
ENFORCEMENT OF POLLUTION LAWS IN AUSTRALIA - PAST EXPERIENCE AND CURRENT TRENDS

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SUMMARY

This paper considers the key features of Australia's pollution laws. It then discusses, in detail, pollution laws in two States to illustrate those features showing examples of two different approaches. The paper goes on to discuss current enforcement practice and trends in those States.¹

1 THE NATIONAL CONTEXT - FEDERAL/STATE INFLUENCES ON POLLUTION CONTROL

Australia has a federal system of government created by the *Commonwealth of Australia Constitution Act* 1901. Under the Constitution, there is no specific power for the federal government to legislate in relation to the environment, but it can do so by using other authorities.

However, rather than using these powers, a succession of federal governments have chosen a model of cooperative federalism. This approach led to the signing of the Intergovernmental Agreement on the Environment ("IGAE") in 1992. In implementing its obligations under that agreement, the federal government passed the *National Environment Protection Council Act* 1994 to establish the National Environment Protection Council ("NEPC"). Its role is to develop National Environment Protection Measures which are national environment protection standards, goals, guidelines or protocols.² These measures can relate to ambient air or water quality or a range of other matters.

When developed, the measures will represent the national dimensions to the pollution control framework and therefore provide a key part of the national context for enforcement in Australia. They are intended to promote greater uniformity in environmental goals across the States to discourage industries from moving to States with lower standards in environmental control.

There are of course existing guidelines which provide a national dimension to pollution issues. These include the Australian and New Zealand Environment Conservation Council ("ANZECC") Water Quality Guidelines for Fresh and Marine Waters 1992, which seek to establish criteria for a range of environmental values for rivers and other waters. They help guide the licence setting process of pollution control authorities. Once developed, the National Environment Protection Measures will contribute to this function and similarly influence the pollution control process.³ In 1996, the federal Environment Department also released Australia's first State of the Environment Report. This was an independent report prepared by the State of the Environment Advisory Council and seven expert reference groups. It provides

an objective picture of the state of Australia's environment and identifies those areas where action needs to be taken to address environmental problems and move the country towards ecological sustainability.⁴

The result of this approach is that responsibility for regulating pollution and waste disposal falls on each of the six Australian States and the two Territory governments. That means there are eight different sets of pollution laws and administrative approaches to enforcement and monitoring in Australia.

From this range of pollution laws, we propose to identify past experience and current trends in enforcement in Australia.

2 KEY FEATURES OF POLLUTION LAWS IN AUSTRALIA

To understand the key features of Australia's pollution laws, it is first of all necessary to briefly overview the history of enactment of those laws.

In 1970, Victoria was the first State to enact comprehensive, cross media pollution laws. Around that time, other States and Territories also enacted pollution laws but they were sector specific, namely separate water, air and noise legislation, and the laws were also generally less sophisticated than the Victorian legislation.

It was not until the late 1980's and the early 1990's that there was a major change in pollution laws in Australia. The key pieces of legislation during that period were the:

- *Environment Protection Act 1986* (Western Australia);
- *Environmental Offences and Penalties Act 1989* (New South Wales);
- *Protection of the Environment Administration Act 1991* (New South Wales);
- *Environment Protection Act (1993)* (South Australia);
- *Environment Protection Act (1994)* (Queensland); and
- *Environmental Management and Pollution Control Act 1994* (Tasmania).

The main cultural change effected by these laws has been to move away from the "command and control" regulatory model of pollution control, where the laws are highly prescriptive as to what can and cannot be done, to an approach that places greater emphasis on environmental outcomes. The laws are founded on four principles.

- *Pollution Prevention* - The goal of pollution law and policy is to eliminate or reduce polluting products or products which create or use pollutants in their manufacture. However, this goal is not immediately achievable and therefore other principles have to direct pollution strategies to move towards achieving pollution prevention.
- *Integrating Pollution Control Principle* - The purpose of integrated pollution control is to consider pollution impacts across air, land and water media.
- *The Precautionary Principle* - The principle is described in the IGAE: "Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation".⁵ For example, it may not be appropriate to wait for full scientific information on a chemical prior to restricting its use.

- *Optimizing the Regulatory Mix* - This is directed to finding the optimum mix of regulatory approaches to pollution prevention and control, and market based approaches. Market based mechanisms are related to the “polluter pays” principle, which are supported in the IGAE.⁶

These principles have to be considered having regard to the broader goal of ecologically sustainable development which requires the effective integration of economic and environmental considerations in decision making processes, intergenerational equity, the conservation of biological diversity and improved valuation and pricing of environmental resources.⁷

In particular, key features of this new wave of pollution laws are provisions for:

- an environmental duty;
- integrated pollution control;
- environmental protection policies which indicate in advance the particular environmental objectives that are to be met and which provide the context for determining licence conditions;
- economic instruments;
- a range of administrative tools for preventing or minimizing pollution;
- civil and criminal law enforcement ;
- strict or absolute liability for environmental offences;
- personal responsibility of directors of corporations and their employees for environmental offences;
- larger penalties for environmental offences;
- provisions directed to better integration with planning laws, so that greater consideration is given to the potential pollution impacts of a development at the time a decision is being made on the location of a development; and
- stringent monitoring conditions.

3 KEY FEATURES OF THE ENVIRONMENTAL AGENCIES ADMINISTERING POLLUTION LAWS

Environmental agencies administering pollution laws are:

- Guided by Ecologically Sustainable Development (“ESD”). For example, the Environment Protection Authority in New South Wales is directed by the ESD objectives set out in the *Protection of the Environment Administration Act 1991* (“Administration Act”). Similarly, the South Australian EPA is guided by ESD principles set out in the *Environment Protection Act 1993*.
- Developing or have developed prosecution and enforcement guidelines to indicate in advance the circumstances when an agency is likely to prosecute an offence or take other enforcement action in relation to breaches of the legislation.
- Making greater use of administrative tools or noncriminal sanctions for achieving compliance with pollution licences and other legal requirements.
- Better integrating the use of legal and economic approaches to pollution control.

- Seeking to devolve some functions to local government bodies.
- Beginning to use their State of the Environment Reporting to inform pollution control priorities and direction.

In view of the large number of pollution laws in Australia, in this paper we will focus on experience in enforcement in two States, New South Wales and South Australia. The structure of the relevant legislation in both States is generally very similar.

As will be seen in the case studies of each State, both have adopted many of the key features of pollution laws referred to above. This is despite the fact the two States are very different. New South Wales is Australia's most populous State with approximately 6,163,500 million people incorporating Sydney, Australia's largest city with approximately 3,821,400 million people.⁸ It has a healthy economy and a strong active industrial and manufacturing sector. It also has a strong rural sector and the manufacturing sector is such that large regional cities have significant industrial components. Water is generally available in many parts of the State.

South Australia, on the other hand, although a large State in area, has a small population, essentially arid environment and small industrial base. Most of the State's population of 1.5 million live in its capital city, Adelaide. Its economy has been struggling for some time and although a manufacturing industry centered around white goods and the car industry was established in the post war years, it has been in decline in recent times and is likely to continue to decline. Much of its original wealth came from the agricultural, mining and pastoral sectors. Significantly, it has never had the extensive manufacturing sector of New South Wales.

This paper will consider the three approaches to enforcement, namely:

- prosecution;
- civil enforcement;
- administrative remedies.

Which method of enforcement is adopted depends on the nature of the breach or requirement. For example, the South Australian legislation creates a general environmental duty which provides that a person must not undertake an activity that pollutes, or might pollute the environment unless the person takes all reasonable and practicable measures to prevent or minimize any resulting environmental harm.⁹ This duty is only enforceable by the administrative and civil mechanisms and cannot be the basis for a criminal prosecution. Offences against that Act can be the subject of a prosecution.

In particular, the discussion on New South Wales focuses on that State's prosecution history and trends based on its experience under the *Environmental Offences and Penalties Act 1989* ("the EOP Act"). This work was facilitated by the establishment of a new style Environment Protection Authority under the *Protection of the Environment Administration Act 1991*.

The discussion of the South Australian experience gives a fuller view of the overall framework of the *Environment Protection Act 1993* which comprised a major overhaul of that State's pollution legislation into the new mode. By comparison, apart from its environmental offences regime, New South Wales has only just "modernized" its legislation in similar style.¹⁰

4 ENFORCEMENT IN NEW SOUTH WALES – THE FRAMEWORK AND PRACTICE

4.1 Introduction

In December, 1997, the New South Wales Parliament passed the *Protection of the Environment Operations Act 1997* (the “Operations Act”) and the *Contaminated Land Management Act 1997*. The Operations Act integrates the *Environmental Offences and Penalties Act 1989*, the *Pollution Control Act 1970* and media specific legislation for water, air and noise pollution. It is due to commence operation in November, 1998.

The Act complements the *Protection of the Environment Administration Act 1991* which provides that the EPA is to be managed and controlled by the Director-General who is subject to the direction of the Minister for the Environment.¹¹ A ten person Board determines the policies and long-term strategic plans of the Authority, whether it should consent to the institution of proceedings for serious environment protection offences and advises the Minister on any matters relating to the protection of the environment.

The new Operations Act improves upon the old Acts in a number of ways. Briefly, these include provisions for the making of broad policy instruments (“Protection of the Environment Policies”) which are to be considered by public authorities when making environmental decisions, creates an environmental duty and enables the development of economic instruments. Like the South Australian legislation, the Act seeks to integrate its licensing process with the development consent processes under the *Environmental Planning and Assessment Act 1979*.¹²

The Act will also incorporate amendments to the *Pollution Control Act 1970* enabling establishment of a system of load-based licensing. This involves linking licence fees to the amount of pollutants released to the environment. Industries will have to pay more for larger pollution loads with maximum loads set for different pollutants. Criticisms of the Act have included limited provision for public participation in the licensing process, the failure to provide third party appeal rights and the lack of enforceable provisions in the broad policy instruments.

Particular changes affecting enforcement include:

- increased penalties,
- expansion of the investigative powers of authorized officers,
- the strengthening of powers in relation to cleanup and other notices,
- expanded sentencing powers to enable additional penalties that take account of the economic benefit flowing from the commission of an offence, and the making of orders requiring publication by the offender of the facts of an offence or the conduct of an environmental project of public benefit¹³, and
- introduction of an audit scheme that allows the imposition of licence conditions that require mandatory audit in the event of breach of the Act causing environmental harm.¹⁴

4.1.1 Environmental Offences

The scheme of offences created under the *Environmental Offences and Penalties Act 1989* has been carried over into the new Operations Act. In summary, under the current Act and new Operations Act, it is an environmental offence to:

- pollute the environment by permitting the discharge of a contaminant;

- carry out processes which may pollute, without an environment protection licence or in breach of the conditions of the licence;
- construct or alter premises or equipment which may pollute without environment protection licence or in breach of the conditions of the licence;
- not comply with a notice issued by the Environment Protection Authority for stopping an activity, doing work or cleaning up a site; and
- not comply with specifications for the manufacture, storage, transport and disposal of toxic and hazardous substances.

The consequences of committing an environmental offence, include:

- strict or absolute liability for an offence;
- large penalties or imprisonment for personal offenders and large penalties for corporations; and
- personal liability of directors and managers for offences committed by the corporation.

More specifically, the offences fall into three categories which have been retained under the new Act.

Tier 1 offences include:

- wilfully or negligently disposing of waste, or causing any substance to leak or escape,
- being the owner or immediate prior owner of waste, or a substance, which someone without lawful authority, has wilfully or negligently disposed of or caused to leak,
- being the owner of a container or being the owner or occupier of land on which a substance is located, and wilfully or negligently causing or contributing in a material respect to the conditions which give rise to someone, without lawful authority, wilfully or negligently causing it to leak or escape,

in a manner which harms or is likely to harm the environment.¹⁵

An individual or corporation can be liable for any acts done “wilfully” or negligently, though it must be gross or criminal negligence. In determining whether there has been such gross negligence in the case of a corporation, consideration will be given to “due diligence” and whether for the particular industry concerned practices were reasonable.

Tier 2 offences are all other offences under the Act or regulations relating to water, air, noise or land pollution, where the polluting acts have not been wilful or negligent. They include:

- breaching air pollution standards,
- occupying scheduled premises without an environment protection licence,
- breaching the conditions of an environment protection licence; and
- not maintaining pollution control equipment.¹⁶

Penalties in respect of these offences have increased. Penalties of up to \$250,000 for corporations and \$120,000 for individuals will apply once the new Act commences.

Tier 3 offences are tier 2 offences that may be dealt with by way of a penalty notice. A penalty infringement notice can be issued where prosecuting the offence in Court is not warranted. The main purpose of penalty notices is “to deal with one-off breaches that can be easily remedied. They are appropriate:

- where the breach is minor;
- where the facts are apparently incontrovertible;
- where the breach is a one-off situation that can be remedied easily; and
- where the issue of a penalty notice is likely to be a viable deterrent.”¹⁷

Issue of a penalty notice operates as an on-the spot fine ranging from \$200 to \$600 usually given within 14 days of the breach occurring. A person can pay the fine if they do not want the offence dealt with by a Court and no criminal conviction will be recorded. Notices can be issued by “authorized officers” which can include inspectors from councils, police, or water and maritime authorities. It is not appropriate to issue a penalty notice where the EPA is already involved in a matter.

4.2 Prosecutions

The EPA is required to investigate and report on alleged noncompliance with environmental protection legislation¹⁸ for the purposes of prosecution or other regulatory action. It has therefore developed prosecution guidelines which set out the EPA’s approach to prosecution including the factors it considers when deciding whether to prosecute.

Offences are prosecuted in the Land and Environment Court, a specialist Court of Supreme Court standing which deals with criminal and civil enforcement action and appeals under a broad range of environmental legislation. Prosecution for less serious offences will normally be conducted before a Magistrate. It is worth noting that Australia is a common law jurisdiction and dispute resolution and prosecutions are normally conducted in an adversarial manner.

The EPA has key responsibility for prosecuting environmental offences, and will generally investigate and take action where there are serious breaches of environment protection laws.¹⁹ However, councils, water supply authorities and the police can also bring prosecutions.

There is also provision for private prosecutions brought by a member of the public with the leave of the Land and Environment Court.²⁰ Under the *Environmental Offences and Penalties Act 1989*, the EPA can also grant consent to a private prosecution where amongst other things the offence is relatively minor or the matter can be prosecuted most efficiently locally, particularly in country areas.²¹ However, this power has been removed under the new Act.

Under the Operations Act, the EPA has expanded its investigative powers. An authorized officer will have power to require a person reasonably suspected of having relevant knowledge to answer questions and not just to provide information.²² This power envisages oral questioning and is not limited to emergency situations. The powers of arrest, search and seizure are also wide.

4.2.1 Prosecutions by the Environment Protection Authority

The EPA has a discretion as to which approach it will take in pursuing environmental breaches. It can prosecute an offence, take civil enforcement proceedings²³ or pursue other options under any Act “to prevent, control, abate or mitigate any harm to the environment caused by the alleged offence or to prevent the continuance or recurrence of the alleged offence”.²⁴

Which option is pursued, is decided on a case by case basis.

“Prosecution will be used, ... as part of the EPA’s overall strategy for achieving its objectives. Each case will be assessed to determine whether prosecution is the appropriate strategic response. It will be used as a strategic response where it is in the public interest to do so”.²⁵

“The ultimate aim of any prosecution is to ensure compliance with environment protection laws”.²⁶

The EPA considers a range of factors when deciding whether the public interest requires a prosecution. These include the following factors:

- a. the seriousness or, conversely, the triviality of the alleged offence or that it is of a “technical” nature only;
- b. the harm or potential harm to the environment caused by the offence;
- c. any mitigating or aggravating circumstances;
- d. the degree of culpability of the alleged offender in relation to the offence;
- e. the variability and efficacy of any alternatives to prosecution;
- f. whether the offender had been dealt with previously by non-prosecutorial means;
- g. whether the breach is a continuing or second offence;
- h. whether the issue of Court orders are necessary to prevent a recurrence of the offence;
- i. the prevalence of the alleged offence and the need for deterrence, both specific and general;
- j. the length of time since the alleged offence;
- k. the age, physical or mental health or special infirmity of the alleged offenders or witnesses;
- l. whether there are counterproductive features of the prosecution;
- m. the length and expense of a Court hearing;
- n. the likely outcome in the event of a conviction having regard to the sentencing options available to the Court;
- o. any precedent which may be set by not instituting proceedings;
- p. whether the consequences of any conviction would be unduly harsh or oppressive; and
- q. whether the proceedings are to be instituted against others arising out of the same incident.²⁷

The EPA must also decide whether to prosecute the company, individual or both. A company is likely to be prosecuted where employees/agents or officers committed an offence in the course of their employment with the company.²⁸ If an employee had a particular intention at the time of the offence that is evidence that the company had that intention.²⁹ A company

can seek to refute this in its defence to offences where intention is relevant. For example, the company will not be prosecuted if the employee “embarked on a venture of (their) own making or volition outside the scope of (their) employment.”³⁰

The prosecution guidelines state that “as a general policy, the EPA will institute proceedings under Section 10 only where there is evidence linking a director or manager with the corporations illegal activity”.³¹ That linkage can include negligence, and will depend on the facts of each case, requiring consideration of a person’s actual influence “over the conduct of the corporation in relation to its criminal conduct”. This test is also applied by the EPA when deciding whether to take proceedings against a lending institution, which may be concerned in the management of a company and therefore potentially liable under the environmental offences legislation.

In summary, when looking at prosecuting company directors, company employees or lending institutions, the key issue is the degree of culpability of the director, the employee or the institution.

The EPA can also bring proceedings against public authorities, so that the law can be seen to apply equally to the public and private sectors. Previous experience has shown that it is not enough to rely on the fact that public authorities are under the direction of a Minister who can require compliance with the particular laws.

Ultimately, the decision to prosecute will depend on whether it is in the public interest to do so.

In choosing the particular charges it wishes to prosecute, the EPA needs to make sure, they reflect the seriousness of the alleged criminal conduct. For example, although some acts may have an element of wilfulness or negligence, if they are of a minor nature then it is more appropriate to deal with them through the lower tier offences. The aspect of wilfulness or negligence can then be dealt with by the Court, when imposing sentence.³²

4.2.2 Prosecutions – History and Trends

In New South Wales, the EPA increased its legal action by almost 30% between 1990/91 and 1993/94. This included greater use of the full range of enforcement approaches from fines to prosecutions.

This contrasts markedly with the approach in the 1980’s of the EPA’s predecessor, the State Pollution Control Commission. At that time the emphasis was on “self-control and self monitoring” of compliance with licence conditions.³³ The Commission pursued a “cooperative enforcement strategy” which “aimed at securing compliance by companies, through bargaining and compromise, rather than punishing wrongdoers, although in part it was necessitated by a shortage of resources.”³⁴

This meant few prosecutions were undertaken. For example, from 1985 - 1989, the highest number of prosecutions under the *Clean Waters Act* 1970 in any one year was 31 in 1986-1987.

However, the late 1980’s and the early 1990’s saw a community call for tougher penalties against polluters. Industry was also wanting to ensure that those companies acting responsibly were not put “at a competitive disadvantage by those flouting the law particularly if the fines imposed are no real deterrent.”³⁵

The introduction of the *Environmental Offences and Penalties Act* in 1989 sought to respond to the changed mood.

The new regime allowed for penalties of up to \$1 million against corporations and \$125,000 for offences under the Clean Waters and Clean Air Acts. This was a substantial increase on the previous maximum penalty that could be imposed for a pollution offence of \$40,000 for a company and \$20,000 for an individual.

The new regime allowed the EPA Board to decide whether to consent to the institution of proceedings for offences. It is not subject to directions from the Minister on whether to prosecute, and as we have seen, there are clear prosecution guidelines that set out the EPA's approach to prosecution.

The decision to prosecute is still dependent upon the circumstances of the particular case, with the EPA given the discretion to choose non-prosecution options, if that is considered more appropriate for achieving the goals of pollution prevention and control. However, the new approach gives greater recognition of the role of prosecution in achieving environment protection objectives.

In particular, the change in approach is illustrated by the guidelines for prosecuting public authorities:

"Public authorities are usually under the control and direction of a Minister who can direct compliance with the relevant legislation. However, the experience of the period pre-1991 indicates that sole reliance on that avenue does not make for the same rigid adherence as the requirements of the Court process."³⁶

With introduction of the new offences regime, there has been a big increase in the number of prosecutions vigorously pursued by the EPA.

In the past five years, the EPA has prosecuted a range of Tier 1 offences which have resulted in penalties of between \$60,000 to \$100,000 against companies and \$15,000 to \$25,000 against individual company directors. Each year there has been no more than a handful of prosecutions for Tier 1 offences with the majority of the more serious offences being prosecuted as Tier 2 offences. Tier 2 offences attract penalties anywhere from \$1000 to \$50,000 with the majority of orders being between \$5000 to \$15000.

The range of businesses that have been prosecuted for Tier 1 and Tier 2 offences is broad. They include petrol refineries, mining, manufacturing, food processing, cleaning, chemical, aerial spraying and waste disposal companies, autowreckers, building contractors, abattoirs, asphaltting and stonecutting operations, ship owners and operators, the electricity authority, water supply and local government authorities. Company managers have also been prosecuted in addition to company directors.

The offences for which they have been prosecuted relate primarily to the discharge in one form or another, of polluting substances into rivers, creeks and harbor, and the emission of air and noise pollution.

The level of penalties imposed will also be influenced by the EPA's decision to prosecute offences as Tier 1 or Tier 2. However, overall the amount of the penalties imposed has also increased.

In considering the trends towards higher penalties, commentators have noted the importance of looking at cleanup costs and not just the size of the fine. A company's assets may be better spent on cleanup costs, particularly if they are limited assets; "Fines can actually reduce the ability of particular industrial units to improve their pollution control technology."³⁷

Fines have been the main sanctions imposed for securing compliance with pollution laws. Law makers have been slow to introduce nontraditional penalties for breaches of environmental laws. For example, it is only now with introduction of the new Operations Act, that Courts will have power to order publication of the facts relating to a conviction or the conduct of a specified environmental project for the public benefit.

Latest trends in the administration of pollution laws by the EPA show a continuing vigorous approach to prosecutions.

The EPA has a 95% success rate in its prosecutions, only prosecuting those offences where there are very high prospects of success. This is because there are important credibility issues at stake. It also has to pay the defendant's costs if it loses.

Year	Prosecutions Concluded by the EPA	Total Value of Fines, not including Fines from PINS
1992/93	53	\$406,000
1993/94	74	\$314,000
1994/95	59	\$357,000
1995/96	94	\$324,000
1996/97	141	\$697,010

Most recently in November 1997, the EPA was successful in a prosecution against a caravan park owner who had wilfully pumped sewage effluent from the park into a river in proximity to active oyster leases causing significant environmental degradation. For over two years, the owner had pumped an average per week of 128,710 liters of sewage effluent, through a concealed system of underground pipes and valves to avoid the pump out costs which over the period would have totalled \$138,621.70. The judge described the offence as "the most serious environmental crime to have come before this Court", sentenced the defendant to 12 months imprisonment, and ordered payment of the maximum penalty of \$250,000 and the EPA's costs of prosecuting the action.³⁸

The issue of penalty infringement notices for Tier 3 offences also comprises an extensive portion of enforcement activities in New South Wales. Both the EPA and local councils have power to issue these notices. The largest infringement area relates to the issue of notices for smoky vehicles for which the EPA issued 3,079 notices in 1996/97. The next largest area relates to the pollution of waters, where the EPA issued 92 notices and local councils issued 516 notices in 1996/97. In that year councils also issued 725 notices for littering in a public place. Together EPA authorized officers and local government officers issued 5396 penalty infringement notices.³⁹

The total value of fines imposed by way of penalty infringement notices can be substantial. In 1995/96, the total value of fines imposed by way of penalty infringement notices issued by the EPA was \$649,711. This compares with the total of \$697,010 recovered through prosecutions for that year. The value of fines imposed by councils for the same period was estimated to be \$472,200.⁴⁰

More broadly, there are other factors that will influence enforcement trends in the future.

Due to constraints on resources the EPA is targeting particular industry sectors to try and improve their environmental performance. This trend is occurring Australia-wide:

"...the main impetus for change has been the recognition that targeting the most environmentally critical industry sectors, and then working with the companies in those sectors, will produce the most effective outcomes."⁴¹

There is also greater use of economic instruments. As the use of these instruments becomes more effective, compliance behavior may change, thereby affecting enforcement needs and approaches. This may include a reduction in the number or type of prosecutions, though not the need. However, this is still some way off as the introduction of economic instruments is still in its infancy.

For example, the relevant regulation detailing the operation of the load based licensing system is currently being developed. Implementation will involve a staged introduction of load based licences for different industry groupings. It will therefore be some time before these changes will affect compliance behavior.

In analyzing future trends, it will also be important to track the effect of particular powers, like the investigative powers of authorized officers, on the number and type of prosecutions, and the role of those prosecutions in achieving better environmental outcomes.

4.3 Civil Enforcement for Environmental Harm

Rather than prosecuting an environmental offence, the EPA or any other person, with the leave of the Court can bring civil proceedings to restrain a breach or threatened breach of the Act or any other Act, if the breach or threatened breach, is causing or is likely to cause harm to the environment.⁴² The EPA can therefore pursue civil enforcement in tandem or in lieu of criminal proceedings as part of its overall strategy for environmental improvement.⁴³

The availability of civil enforcement recognizes that a criminal penalty may not be effective in deterring unlawful conduct or where there is an intention or significant risk of ongoing breaches.⁴⁴ In particular, civil enforcement can be useful in addressing recurring acts of pollution.

Although there is provision for any person to bring civil enforcement proceedings for environmental harm in breach of the pollution or other legislation, use of this provision by third parties has been very limited. According to the EPA, there have only been two cases in which leave of the Court has been sought and granted to bring civil enforcement proceedings. One case related to an alleged breach of the pollution legislation and the other to a breach of the water legislation.⁴⁵ However, it does not appear that use of the provision has been limited because the leave requirements are too rigorous as there has been no history of application for leave. Rather, it is likely that resourcing constraints have limited the exercise of these rights by third parties.

4.4 Administrative Remedies

The new Operations Act in New South Wales provides for "environment protection notices".⁴⁶ These include:

- Cleanup notices;
- Prevention notices; and
- Prohibition notices.⁴⁷

A cleanup notice can require a person to take such cleanup action as is specified in the notice and within such period as is specified in the notice.⁴⁸ A prevention notice may be issued to ensure that the activity is carried out in an environmentally satisfactory manner, and can require a range of actions to be taken.⁴⁹ A prohibition notice is intended to require a person to cease carrying out an activity, and is issued by the Minister on the recommendation of the EPA.

Occupiers or polluters may also be required to provide reports on the carrying out of the cleanup or prevention action. If the EPA incurs costs relating to the notices, including costs for the monitoring of action under a cleanup notice, it can recover those costs as a debt by way of a compliance cost notice.⁵⁰ Public authorities that incur costs in taking cleanup action can also require the payment of their costs in doing so. These notices can be registered against the land of a person.⁵¹

Though not classified as an environment protection notice, the EPA can also issue a notice requiring an occupier to remove work where a licence was required but not obtained, and to restore premises to their previous state.⁵²

It is an offence to fail to comply with any of these notices. However, there are rights of appeal in relation to a prevention notice or a removal and restoration notice.⁵³

5 ENFORCEMENT IN SOUTH AUSTRALIA - THE FRAMEWORK AND PRACTICE

5.1 Introduction

A less prominent role for industry in the State has been reflected in the State's approach to pollution control legislation and, more particularly, the enforcement of that legislation. In recent years the State's economic woes have seen State Governments eagerly seeking investment from industry and manufacturing groups. The State does not want to develop a reputation for a heavy handed approach to enforcement of its environment protection laws and this attitude has been reflected in a very flexible approach by the regulators to this issue.

South Australia's pollution control legislation is found in the *Environment Protection Act 1993* which came into operation on 1 May 1995. The legislation is the first piece of comprehensive environment protection legislation adopted in the State of South Australia. Its most significant effect is to create in South Australia, a single integrated system of environment protection which replaces six piecemeal pollution measures which previously operated, and amends three other related statutes.

Under the legislation, a single environmental authorization addresses air, water, noise and waste aspects of activity regulated by the Act. Furthermore, there is a deliberate link between the processes which require that prescribed activities of environmental significance obtain an environmental authorization under the *Environment Protection Act 1993* and those processes requiring development authorization under the State's land use development control legislation, the *Development Act 1993*. It is the first time that South Australian environmental legislation has provided a recognized format for coordination between environmental agencies and development control authorities in relation to development having environmental significance.

The Act is a model for modern environment protection legislation.⁵⁴ It moves the State of South Australia away from the outdated 'command and control' methods of dealing with environmental problems to an approach centered around pollution prevention and wide community education. The overall aim is to provide South Australians with a cleaner, safer and healthier living and working environment.

5.2 Administrative arrangements

The Office of the Environment Protection Agency (EPA) is a six person authority established under the legislation with primary responsibility for decisions on all activities requiring environmental authorization under the Act and enforcement measures to be taken in relation to noncompliance with the State's environment protection legislation.⁵⁵

The EPA has extensive powers of delegation⁵⁶ including to local government officers. It is supported by a nonstatutory Office of the Environment Protection Authority. The EPA is subject to the direction of the Minister for Environment and Natural Resources except in relation to a number of matters, one of which is the enforcement of the Act.⁵⁷

In theory, this means that, like the position in New South Wales, the Minister has no influence on the EPA's enforcement decisions. However, the EPA is dependent on the State Government for its funds, and there is close and regular liaison between the EPA, the Minister and the Minister's advisers. If the government of the day was in favor of prosecution in a particular case or desirous of preventing prosecution in another, subtle pressure can arguably be brought to bear on the Authority.

5.3 Prosecutions

Offences under the *Environment Protection Act 1993* can very generally be placed into three classes: offences arising out of a breach of mandatory provisions in an environment protection policy;⁵⁸ general offences, such as the offence of causing environmental harm;⁵⁹ and offences associated with administrative matters under the Act.⁶⁰ 'Environmental harm' is any harm, or potential harm to the environment (of whatever degree or duration), and includes an environmental nuisance.

Substantial penalties may be imposed by the appropriate Court for offences against the Act. The most serious level of offence is that of causing serious environmental harm.⁶¹ If done intentionally or recklessly and with the knowledge that such harm will or might result, a maximum penalty of \$1 million may be imposed on corporate offenders. If done negligently (that is, through a failure to take all reasonable and practicable measures to prevent commission of the offence), the maximum penalty for a body corporate is \$250,000. 'Serious environmental harm' is defined by Section 5 of the Act as:

- actual or potential harm to the health or safety of human beings that is of a high impact or on a wide scale, or other actual or potential harm (not being merely an environmental nuisance) that is of a high impact or on a wide scale; or
- harm which results in actual or potential loss or property damage of an amount, or amounts in aggregate, exceeding \$50,000.

The term 'loss' includes the reasonable costs and expenses that would be incurred in taking all reasonable and practicable measures to prevent or mitigate the environmental harm and to make good resulting environmental damage. Thus, it can be seen that actions which result in relatively medium-level environmental damage and cleanup costs (that is, any amount beyond \$50,000) will attract the potential operation of the most serious offence provisions within the Act. It is also clear from the definitions that ecological harm which poses no direct threat to the health or safety of humans will still fall within the offence provisions.

A separate offence of causing material environmental harm⁶² carries a maximum penalty for corporate offenders of \$250,000 where done intentionally or recklessly, and \$120,000 where done negligently. 'Material environmental harm' is environmental harm which involves:

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- a. an environmental nuisance of a high impact or on a wide scale; or
 - b. actual or potential harm to the health or safety of human beings that is not trivial or other nontrivial environmental harm; or
 - c. actual or potential loss of property damage of an amount exceeding \$5,000.

The offence of causing an environmental nuisance⁶³ carries a maximum fine of \$30,000. An 'environmental nuisance' is the lowest level of environmental offence and includes:

- a. any adverse effect on an amenity value of an area that:
 - is caused by noise, smoke, dust, fumes or odor; and
 - unreasonably interferes with or is likely to interfere unreasonably with the enjoyment of the area by persons occupying a place within, or lawfully resorting to, the area; or
- b. any unsightly or offensive condition caused by waste.

Where the offence committed by a person is one of a continuing nature such as the ongoing pollution of the environment rather than a "one off" incident, additional penalties may be imposed for each day during which the contravening act or omission continues.⁶⁴

Offences under the Act lie within the criminal jurisdiction of the Environment Resources and Development Court, which is a specialist Court established expressly to deal with appeals and civil and criminal enforcement action under the *Environment Protection Act 1993*, the *Development Act 1993*, the *Heritage Act 1993* and related legislation.⁶⁵ In the case of the more serious offences of causing serious or material environmental harm, a defendant can elect to be tried by judge or jury.

5.3.1 Liability for Offences

As in New South Wales, where a natural person or a corporation has quite clearly breached a provision of the Act then liability for that offence will attach to them. Both corporations and natural persons who employ staff or engage contractors to act as their agents in particular matters may also find that the conduct and state of mind of those employees or agents will be imputed to them for the purposes of proceedings for offences against the Act providing the employee or agent was acting within the scope of his or her actual, usual or ostensible authority.⁶⁶ If a natural person is convicted of an offence as a result of the imputation of conduct or a state of mind of an employee or agent to that person the natural person cannot be punished by a term of imprisonment but only a fine.⁶⁷

Liability under the Act can extend beyond the obvious examples of corporations and individuals and will in appropriate cases attach to what the Act describes as "officers of the body corporate", to include the directors or chief executive officer of the corporation, a receiver or manager of any property of the body corporate or a liquidator and in relation to the contravention of the Act by the corporation, includes an employee vested with management responsibility in respect of the matters to which the contravention is related. It is the last category which creates considerable interest. Arguably, a wide range of people may be included under the category of "persons with management responsibilities", particularly in large organizations.

The significance of the definition of "officer of the body corporate" becomes apparent upon consideration of the provisions of s129 of the Act, which provides that if a corporation commits an offence under the Act any officer of that corporation is, (subject to possible defences), also guilty of an offence. The penalty applicable to the officer will be the same penalty

as would apply to a natural person who committed the offence except that the offender cannot be liable to be punished by imprisonment.⁶⁸ Thus if a corporation commits an offence by polluting the environment and causing serious environmental harm, an officer of that corporation is at risk of also being prosecuted and fined up to \$120,000. Where the officer knowingly promoted or acquiesced in the contravention of the Act by the corporation the officer is also guilty of an offence and has no immunity from punishment by imprisonment.⁶⁹ In March 1995 a company director in Western Australia was prosecuted and imprisoned for a contravention of the Western Australian *Environment Protection Act* 1986 under provisions not dissimilar to the South Australian legislation.⁷⁰

The provisions imposing liability on officers enable an officer of the corporation to be prosecuted and convicted regardless of whether or not the corporation has also been prosecuted. The provisions imposing liability on the officers of corporations are designed to make persons responsible for the day to day management of those corporations more aware of the corporation's environmental obligations and more diligent in ensuring the corporation meets such obligations.

5.3.2 Defences to Prosecutions

There are two defences which can be raised in criminal proceedings under the Act. The first relates to charges that a person has caused serious or material environmental harm or an environmental nuisance. To establish the defence, the accused person has to establish that any pollution or harm caused by them was consistent with existing limits set by Environment Protection Policies or conditions attached to an environmental authorization or harmed no person or property other than their own!⁷¹

This defence can also apply in civil proceedings under the Act.

The second defence known as the general criminal defence can apply to all offences under the Act whether or not the first defence is also applicable. It is the equivalent of the 'due diligence' defence in New South Wales.⁷² To establish the defence, it must be proved that the alleged offence did not result from any failure on the part of the defendant to take all reasonable and practicable measures to prevent the commission of the offence or offences of the same or similar nature. It is available to both corporations and natural persons and in situations where conduct or state of mind has to be imputed to those persons.

Where an employer or corporation seeks to establish the defence by reference to the establishment of proper workplace systems and procedures then the Act requires that proof be given of the existence of an appropriate system for reporting contraventions or risks to the corporation's governing body or the employer and that the governing body of the corporation or the employer actively and effectively promoted and enforced compliance with the Act and with the established systems and procedures within all relevant areas of the workforce.

Thus, an employer or corporation wishing to obtain the benefit of the general criminal defence provisions, must do more than simply prove that the employer or corporation had undertaken an environmental audit which resulted in the production of a guide or manual for future sound environmental management. They must also prove that the recommendations in that guide were and are actually being implemented and promoted by the management of the organization. They should be able to produce evidence of proper systems for the reporting of incidents with pollution potential to the people at management level.

5.3.3 Expiation Notices

With some offences under the South Australian *Environment Protection Act* there is provision for the expiation of that offence. Offences involving breaches of mandatory provisions of the Environment Protection Policies may often be expiated by the issue of a notice known as an 'Expiation Notice' requiring payment of a penalty in a similar manner to the penalty infringement notices used in New South Wales..

Environment Protection Policies are policies prepared by the EPA following a period of public consultation. The draft EPPs are referred to the Minister who, if happy with the contents, then refers them to the Governor of the State for authorization. They only become operative and legally binding once authorized in this way. EPPs must be directed towards securing the objects of the Act. They are an essential management tool and are one of the matters which the EPA has to have regard to when assessing applications for environmental authorization or development applications under the *Development Act* which have been referred to the EPA for comment or direction. Those controls or requirements contained within the EPPs which are enforceable as offences are known as Mandatory Provisions. Other provisions can be enforced by the issue of Environment Protection Orders, one of the administrative enforcement mechanisms. EPPs can incorporate a standard or other document prepared or published by another body. In particular, national environment protection measures created by the National Environment Protection Council will be adopted by the South Australian Environment Protection Authority and become law in South Australia.⁷³ Upon adoption and over a period of time it is expected that there will be more uniformity of standards and pollution controls across Australia through this process.

An Expiation Notice must be served on the person in breach of the Act within six months of the breach occurring. Only the EPA, officers authorized by the EPA or the police can issue such notices.⁷⁴ If the alleged offender pays the expiation fee within the appropriate period, that person is not liable to be prosecuted for that offence or those offences, or any other expiable offence arising out of the same incident.⁷⁵ An offender may elect to be prosecuted in which case the matter will proceed to trial and the EPA will be required to support its allegations with evidence. Expiation fees are always much less than the maximum fine applicable for the offence as a means of encouraging payment.

It is suggested that expiation notices will only be appropriate where:

- a. the breach is minor;
- b. the facts are undisputed;
- c. the breach is a one off situation that can be remedied easily; and
- d. the expiation fee is likely to be a viable deterrent.

5.4 Observations on Prosecution as an Enforcement Mechanism

In South Australia the use of the criminal law to enforce environmental legislation has been an infrequent occurrence.⁷⁶ Prosecutions for breaches of such legislation were traditionally seen as a last resort. The bodies responsible for enforcement of previous environmental legislation in South Australia had a policy of persuading people to comply with the Acts they administer and resorting to legal action only when there remained no alternative. It appears from various public statements made by the office of the EPA that a similar policy will apply with respect to the *Environment Protection Act*. Prosecution for breaches of the Act has its place

but the EPA will seek to negotiate and achieve a resolution of problems by alternative means. Appropriate powers to achieve this purpose can be found in the provisions dealing with environment protection orders, cleanup orders and cleanup authorizations.⁷⁷

Under the adversarial system, prosecutions can be costly and time consuming and often do not result in an ultimate resolution of the problems created by the breach of the Act. All too often they can become bogged down by legal technicalities. Days can be spent arguing about whether or not notices were validly issued or the proceedings properly commenced. While such issues are often raised as part of the defence case in a prosecution, many would argue that in the case of prosecutions for environmental offences, they do not assist in resolving the harm caused to the environment by the alleged breach of the legislation. There will, however, be some situations where prosecution has a significant deterrent effect.

Courts now have the power to impose orders on conviction for an environmental offence as well as a monetary fine or term of imprisonment. As in New South Wales, they include orders requiring the making good of any environmental harm, the carrying out of specified projects for the restoration or enhancement of the environment in a specific place, the publication of the contravention of the Act and its environmental and other consequences and the payment of compensation to others who suffer injury, loss or damage to property as a result of the contravention. These provisions add another dimension to the overall costs of breaching the Act. In some cases the remedying of environmental harm could be very costly and time consuming. Furthermore, the conviction for an offence against the Act and the imposition of a penalty does not prevent the use of other administrative remedies or civil enforcement under the Act in relation to the contravention.

The creation of offences under the *Environment Protection Act 1993* (SA) and the use of the criminal law to ensure compliance with the legislation is only one option available to the Environment Protection Authority ("EPA") as an enforcement mechanism. The use of the administrative and civil remedies outlined below is also a powerful means of ensuring compliance.⁷⁸

5.5 Non-Criminal Enforcement Methods

There are a range of administrative remedies available to the EPA for enforcement purposes. They include Environment Protection Orders,⁷⁹ Cleanup Orders⁸⁰ and Cleanup Authorizations.⁸¹ Civil enforcement orders made by the *Environment Resources and Development Court Act, 1993*⁸² are the final enforcement method. The administrative and civil enforcement remedies can be collectively referred to as 'civil remedies' in contrast to the criminal remedies discussed above. The following table illustrates the range of administrative enforcement measures taken to date.

Orders Issued by the EPA⁸³

	1994-95	1995-96	1996-97
Environment Protection Orders	5	99 (82 orders issued by SA police – parties and domestic noise	315 (287 orders issued by SA police)
Cleanup Orders	-	6	2

It should be emphasized that the various civil remedies potentially apply to a wide range of activities, not only those requiring authorization under the legislation before they can operate. If a person causes environmental harm whilst undertaking an activity then they leave themselves

open to action involving one of the various forms of civil remedy. Furthermore, civil liability under the Act appears to be much closer to strict than fault based liability and will be imposed regardless of whether or not the person was negligent. The fact that a person can establish the exercise of all due care or diligence will not exonerate them from civil liability under the Act.⁸⁴

5.6 Civil Enforcement Powers under the Act

Under Section 104 of the Act, an application can be made to the Environment, Resources and Development Court for orders to remedy a breach of the Act. A breach of the Act can include a breach of the general environmental duty set out in Section 25 of the Act and a breach of the repealed environment laws. Orders may be sought to restrain conduct, to require action to make good environmental damage, to prevent or mitigate further environmental harm or to pay compensation for loss, damage or expenses.⁸⁵ The courts powers even extend to ordering the payment of exemplary damages in appropriate circumstances.⁸⁶

Such applications can be made by the EPA, any person whose interests are affected or any other person with the leave of the Court.⁸⁷ However, before the Court may grant leave it must be satisfied that:

- the proceedings are not an abuse of process; and
- there is a real or significant likelihood that the orders sought would be justified; and
- it is in the public interest that the proceedings should be brought.

Where civil enforcement proceedings have been commenced by someone other than the EPA, the EPA must be served with a copy of any such proceedings and must be joined as a party to those proceedings on its application.⁸⁸

It is quite conceivable that any person able to satisfy the statutory standing test may seek to commence their own enforcement proceedings under the Act. If the action is unsuccessful, they could be ordered to compensate the respondent for any loss or damage suffered as a result of the proceedings.⁸⁹ Another factor of concern are the provisions which empower the court to order the applicant to provide security for the payment of costs and to give undertakings as to payment of the damages referred to above.⁹⁰ Whilst the court has a discretion on this matter, the making of such orders would in many cases make it impossible for a third party applicant to continue with their application. An applicant may also have to bear not only their own legal costs in prosecuting the action, but the costs of other parties to the proceedings. Though in New South Wales there have been a number of cases where the Courts have not required an unsuccessful litigant in a public interest environmental law case

to pay the costs of those proceedings.⁹¹ It remains to be seen whether a similar approach will be applied in South Australia.

5.7 Administrative Remedies

5.7.1 Environment Protection Orders

Environment Protection Orders (EPOs) may be issued by the EPA under Section 93 for the purpose of securing compliance with the general environmental duty, the mandatory provisions of an environment protection policy, a condition of an environmental authorization or to give effect to an EPP.

The EPA can require a person to discontinue or not commence a specified activity or limit the activity to specific times or conditions or take specified action. EPO's are normally required to be in writing, but can be issued orally (and confirmed in writing within 72 hours) where

there is an emergency. A right of appeal to the ERD Court exists for a person served with an EPO.⁹² An appeal does not automatically stay the effect of an EPO. Application must be made to the Court for that to occur.⁹³

It is an offence to fail to comply with an EPO. The penalty applicable varies, depending on the purpose for which the EPO was issued: to secure compliance with the general environmental duty, or with a requirement imposed by the Act.⁹⁴

Where an EPO was issued in relation to an activity carried out on land, the EPO may be registered on the title to the land if the EPA makes application to the Registrar-General of the Lands Titles Office. An EPO may also be registered on land owned by the person against whom the order was issued, even though that land is not the land upon which the activity, the subject of the EPO, is being conducted.⁹⁵ Where the EPO is registered on land on which the activity is taking place, it binds each owner and occupier from time to time of the land.⁹⁶ Accordingly, purchasers of land, lessees and other occupiers and anyone taking possession of land need to be fully aware of the details of the order and what it means for them once they commence occupation of the land. Although to date this device has been little used, it has the potential to be a very effective aid to enforcement.

The EPA has the power to take any action required by an EPO where the EPO has not been complied with and then recover the costs of doing so as a debt. Any such debt will become a charge on any land owned by the person.⁹⁷

5.7.2 Cleanup Orders and Cleanup Authorizations

Cleanup orders may be issued by the EPA under Section 99 to any person whom the EPA is satisfied has caused environmental harm by a contravention of the Act or a repealed environment law. Such orders basically require the person to make good any environmental damage. A breach of the order is an offence.

The EPA also may, where satisfied that a person has caused environmental harm by a contravention of the Act or a repealed environment law, issue a cleanup authorization which authorizes officers of the EPA or other nominated persons to take specified action to make good the environmental damage.⁹⁸ Cleanup authorizations can be issued whether or not cleanup orders have been made. A copy of the cleanup authorization must be served on the person alleged to have caused the environmental harm.⁹⁹

Rights of appeal to the ERD Court against both orders are available on the same terms as for Environment Protection Orders.

Registration of both cleanup orders and cleanup authorizations on the title to land can be obtained on application by the EPA to the Registrar-General in a manner similar to that applying to environment protection orders.¹⁰⁰ The application for registration can state that the registration of the order or authorization is to operate as the basis for a charge on the land. This charge will secure the payment of the costs and expenses of the EPA either in undertaking the requirements of a cleanup order itself or in engaging someone to meet the requirements of its cleanup authorization, when the land is eventually transferred to someone else

5.8 Training of Enforcement Officers

Finally, the success of any enforcement action whether of a criminal or civil nature will depend to a considerable extent on the quality of the investigation undertaken beforehand. Under the *Environment Protection Act* authorized officers appointed either by the EPA or local government bodies, play an important role. To improve their abilities in that role the EPA's Training and Development Unit is requiring completion of an Environment Protection Certificate course prior to making persons authorized officers under the legislation.¹⁰¹ The course assumes

no prior knowledge or experience of the law or the *Environment Protection Act 1993*. On completion of the course participants have a basic understanding of the nature of laws in our society and environmental laws in particular, the background structure and purpose of the South Australian *Environment Protection Act*, the role and responsibility of authorized officers under that legislation and the available methods for dealing with breaches and enforcement action under the legislation.

6 CONCLUSION

In considering the three approaches to enforcement: prosecution, civil and administrative remedies, in New South Wales and South Australia, we have seen how the respective enforcement agencies have adopted a different focus in their implementation of these approaches.

In South Australia, the focus has been on civil and administrative remedies. In New South Wales, there has been a vigorous approach to prosecution in recent years, with it comprising a major thrust of its approach. Though it will be interesting to monitor developments there to see the extent prosecutions will feature in future enforcement as strengthened administrative remedies come on stream.

In particular, the comparison between States (and at different times in New South Wales), also highlights the different interpretation applied to the use of prosecution “as a last resort”. In South Australia, prosecution is not or almost not perceived as a possibility. In New South Wales, it is seen as a real threat. In that State, the EPA has been active in taking strategic decisions about which cases to prosecute which incorporates consideration of their likely deterrent effect. The consequence is that in New South Wales enforcement is assisted by the deterrent effect of prosecutions. The absence of a similar deterrent effect in South Australia arguably lessens the overall effectiveness of enforcement in that State which may or may not be addressed by other enforcement strategies. Such an approach tends to a narrowing of compliance and enforcement options which contradicts current policy trends.

This is not to underrate the value of civil and administrative remedies as a powerful means of ensuring compliance. Indeed, if the experience of the use in South Australia of civil enforcement proceedings under the repealed *Planning Act 1982* and the present *Development Act 1993* is repeated in the environment protection area, arguably civil enforcement methods can be a more effective means of ensuring compliance.

More broadly, we have seen from the overview of the New South Wales and South Australian systems that each of the enforcement agencies now have a broader range of compliance and enforcement tools than existed in the past. This means there will be more scope to match the remedy to the problem and level of environmental harm: a range of powerful approaches for serious acts, a range of lighter approaches for more minor transgressions. Additionally, apart from the enforcement tools, improvement in the regulatory tools themselves, like more tailoring and the incorporation of economic instruments in environment protection licences, should assist compliance and enforcement.

These changes are, in ‘administrative time’, quite new. In both South Australia and New South Wales it has taken and will take further time to establish systems that allow full and flexible application of the different tools. This includes time for agency staff to become skilled and confident in the application of the various tools. That is, it will take time for the full scope of the new regime and its benefits to be realized in practice.

Importantly, it should also mean that resources can go further than they otherwise would because of the greater choice of enforcement approaches. Likely environmental outcomes can be assessed having regard to the different resource requirements of applying different approaches. That means, priority can be given to achieving the best environmental outcomes from the same resources.

In turn, this will require improved measurement of compliance and enforcement outcomes and environmental outcomes. With a greater choice of tools it will be necessary to gauge the effectiveness of those tools in achieving greater compliance and their significance or contribution to actual environmental outcomes. For example, an assessment of the impact of particular prosecution types rather than mere numbers of prosecutions will be useful in improving ongoing administration and in providing a clearer understanding of their relative contribution to environmental outcomes.

There are therefore numerous challenges in maximizing the effectiveness of the new regimes. However, the key challenge will be to ensure implementation leads to better environment protection outcomes and the achievement of ecologically sustainable development objectives.

ENDNOTES

1. Please note that the views expressed in this paper are those of the authors, and do not represent views of the Healthy Rivers Commission
2. Section 5.
3. It is worth noting that this will be some time off, as NEPC is still in the process of developing its first measure relating to air quality
4. State of the Environment Advisory Council, Commonwealth of Australia *Australia State of the Environment 1996* CSIRO Publishing, Australia 1996.
5. IGAE Clause 3.5.1.
6. *Ibid* Clause 3.5.4.
7. In Australia, Government uses the term Ecologically Sustainable Development rather than Sustainable Development. The principles referred to here are included in *Protection of the Environment Administration Act 1991*, section 6(2)
8. NSW State of the Environment Report 1997, Environment Protection Authority, Sydney, Australia, 1997
9. *Environment Protection Act 1993 (SA)* Section 25.
10. In New South Wales, implementation of the framework is just being determined.
11. Administration Act, section 19
12. Operations Act, sections 50-51
13. Operations Act, sections 249-250
14. Operations Act, Part 6.2. Protection is also provided for documents prepared for a voluntary audit and for some other information, from admission into evidence.

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15. EOP Act, Sections 5,6,6A. Operations Act, Part 6.2
 16. EOP Act, Sections8A-8D, *Operations Act*, Sections 120-144
 17. EPA Prosecution Guidelines, EPA (Sydney) July 1993, page 19, ("Prosecution Guidelines")
 18. Administration Act, Section 7(2)(e)
 19. *Ibid* Prosecution Guidelines, cl 2.
 20. The criteria to be satisfied before the Court will grant leave for a private prosecution are stricter than those which are to be satisfied for leave to bring civil proceedings under s25 to restrain a breach of an Act threatening environmental harm. Environmental Offences and Penalties Act 1989, Section13(2A)(2B)
 21. Prosecution Guidelines, *op cit* No 17 at cl 4.3.
 22. Operations Act 1997, Section 203
 23. EOP Act, Section 25, Operations Act 1997, Sections 252-3
 24. EOP Act, Section 13(2)(B). In these circumstances prosecution by other parties is precluded under the Act c13.5
 25. Prosecution Guidelines, *op cit* No 17 at cl 3.6.
 26. Prosecution Guidelines, *op cit* No 17 at cl 10.3.
 27. Prosecution Guidelines, *op cit* No 17 at cl 3.7.
 28. Prosecution Guidelines, *op cit* No 17 at cl 6.2.
 29. EOP Act, Section 10(4)
 30. SPCC v Blue Mountains City Council, unreported LEC, 13 December, 1990 at page 20.
 31. Prosecution Guidelines, *op cit* No 17 at cl 8.3.
 32. Prosecution Guidelines, *op cit* No 17 at cl 11.
 33. SPCC Annual Report 1984-85 page 141.
 34. Farrier, D. The Environmental Law Handbook, Redfern Legal Centre Publishing, Sydney, 1993 at page 199.
 35. Australian Environmental Prosecutions, Newsletter Information Services, Sydney 1995, Introduction.
 36. Prosecution Guidelines, *Op cit* No.17 cl 10.3
 37. Farrier *op cit* No.34 at page 200.
 38. Environment Protection Authority v Charles A.L. Gardner, No.50072 of 1996, page 3, Judgment Date, 7 November, 1997, Justice Lloyd, Land and Environment Court of New South Wales
 39. Environment Protection Authority Annual Report 1996-97, Sydney, 1997, page 105
 40. *ibid* Annual Report, page 105

41. Environment Business, Melbourne, July, 1997 page 1
42. EOP Act, Section 25
43. Prosecution Guidelines, *op cit* No 17 cl 4.2.
44. Peek v NSW Egg Corporation, (1986) 6 NSWLR 1 at 3-4, Kirby J.
45. Brown v EPA (1992) 78 LGERA 119 and Canyonleigh Environment Protection Society Inc vWingecarribee Shire Council No. 40286 of 1996, Judgment 8 August, 1997, Justice Bignold, Land and Environment Court of NSW
46. See Chapter 4 of the Operations Act.
47. Operations Act, Section 90
48. Sections 91-94
49. Sections 95-100
50. Section 104
51. Sections 106-7
52. Section 86
53. Sections 288-9
54. Both Tasmania and Queensland have adopted similar statutes.
55. *Environment Protection Act 1993* Section 11.
56. Section 12.
57. Section 11(4).
58. *eg Environment Protection Act*, section 34 *eg* Clause 4(1) Environment Protection (Air Quality) Policy 1994.
59. Discussed below.
60. Examples, include failure to assist authorised officers with enquiries (s90). Failure to comply with an Environmental Protection Order (s93). Failure to provide information about the change of ownership or occupation of land which is subject to an environment protection agreement (s94).
61. Section 79.
62. *Environment Protection Act 1993*, section 80.
63. Section 82.
64. Section 123.
65. Section 132.
66. Section 127.
67. Section 127(2).
68. *Environment Protection Act 1993*, Section 129(2).

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69. Section 129(3).
 70. *Environment Protection Authority (WA) v McMurty* - unreported Perth Court of Petty Sessions 9.3.95, **see** Case Note (1995) 1 AELN 14.
 71. Section 84.
 72. *Environment Protection Act 1993*, Section 124.
 73. Section 28a.
 74. *Expiation of Offences Act 1996* Section 6(3).
 75. *Ibid* Section 15(1).
 76. There have in fact been no prosecutions under the *Environment Protection Act* since it came into operation in May 1995. A prosecution conducted by the EPA but relating to offences under the previous *Waste Management Act 1987* was dismissed by the Magistrates Court in early 1997. See EPA Draft *Annual Report of the Environment Protection Authority for Period 1 July 1996 to 30 June 1997*, September 1997 at p50.
 77. See below at page 25
 78. Discussed subsequently at page 24 *et al.*
 79. Section 93.
 80. Section 99.
 81. Section 100.
 82. Section 104.
 83. EPA Annual Report 1996-97, EPA, Adelaide, page 50. Statistics for 1994-95 were only for May and June 1995, as the Act commenced on 1 May, 1995
 84. *Environment Protection Act 1993*, Section 124(4)
 85. Section 104(1).
 86. Section 104(4).
 87. Section 104(7).
 88. Section 104(9).
 89. Section 104(18).
 90. Section 104(17).
 91. *Oshlack v Richmond River Shire Council* [1998] HCA 11
 92. *Environment Protection Act 1993*, Section 106(1)(d)
 93. Section 107
 94. Section 93(8)
 95. Section 94(1)
 96. Section 94(4)

97. Section 95
98. *Environment Protection Act* 1993, Section 100
99. Section 100(3)
100. Section 101.
101. The course is run in conjunction with the Australian Centre for Environmental Law, at the University of Adelaide.