ENVIRONMENTAL PROTECTION AUTHORITY

Environmental Lawyers Conference

Friday, 5 May 2006 at 12.30 pm

Judge Marshall Irwin
Chief Magistrate

Thank you for this opportunity to participate in and address your conference. I congratulate you on holding the conference which brings together environmental lawyers and enforcement officers from throughout Australia and New Zealand with a diversity of backgrounds and experiences.

As a person who has had experience of law enforcement through the National Crime Authority and the Queensland Criminal Justice Commission I recognise that cross-jurisdictional co-operation is vital to the effective discharge of your important functions. In an increasingly borderless world it is essential that such co-operation exists internationally as well as nationally. The exchange of information involved and the new networks formed will be of great benefit to you in the future, in much the same way as we find with

meetings of councils of Chief Justices, Chief Judges and Chief Magistrates.

This conference was opened by the Queensland Minister with responsibility for environmental policy. It has moved to discussions not only of policy but also of issues concerning investigation and enforcement. Therefore it is probably appropriate that this closing address is delivered by a representative of the courts before whom the results of your investigative activities are presented.

The available statistics demonstrate that the majority of environmental prosecutions in Queensland occur in the Magistrates Court. This is not surprising because approximately 96% of all prosecutions of criminal offences in Queensland take place before the court.

The majority of the offences coming before the Magistrates Court are punished by fines. Substantial fines have been imposed for environmental offences – as high as $400,000.00 in one case in Cairns, and only 2 days ago a fine of approximately $100,000.00 was imposed by the Cairns Magistrates Court.

Queensland Courts have emphasised that the nature of the contaminating substance and the nature of the environment into which it has escaped will be material considerations that affect the gravity of the offences. The courts have consistently stressed that

principles of deterrence are of particular importance in sentencing an environmental offender.

It has been stated by the Queensland Court of Appeal in the case of *Moore* that:

> "major environmental offences, particularly when there is a high degree of criminality involved because of the repetitive nature of the conduct will call for the imposition of custodial sentences."

Therefore offenders who engage in significant environmental destruction for commercial gain should be under no misapprehension that they run not only the risk of financial penalty if detected and prosecuted.

However, as I am sure this conference has recognised cost considerations are such that prosecutions are not always the most cost effective manner of achieving compliance with environmental laws. Accordingly there is likely to be a strategic enforcement approach with prosecutions aimed at the cases that people will notice and reliance also placed on other strategies.

It is all a question of balance as recognised by the object of the Queensland *Environmental Protection Act*, which is:

> "to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in way that maintains the ecological processes on which life depends (ecologically sustainable development)."

It is therefore necessary to look beyond prosecutions to other methods of achieving enforcement, compliance and deterrence. This will include enforcement notices, injunctions to cease activity, orders to carry out specified work or clean up damage, and cancellation or suspension of licences; and as has been discussed at this conference, the concept of civil penalties. This proposal is under consideration in South Australia. As I understand it the proposal will involve negotiating with the offender or applying to the court for a civil penalty instead of pursuing a prosecution for the offence. This will enable contraventions to be dealt with faster, without the burden of court costs and the immediacy of punishment involved will have a deterrent effect. It is to be anticipated that defendants will consider that a civil penalty is preferable to the stigma of a criminal conviction. The courts are likely to appreciate the saving of time that would otherwise be occupied by the conduct of a trial for the offence.

Civil penalties are not a foreign concept to the courts, as they have successfully used in the trade practices and corporations areas. There is an analogy in the use of civil remedies to confiscate the ill-gotten gains of criminals using the civil standard of proof. Even when the person has not been convicted this has been a very effective tool.

The developments in South Australia will undoubtedly be watched with interest.

Through talking to delegates during the conference I have also become interested in the Victorian concept of *alternative penalties* where magistrates can make the "penalty fit the crime" by directing that an offender carry out a range of activities including environmental restitution (an example of restorative justice), paying a penalty to the local community or even publish an apology in a local newspaper. By including such concepts in the incentive/enforcement mix a flexible, pro-active and preventative approach can be taken to environmental offending. However because it will remain necessary to prosecute some environmental offences it is essential that environmental investigators have experience in investigation strategy, crime scene security, evidence collection and interview techniques. An area of particular importance is taking steps to avoid disputes over conversations which have the potential to be relevant to later criminal proceedings.

In referring to this I should not be taken as abandoning my objectivity as a judicial officer. My aim is to ensure that prosecutions are presented in such a way as to ensure that cases proceed efficiently and time is not lost in adjournments and legal arguments that may otherwise be unnecessary.

From my experience on both sides of the bench the recording of conversations with persons suspected of committing environmental

offences is not something that is always done well. Time will be saved in court proceedings if such conversations are recorded contemporaneously. The best means of doing this is by using a tape recorder. If a tape recorder is not to be used, or even if it is (because malfunctions are not unknown) it is important that detailed notes be kept contemporaneously, being made either at the time of the conversation or at a time when the conversation can still properly be regarded as being fresh in the investigator's memory.

In addition to the inefficiencies that the failure to adopt such methodologies introduce into court proceedings, there is a risk for the prosecution that some or all of the conversations will not be admitted in evidence or will be regarded as unreliable by the court.

It is obvious from what I have said that with the growing workload, courts are concerned with the efficient conduct of proceedings which come before them. Both efficiency and justice can be promoted by full prosecution disclosure of all statements and documents relevant to its case at the earliest possible stage of the proceedings.

Full disclosure in my experience advances the prosecution case and in most cases will result in early pleas of guilty with considerable cost savings for law enforcement and prosecution authorities. Even if it does not achieve this result it is likely to result in defence admissions reducing the issues in contest and the extent of evidence required to be called. This is important because environmental prosecutions can involve some complex issues.

Another “tip” on the presentation of prosecutions, which I mention because of a question asked of me during the conference, is to be *prepared* and *precise* in presentation. The court will be greatly assisted by preparation which enables the production of materials such as diagrams, photographs and plans which will assist it to more easily understand the case. In presenting the case it is essential to go to the heart of the matter so as to focus only on the real issues in dispute.

I hope that these observations resonate with some of the issues discussed during the conference or at least add to the discussion and debate.

I have much pleasure in declaring this conference to be closed. And I wish you well as you go your separate ways in the knowledge that the networks you have established or reinforced this week will be of significant benefit in discharging your important community functions.