilty or not. The content of this provision is very similar to one found in the recently proclaimed **Canadian Environmental Protection Act (CEPA).**

As in **S.5** the normal burden of proof is reversed. In order to escape conviction such individuals must convince the Court that: they had no knowledge of the contravention; they could not influence the practice of the contravention; or "all due diligence" was used to prevent the contravention.

Where the precise circumstances of the offence – i.e.nature, place and time – is not known to these "management" personel but there is nonetheless common knowledge within significant sectors of the corporations that contraventions do take place, it is essential that these individuals do not escape conviction. They are supposed to be the decision-makers of corporations. Penalties appropriate to their position of responsibility must be imposed. Likewise, from a policy perspective, any attempt at running the "impotence" defence should be viewed with a healthy scepticism.

The Ministers Decision to Prosecute

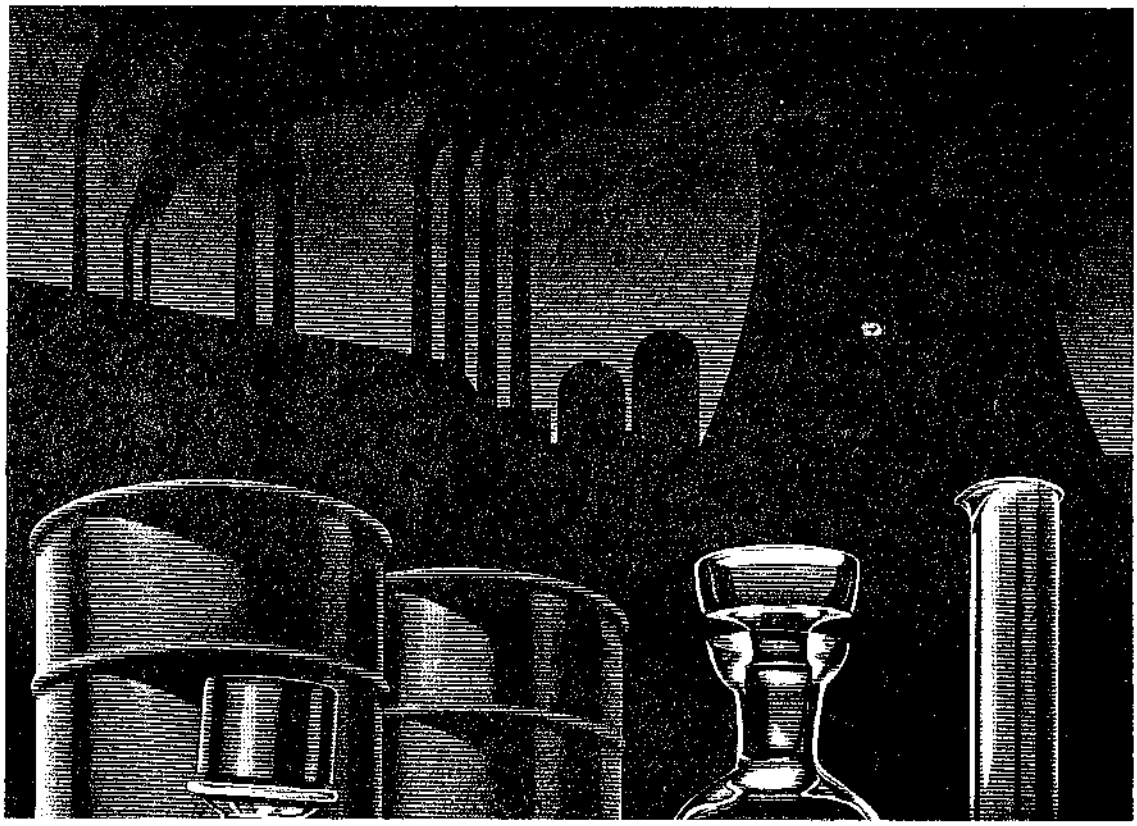
S.13 of the **EOPB** allows the NSW government a substantial measure of control over just who is prosecuted. At a minimum, proceedings cannot be instituted against any party without written consent of a member of the State Pollution Control Commission (SPCC), who in turn must be authorised by the SPCC to perform such duties.

This provision would be an effective bar to third party rights of enforcement. It contrasts markedly with **S.123** of the **Environmental Planning and Assessment Act 1979 NSW (EPAA)** which allows any person to bring an action to restrain a breach of that Act. Apparently the government has a good deal of faith in the SPCC's diligence in protecting the environment (3) and that they have the resources to do so, say for example, where the geographical remoteness is a problem or the immediacy in gaining a injunction on actual or anticipated harm is paramount.

In the case of government and public bodies or a person working on the behalf of the government, the Environment Minister is in a position to virtually dictate prosecution policy. Authority to bring proceedings under the **EOPB** in these instances has only two sources: the Minister him/herself or a member of the SPCC specifically authorised by the Minister. Given such a relationship this person would be (very) accountable to the Minister for their decisions. In practice, then, it is unlikely these two persons would have wildly differing opinions over who warrants prosecution and who does not. Whilst this is not necessarily undesirable, it is matter of some concern since it means we may have to rely on the Minister's integrity in the enforcement of the E**OPB** where the public sector is the "culprit".

Environmental Pollution:the (ab) user pays

In the aftermath of the Exxon Valdez oil spill it is painfully obvious the cost in dollar terms of cleaning up a major environmental disaster can be almost astronomical (4). Generally, the party responsible for the incident will foot the bill. However in the case they refuse to do so, the community should not be forced to pay for the consequences of their pollution. To this end, the **EOPB** will give



the government statutory power to force the offender to meet their social responsibilities. The relevant provisions are contained in Part 4 of the bill.

S.14(1) allows the court to order the convicted offending party to take specified measures so as to "prevent, control, abate or mitigate" harm to the environment caused by the contravention of the **EOPB**. Where other parties – including individuals, corporations and public authorities – have incurred costs in the same the court may order that they be reimbursed for their expenses. In addition where the contravention causes loss or damage to property to innocent parties the court may likewise order appropriate compensation: **S.14(2).**

S.15 gives these parties a right to a direct cause of action against the offender to the same effect as **S.14** in the Land and Environment Court or any other court of "competent jurisdiction".

S.16 targets attempts at asset stripping. The provisions of **SS.14 and 15** could effectively be rendered impotent by offending corporations transferring assets in such a way as to leave themselves unable to meet financial liabilities imposed by such orders. **S.16** permits the person bringing a proceeding that involves potential liability under **SS.14 (2) or 15** to apply to the court to prevent such a corporation from disposing or otherwise dealing with its assets except as specified in the court order.

The party making such an application must, however, generally be prepared to give an undertaking as to damages/costs that such an order imposes on the corporation whose assets are frozen.

Whether **S.16** is to be invoked upon receival of an application to this effect is entirely reliant on the discretion of the court: it must be convinced that there is a "real risk" of financial evasion. The "target" corporation has a right to reply in a hearing convened to consider the application. The court is also empowered to question on oath any person about the details of the defendant's property so as to determine its extent and nature: **S.17.**

Other principal provisions contained in Part 4 include **S.20** to the effect that a conscious violation of a property restraining order constitutes contempt of court, with attendant penalties of fines or imprisonment (maximum two years).

Replacement of Public Bodies

Another interesting aspect of the **EOPB** is that it allows the Minister under certain circumstances to replace specialist functions of non-accountable public bodies – local councils, for example. **S.24** operates where the body in question does some act or fails to act, and the consequences of this are that (5) the environment is harmed, or likely to be harmed. It this is the case, the Govenor may appoint a person to exclusively perform and control those functions. In this way the Minister may prevent the carrying out of environmentally destructive acts or omissions by making those functions only exercisable by his/her appointee.

The length of tenure is only twenty-one sitting days of the Legislative Assembly (unless revoked sooner). Of course what this amounts to in practical terms depends of the activity of Parliament at the time. It is not particularly clear whether the appointee (or another person) can immediately be re-appointed after the expiry of the twenty-one days. Probably the answer is yes where there is no evidence of a change in policy of the public body in question, since any resumption of former practice is likely to attract the "anticipatory" power of the Govenor.

Prevention of Apprehended Offences

Over and above the Minister's power to apply to the Land and Environment Court to restrain an actual breach of the **EOPB,** he/she may also seek to restrain an apprehended breach. If we are serious about protection of the environment this is a very necessary provision: to employ a cliche, it is of little use to shut the gate after the horse has bolted. The scope of the orders that the Court may order is apparently wide. **S.25** only says that such orders are to be those that the Court "thinks fit" so as to achieve the purpose of prevention of the breach.

As a punitive measure, in the event that a holder of a pollution control authority – basically a license to pollute in a controlled manner – or occupier of premises subject to such an authority is convicted of a "pollution offence" (an offence that harms the environment) the Minister has the option of revoking or suspending this authority: **S.26.** This would effectively prevent a commercial operator from carrying out at least some portion or level of their business within the law.

Room for Improvement

Mr Moore has stated in Parliament that this legislation will be subject to amendment to improve its efficacy in certain areas. However it remains to be seen whether or not these will be merely cosmetic changes to the bill examined in this short review. We suggest that several alterations and additions should be very seriously considered before the bill becomes law. Some of them are based squarely on the very comprehension **CEPA.** No apology is made for this. If the Environment Minister is sincere in his deep concern for our environment (6), this state could do worse than following the lead of the Canadian legislature.

- Any individual or interest group should be able to mount proceedings to restrain a breach of the **EPOB** independent of the need for authorisation from the SPCC. This option should also be available for **S.25,** which allows a court to prevent a apprehended breach. In its present form, **S.25** only permits the Minister to make such an application to the court.
- The NSW government must realise that it is the duty of the people, not only the government, to protect and preserve the environment. Real and meaningful public participation in enforcement of this ethos must be possible under any legislation.
- Where it is considered to be both practical and equitable, the **EOPB** should provide that every day of a continuing contravention should be considered a separate offence.
- The following are taken from **S.130(1)** of the **CEPA.** Upon conviction of the offender the court may:–

  Order them not to engage in an activity that may result in the repetition of the offence they have been convicted of. This could be used to curb undesirable work practices, for example.

  Order them to publish, in a manner prescribed, the facts involved in the offence. Public opinion can be powerful vehicle for beneficial change. Corporations, particularly, are sensitive about their image.

  Make an order to the effect that the offender pay a sum for the purpose of financing research with the aim of preventing environmental damage in similar circumstances to that which gave rise to the offence.
- If as a result of an offence under the **EOPB,** the convicted party makes monetary gain, a fine corresponding to this amount should be levied. This would

be independent of any other financial penalty imposed under the **EPOB.**

FOOTNOTES:

1. What constitutes "harm to the environment" is not detailed in the **EPOB.** It is suggested that specific proof of damage will not necessarily need to be shown since the bill contemplates no distinction between actual or **likely** harm (except perhaps in the imposing of penalties). The **EOPB** also makes provision for the evidence of appointed "experts" to be admissible in court **(S.27).** Thus it would seem the professional opinions of these persons as to the probable aesthetic or biological consequences of a prima facie unlawful act would guide the court on this question.
2. In simple terms, "strict-liability" exists where, in an escape of a dangerous or hazardous thing, the owner does not have to be proven to be "to blame" or "at fault" for the escape to be held legally responsible for its consequences.
3. Unlike the Forestry Commission that is frequently forced to defend itself in proceedings brought under the **EPAA** in the Land and Environment Court.
4. Regardless of how effective this "cleaning up" actually proves to be.
5. In the opinion of the Governor, presumably acting on the advice of the relevant Ministers of the Government.
6. Or more to the point, politicians in general.

"NELA/LAWASIA INTERNATIONAL CONFERENCE ON ENVIRONMENTAL LAW: A BRIEF SUMMARY"

by Judith A Preston
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On June 14-17 this year the National Environment Law Association of (NELA) and the Law Association for Asia & the Pacific (LAWASIA) joined forces to conduct an important international conference on environmental law. Delegates were privileged to hear some of the world's foremost experts in this burgeoning field. The conference programme was divided into sessions on legislative and judicial perspectives, alternative dispute resolution and traditional practices that may be used to protect the environment.

In this brief review I have attempted to extract some points of interest and themes which emerged during the session of the conference. Unfortunately due to space constraints I have not been able to review all of the papers presented.

The conference was opened by His Excellency, the Govenor General of Australia the Honourable Bill Hayden. Mr Hayden's address focussed on the international and multi-disciplinary approach required to solve the problems facing modern man's interaction with the environment. Mr Hayden observed the increasing sophistication and legitimization of the environmental debate in these terms:

"It is extraordinary how rapidly over the past year or so environmental issues have leaped from the margins to occupy a very high place on the political economic and social agendas ... not only in this country, but among nations of the world."

(p.5 transcript of Mr Hayden's address)

Mr Hayden suggested that the role of the international legal system was to establish and enforce standards for the multi-disciplinary response to the conflict between economic growth and environmental protection. Such standards could include conventions, treaties and protocol to which both developed and third world nations could become signatories to be enforced by penalties imposed and enforced by the International Court of Justice and domestic courts in each country.

The challenge posed by Mr Hayden, viz of rethinking traditional approaches to legislation and legal practice in maintaining a balance between individual property rights and the public interest, was taken up by Professor Joseph Sax, the keynote speaker. Professor Sax points out:

"... the very essence of the legal structure of resource ownership is the division of the earth into segments created by the drawing of arbitrary lines, to isolate these segments from one another (the fence being the dominant symbol of our system) and, then leave it to each owner with his own fence enclave to exploit the resources to his maximum benefit."

(Sax J: The Law of a Liveable Plant p.3)

He suggests that environmental law must incorporate concepts which support man's responsible stewardship of the earth. Such concepts include ascribing property owners with a positive duty to protect their property for the common benefit. Sax sees two natural corollaries of such a duty. The first is that the effect of a potential development proposal for a particular area of land must be assessed in the context of the global ecosystem as opposed to the local or national ecosystem. The second is that decisions about the use of land will be increasingly regulated by the State. Any abuse of such power by the State will presumably be kept in check by judicial review.

Ms Helen Hughes provided an interesting report on the achievements of her office as the Parliamentary Commissioner for the Environment in New Zealand. The Commissioner is appointed by the Government but performs an independent role in monitoring the administration of the environment portfolio by the State. The responsibilities of the office extend to regional and local government issues.

The powers of the Commissioner are derived from the **New Zealand Environmental Act** and includes obtaining information, conducting an inquiry and having a right to be heard in statutory proceedings. There are a range of matters to which the Commissioner must have regard in carrying out her investigation . Such matters include the maintenance and restoration of ecosystems, the heritage of the New Zealand indigenous people, the effect on human communities, pollution and sustainability of resource use. Ms Hughes sees her role as a guardian of the public right to the accountability of the government to its constituents for its decisions on environmental matters. The role is a positive one – of "remedial advice and the strengthening of the system and processes established by the Government for the protection of the environment."

One of the most valuable aspects of the Commissioner's role is in facilitating public participation in environmental decision-making. This includes:

(1) her ability to appear in judicial proceedings. This is of great assistance to the public who are unqualified to present technical information to the courts or tribunals or lack the resources to do so;

(2) providing an avenue for the public to seek redress for environmental problems; and

(3) providing a relatively inexpensive audit of the Government's environmental performance.

Mr Anil Divan, a senior advocate from India, spoke on the progress of the Indian government and judiciary in the area of public interest litigation. The Supreme Court is the highest appellate court in India. It has original jurisdiction under Article 32 of the Constitution to enforce fundamental rights by any appropriate writ, order or direction. Fundamental rights have been expanded to include rights to a healthy environment, and healthy conditions of life and the right to have a pollution-free environment. Although it is a breakthrough to have some measure of environmental rights entrenched in the Constitution, it is noteworthy that such rights still remain anthropocentric. The United States of America seem to be the only country at present which has extended rights to the environment itself through the doctrine of the public trust which is well documented in the paper by Mr Justice Toohey of the High Court and Mr Anthony D'Arcy.

Any member of the public has standing as of right to approach the Supreme Court of India for orders, inter alia, to protect a breach or anticipated breach of fundamental rights. In some instances, the Court has relaxed the litigious procedures to facilitate such public access. Any person wishing to protect what is perceived to be matters of public interest is only required to demonstrate 'sufficient interest'.

In the **Doon Valley case** an application was made to the Supreme Court to restrain the operation of a limestone quarry which was polluting the air and water of the area. During the course of the proceedings, the Supreme Court appointed several expert committees to report to the Court on the issues raised in the case. Mr. Divan observes:

"The Court supervised the work of these Committees and went on adding to, and, altering its directions from time to time. The Court directed [the] government to provide funds to support the work of the Committees and over a period of six years the Court is exercising control and supervision over the litigation."

The defendant and other third parties have the right to challenge the conclusion of the expert committees.

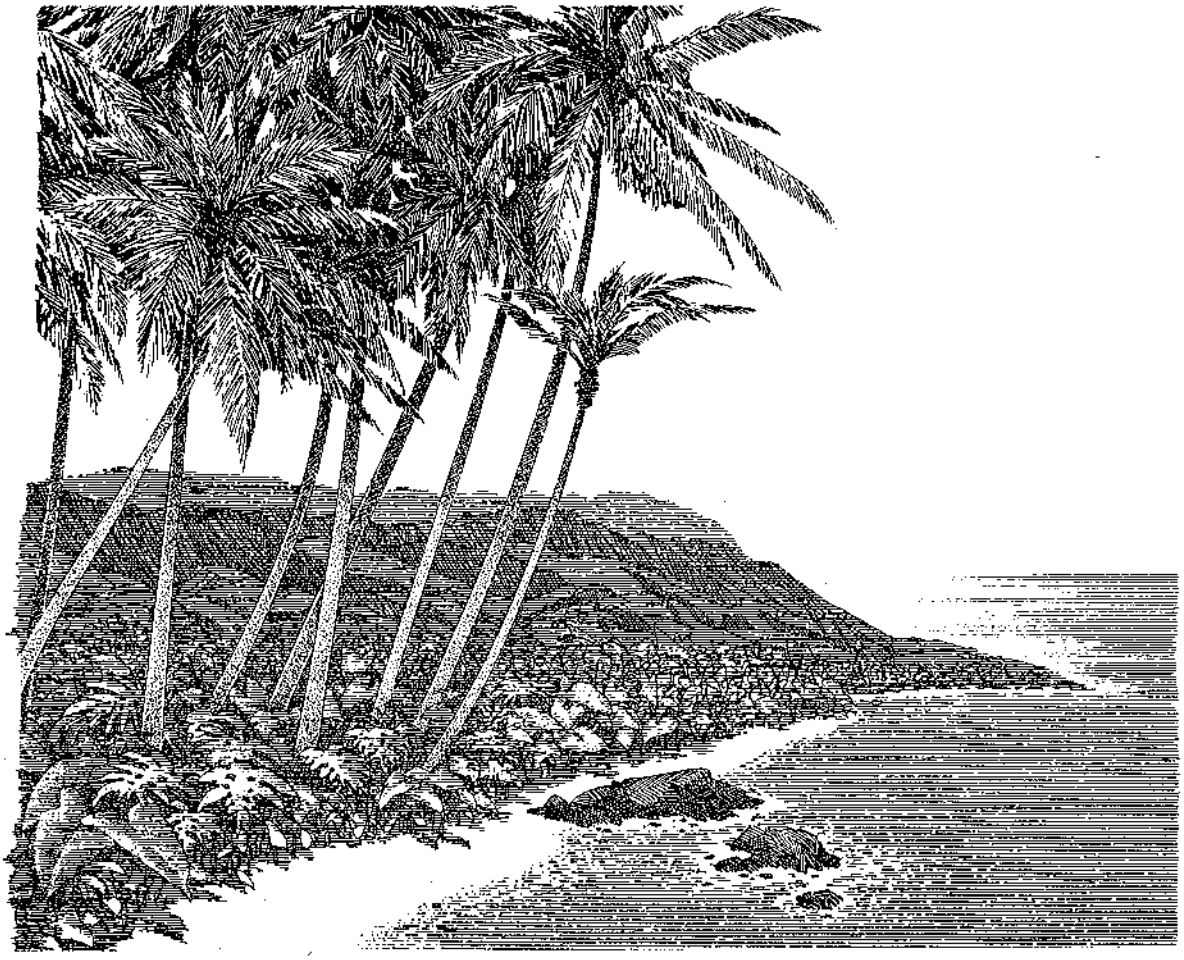
Judges of the Indian Supreme Court appear to play an active role in not only granting relief to litigants but have gone so far as to active litigation by inviting the public to bring violation of fundamental rights to their attention.

It does not appear that this will be the likely approach in the United States Court of Appeals for the Ninth Circuit where the Honourable Betty Binns Fletcher concludes:

"Our courts are reactive bodies ... like spiders, we judges wait and watch to see what controversies may fly into our webs ... Our obligation is to resolve the dispute presented on as narrow grounds as possible."

Mr Justice Cripps, the Chief Judge of the Land and Environment Court of New South Wales, proposed the notion of awarding aggravated or punitive damages for curbing breaches of environmental and planning laws. This would "reflect the Community's sense of outrage in an appropriate case over and above its other powers".

Such a step would have to be legislatively supported. Further, Mr Justice Cripps suggests that the punitive damages be directed to a State body to be used for "furtherance of the objectives of environmental laws" one



of which may be to provide further legal aid or a grant to an appropriate body such as the Environmental Defender's Office in Sydney.

The Honourable Betty Binns Fletcher notes in her paper that the Court has approved civil settlements in cases involving breaches of environmental and planning laws which earmark special funds for projects beneficial to the environment. Under certain United States statutes, polluters may be fined at an appropriate level to clean up any unlawful discharges.

In the traditional practices session it was evident that there is now a growing awareness by the State of the value of the traditional knowledge and practices of indigenous people in environmental protection. In Australia the Federal Government's land rights legislation has undoubtedly been a catalyst for the publication of knowledge and practices of Aboriginal people.

Dr Nancy Williams comprehensively reviewed the role of Aboriginal tradition in the management of national parks and reserves in Australia. Dr Williams also details many joint projects between traditional owners and State authorities, inter alia, to preserve traditional lands, and food sources, to collect information on local vegetation and to assist in mapping of clan sites and territories.

The results of these collaborative efforts between conservation authorities and Aboriginal people are encouraging for both the protection of traditional lands and/or sacred sites and more information management of these areas by conservation authorities.

Mr Mohadeen Abdul Kader identified the difficulties faced by the Dayaks and Penans, the indigenous people in Sarawak to preserve their traditional land from exploitation by the government and developers. He observes that the destruction of Malaysia's rainforests through logging, damming of rivers and clearing for plantations has also had devastating effects on the world's environment. He quotes disturbing statistics concerning the extinction of rainforest plants and animals as a result of those activities. The paper identifies the major cause of environmental destruction as the maintenance of the iniquity of the exchange of low price raw materials by the third world for expensive manufactured goods from developed nations. Mr Kader poses the hard conclusion in this way:

"... anyone who is seriously concerned with saving tropical rainforests must address himself to the problem of unequal exchange between the poor and rich nations and the consequent transfer from the third world to the first world."

Although not addressing the cause of the environmental degradation in the third world Mr Reti and Ms Wendt suggested some practical guidelines for integrating customary law and practices with modern development.

The most important suggestion is that developers should consult with the local community to assess the likely impact of a particular development proposal on traditional ways of life. International financiers supporting projects in the third world should be strongly encouraged to make effective consultative procedures a condition precedent to any loans provided to developers. Traditional sanctions placed on the use of the natural resources by development could be incorporated into the project guidelines and supervised by the community. To some extent examples of this involvement by indigenous people in development projects can be seen in mining and tourist projects in the Northern Territory.

In this closing address to the conference Sir Maurice Byers Q.C. warned that:

"The future of environmental law lies in increased community awareness of the large dangers we face and in the development of legal doctrines to cope with them."

Sir Maurice further develops Professor Sax's suggestions with regard to the innovative use of law to afford protection to the environment. He proposes the notion that a contract can be declared invalid if its implied purpose is to pollute the land, air or sea. Such a notion may fill the void if pollution was not the result of an act which was contrary to any statute.Sir Maurice envisages that this notion would have to be developed by the courts but it is possible to envisage a suitable amendment to statutes prohibiting pollution.

In summary the conference was a fertile source of ideas for new and effective ways of protecting the environment through legislation, common and customary law and negotiation. Now it is a matter of convincing the government, the legislators and the public that the world is worth such an effort.

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