THE OPERATION OF THE CRIMINAL JURISDICTION IN THE FIELD OF ENVIRONMENTAL LAW

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at the

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INTRODUCTION

[1] Since the early 1980s there has been a seismic shift in the public's awareness of, and enthusiasm for, environmental issues. The community now expects and, indeed, demands that the State, acting through the legislature, enacts laws for the appropriate protection and enhancement of the environment, for present and future generations. The community also expects the State, acting through the executive, to ensure that those laws are properly administered and enforced. It is hardly surprising, that, in the same period, there has been something of an explosion in the quantum and scope of environmental legislation and an increasing public scrutiny of its enforcement. Those trends show no sign of abating.

[2] One of the consequences of these trends is that the courts of criminal jurisdiction, and the practitioners who appear before them, are now not only dealing with more familiar criminal matters such as dishonesty, drug, violence and sex offences, but must now adapt to deal with a relatively new and quite different subject matter, in the field of environmental law. Similarly, those practitioners who specialise in planning and environment law are increasingly called upon to advise in criminal proceedings. A schedule of just some of the offence provisions is attached.

[3] An examination of how the criminal jurisdiction functions in this area of the law requires first a consideration of the role which the criminal jurisdiction plays in the area of environmental law and the context in which that role is played.

THE ROLE OF THE CRIMINAL JURIDICTION IN ENVIRONMENTAL LAW

[4] The expression "environmental law" is itself imprecise. In the Queensland context, it obviously includes the *Environmental Protection Act 1994* (Qld) (EPA), but the expression is best understood as a broad church which encompasses a range of statutes, the subject matter of which touches or concerns the environment. Significantly in the Queensland context, this includes the *Sustainable Planning Act 2009* (Qld) (SPA) as well as a range of other statutes.

[5] The overarching purpose of environmental law, in the Queensland context, is the promotion of ecological sustainability or ecologically sustainable development. The object of the EPA, is stated in s 3 as follows:

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

[6] The purpose of SPA is stated in s 3 of that Act as follows:

> "The purpose of this Act is to seek to achieve ecological sustainability by –
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> (a) managing the process by which development takes place, including ensuring the processes are accountable, effective and efficient and deliver sustainable outcomes;

(b) managing the effects of development on the environment, including managing the use of premises; and
(c) continuing the co-ordination and integration of planning at the local, regional and State levels."

[7] Ecological sustainability is, in turn, defined in Section 8 of SPA as follows:

"**Ecological sustainability** is a balance that integrates –
(a) protection of ecological processes and natural systems at local, regional, State and wider levels;
(b) economic development; and
(c) maintenance of the cultural, economic, physical and social wellbeing of people and communities."

[8] The criminal law has an important role to play in achieving that object or purpose. It does so by bringing the perpetrators of environmental offences to justice and by providing a deterrent to breaches of environmental law by others. In the course of dealing with offences of this kind, the courts of criminal jurisdiction develop legal principle and establish sentencing ranges. While that is important it is obviously not, in itself, sufficient to achieve ecological sustainability or ecologically sustainable development. The role of the criminal jurisdiction in the environmental law field must be viewed through the prism of other statutory provisions which, amongst other things:

(i) create statutory environmental, planning or policy documents;

(ii) require authorities, permits or other approvals to be obtained before certain activities, which may adversely impact upon the environment, may occur;

(iii) permit the assessing authority for such applications to impose conditions on any approval, to ensure appropriate protection of the environment;

(iv) provide for a decision making regime, including avenues for review and/or appeal in relation to decisions on applications for authorities, permits or other approvals;

(v) provide investigation powers;

(vi) provide for the issue of statutory notices;

(vii) provide for declarations and other orders to be made by the Planning and Environment Court; and

(vii) provide for civil enforcement orders by the Planning and Environment Court.

[9] The multi-faceted nature of environmental law is significant, not least because the various elements have the potential to impact upon one another. It is in this context that the role of the criminal jurisdiction in environmental protection is delineated.

Further, the courts of criminal jurisdiction, prosecuting agencies and legal practitioners need to be as much 'across' the other elements of environmental law and, indeed, administrative law, as they are 'across' the criminal law.

THE SPECIALISED NATURE OF THE JURISDICTION

[10] The specialised nature of the criminal jurisdiction in the environmental law field can be illustrated by reference to the nature of the offence provisions themselves. There are a myriad of offences, the subject matter of which is quite foreign to the types of matters which traditionally come before courts of criminal jurisdiction more generally. They are not able to be understood without a working knowledge of the relevant statues. Relevant concepts include, for example, "assessable development", "self assessable development", "applicable codes", "compliance permit", "development permit", "codes", "prohibited development", "unlawful use of premises", "tidal works", "heritage place", "enforcement notice", "show cause notice", "clean-up notice", "environmental authority", "transitional environmental program", "site management", "a standard environmental condition of a code of environmental compliance", "serious environmental harm", "material environmental harm", and "environmental nuisance" just to name a few.

[11] Notwithstanding the specialised nature of the jurisdiction, prosecutions come either before Magistrates, not many of whom will have had any great prior familiarity with the concepts, or before District Court juries, the members of which can be presumed to have no knowledge at all of the concepts. This has caused some to question whether these prosecutions ought to be able to be brought in the Planning and Environment Court instead.

[12] Further complication is introduced by the fact that some of the offence provisions relate to a failure to obtain a relevant authority, permit or other approval. In those circumstances careful consideration must be given to the proper characterisation of the development or activity in respect of which the prosecution is proposed to be brought and to whether, on a proper construction of the statute any relevant statutory instruments, the activity is one which in fact required an authority permit or other approval in any event. Issues of that kind are sometimes problematic.

[13] Further, where the charge is based upon a failure to comply with the terms or conditions of a relevant permit, authority or approval it is those terms and conditions which come under the microscope. Unfortunately, they are not always drawn in terms which are, in all respects, clear and certain as to their content and meaning or even practicably achievable. This can considerably complicate enforcement proceedings generally and criminal prosecutions in particular.

[14] It is relatively common for the prosecuting authority to also have been the authority which formulated the relevant terms or conditions. A want of care or discipline in the formulation of conditions of an approval can negatively impact upon a subsequent prosecution. Relatively common mistakes include:-

(i) drafting conditions which might reflect discussions, assessments or negotiations in the application process (or even the subjective intent of the decision maker), but which are difficult to construe on their face; and

(ii) prosecuting agencies construing those conditions, and their requirements, by reference to an internal policy position or departmental "lore" rather than by a proper, objective construction.

THE INFLUENCE OF ADMINISTRATIVE LAW

[15] Prosecuting authorities need to bear in mind the principles of administrative law in relation to the construction of permits, authorities or other approvals. I summarised that law, in the context of the *Integrated Planning Act* 1997 (Qld), in *Brisville Pty Ltd v Brisbane City Council* [2007] QPEC 63 as follows[1] (footnotes deleted):

> [7] The development approval is a public document, which constitutes the decision of the local authority, expressed in a formal manner and is required to operate in accordance with its terms. It is not personal to the applicant. It runs with the land and may be relied upon by many persons dealing with the grantee (or others exercising the rights conferred by it). A breach of its terms may, under the *Integrated Planning Act 1997 (Qld)*, result in proceedings not only at the instance of the local authority, but by any person. In construing an approval, the search is not for what the Council may have intended or the applicant understood. Each approval must speak according to its written terms, construed in context, but having regard to its enduring function.
>
> [8] Accordingly, the construction of a development permit is undertaken having regard primarily to the terms of the approval, as it appears on its face, together with other material, such as approved plans, where they are incorporated expressly or by necessary implication. An explanatory statement in the approval itself may also be considered. The process of construction is however, to be aided only by evidence admissible in relation to the construction and which establishes or helps to establish the true meaning of the document as the act of the relevant authority, not the result of a bi-lateral transaction between the applicant and the Council.
>
> [9] Permissible extrinsic evidence may include evidence of the "physical reality" as at the time of approval (e.g. the nature of the site and, I accept, its context), if that assists in understanding the subject matter and meaning of the approval or condition contained within it. Expert evidence

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[1] See also *Auburn Municipal Council v Szabo* (1971) 67 LGRA 427; *House of Peace Pty Ltd v Bankstown City Council* (2000) 106 LGERA 440; *Serenity Lakes Noosa Pty Ltd v Noosa Shire Council* [2007] QPEC 005; *Aqua Blue Noosa Pty Ltd v Noosa Shire Council* [2005] QPELR 318; *Hubertus Schuetzenverein Liverpool Rifle Club v Commonwealth of Australia* (1994) 85 LGERA 37; *Crisp from the Fens Ltd v Rutland County Council* (1950) 1 P&CR 48; *Parramatta City Council v Shell Company Australia Ltd* [1972] 2 NSWLR 632; and *Caloundra City Council v Pelican Links Pty Ltd* [2005] QCA 84

> may also be called to explain technical terms. The scope for extrinsic evidence is however, limited.

[16] Where a prosecution is based upon a failure to comply with the terms or conditions of a relevant authority, permit or approval, administrative law principles may also be potentially relevant to possible defences, or at least to the legal strategy formulated for the accused. It would be remiss of a practitioner, engaged to act on behalf of a defendant in criminal proceedings of this kind, not to at least give consideration to whether the condition, the subject of the prosecution, is itself unlawful or invalid. In some cases the statute itself will provide tests for the validity of a condition. Section 345(1) of SPA, for example, provides that:

> "A condition must:
>
> (a) be relevant to, but not an unreasonable imposition on, under the development or use of premises as a consequence of the development; or
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> (b) be reasonably required in relation to the development or use of premises as a consequence of the development."

[17] Conditions in which an environmental offset condition may be imposed are also restricted by s 346A(2) of SPA, which provides:

> "An environmental offset condition may be imposed only if the concurrence agency or assessment management is satisfied that all cost effective onsite mitigation measures for the development have been, or will be, undertaken."

[18] Beyond such statutory tests, conditions may be challenged on more general administrative law bases as, for example, not being sufficiently certain or as lacking finality. In considering the vulnerability of a condition, the subject of a prosecution, to such a challenge, a legal practitioner must also consider administrative law principles as to whether the condition is severable, such that the approval (which the practitioner's client presumably has the benefit of) can stand shorn of that condition, or whether the approval itself would fall in the event of a successful challenge.

[19] Where an offence, constituted by a failure to comply with conditions, is of a continuing nature, consideration may also need to be given to whether future development or activity can be regularised, to protect the client against further prosecution. This might involve using statutory provisions which provide scope for changing, amending or cancelling conditions.

[20] In *Sustainable Organics (Wooshaway) Pty Ltd v Department of Environment & Management* [2010] QPEC 129 (*Sustainable Organics*) the appellant (SO) had the benefit of an approval pursuant to which it operated an environmentally relevant activity (ERA 53-soil condition and manufacturing). One of the conditions set limits for various chemicals in products derived from the composting. The condition was not challenged at the time it was imposed. Subsequently, tests showed that the limits were not being adhered to and an environmental protection order (EPO) was issued. SO responded by seeking a review of the decision to issue the EPO and by making an application to change the limits imposed by the

condition which, it appeared, had been set, in error. The application to review the decision to issue the EPO resulted in more generous limits being set for the purposes of the EPO. The application to vary a condition was initially refused, but new limits were agreed to in the context of an appeal to the Planning and Environment Court.

[21] The above illustrates that the criminal jurisdiction does not operate in isolation in the context of the environmental law field. Those concerned with the criminal jurisdiction in this field must be familiar with the legislation more generally and be aware of the other aspects of the statutory scheme and the principles of administrative law more generally. That is underscored by consideration of the range of options which are available for enforcement.

PARALLELL PROCEEDINGS

[22] It has already been noted that there are a range of measures available to secure enforcement of environmental law. These include not only criminal prosecution, but provisions which allow for the issue of notices with statutory effect, for the Planning & Environment Court to make declarations and other orders and to entertain proceedings for civil enforcement, and criminal prosecution in courts of criminal jurisdiction.

[23] Increasingly, prosecuting authorities are choosing to use more than one of those concurrently. So, for example, a relevant agency might commence civil enforcement proceedings, seeking both interim and final enforcement orders, in the Planning & Environment Court, while also causing a parallel criminal prosecution to be commenced. The relationship between criminal prosecutions and remediation orders sought by way of civil enforcement proceedings is examined in the paper to be given by Hinson SC[2]. He calls for a closer alignment of the orders available in each type of proceeding and for there to be a single specialised forum (The Planning and Environment Court) for hearing both civil and criminal enforcement proceedings.

[24] Where parallel proceedings are instituted there is an obvious and understandable concern on the part of the respondent/defendant, that the civil enforcement proceedings in the Planning & Environment Court will or may be used (or abused) to assist the criminal prosecution. This concern arises because the civil enforcement proceedings:

(i) do not require proof beyond a reasonable doubt[3];
(ii) potentially call upon the defendant to participate in pre hearing steps in those proceedings, and to choose whether to articulate a positive defence, even though the defendant has a right to silence in criminal proceedings; and
(iii) may come on for hearing and determination before the criminal prosecution.

[2] "Remediation Remedies", Hinson SC.
[3] See the discussion of authorities by Robertson DCJ in *Caloundra City Council v Tapor Pty Ltd* [2003] QPEC 19 at [14]

Despite these understandable concerns however, the existence of 2 sets of proceedings is not necessarily an abuse of process (see *Environmental Protection Agency v Hudson Timber Products Limited & Ors* [2005] QPEC 069 and *Booth v Yardley* [2007] QPELR 205).

[25] The practical difficulties facing a defendant in these circumstances is discussed in the paper to be presented by Stuart MacNaughton[4]. What makes this complication even more difficult to manage is that the proceedings are in different Courts. The Planning & Environment Court has jurisdiction to entertain civil enforcement proceedings, but no criminal jurisdiction (save with respect to contempt of court). Stuart MacNaughton's paper refers to the increasing calls for Queensland to be brought in to line with New South Wales, where the Land and Environment Court has criminal jurisdiction.

THE NEED FOR CARE IN CRIMINAL PROCEEDINGS

[26] Where an agency pursues a criminal prosecution it is important that both the prosecution and defence are acutely aware of the differences between such proceedings and civil enforcement proceedings, including with respect with to:

(i) the onus of proof;
(ii) limitation periods, and
(iii) the dictates of criminal procedure otherwise, including with respect to particularising the charge and avoiding duplex or uncertain charges.

Similarly, a prosecuting agency needs to be mindful, when investigating a complaint, that evidence sufficient to obtain a civil enforcement order may fall short of what is required in a criminal prosecution.

[27] *Cohen v Macefield Pty Ltd & Ors* [2010] QCA 95 provides an illustration of the care which needs to be taken. Morris De Bray and Macefield Pty Ltd were convicted in the Magistrates Court of damaging, or permitting to be damaged, protected vegetation contrary to section 24 of the Gold Coast City Council's Local Law 6 (Vegetation Management) and were fined. They successfully appealed their convictions to the District Court, where the convictions where set aside and the complaints dismissed. An application for leave to appeal against the decision of the District Court judge was subsequently refused.

[28] Section 24(1) of the Local Law created an offence provision as follows:

> "A person must not damage or permit to be damaged protected vegetation".

[29] "Damage" was defined as including:

[4] "A Comparison of Compulsory Powers under new Queensland Environmental Protection Act 1994 Provisions, and in the UK", MacNaughton.

> "Destruction of the vegetation or interference with its natural growth including, but not limited to, ringbarking, cutting down, topping, lopping, removing or poisoning".

[30] The complaints, which were made on 12 February 2004, alleged that each of the respondents:

> "On a date between December 2000 and November 2003…did, in breach of local law damage, or caused to be damaged, protected vegetation…"

At first instance the prosecutor amended the complaints so as to substitute the word "permit" for the word "cause" in each complaint (so that it accorded with the language of the offence provision).

[31] The De Bray's, with their son, where directors of Macefield Pty Ltd and were the only shareholders. They and the company owned adjoining lots. The land had been the subject of council interest over some years since 2000, when the De Brays obtained a permit to clear vegetation in order to create fire access tracks. Two council officers inspected the property in July 2000 and found some felling in contravention of the conditions of the permit, but there was no evidence, at that time, of any poisoning of trees more generally and the vegetation was, in the main, healthy and vigorous. By May 2001 however, it appeared that a number of trees were dying and there was evidence of diesel and a herbicide (which may be mixed and used to poison trees) being used on the property. At a later inspection, on 19 June 2003, it was found that most of the trees of significant size had chop marks in their trunks and there was still the remanent smell of diesel and the herbicide. A number of trees appeared to have died, however it was impossible to determine when the trees had been poisoned.

[32] An agricultural scientist, Mr Ison, had inspected the site in November 2003 and observed that a large number of trees had incisions made into their bases with a sharp instrument with, apparently, a herbicide applied through the incisions. In January 2004 a council officer returned to the area and saw the vegetation in a similar state of decline to that which he had seen in 2003. Dr Olsen, a botanist, inspected the properties in December 2004 and saw extensive areas where trees had been killed by artificial means. By reference to aerial photography he expressed the opinion that the majority of trees had been killed before 2003 although there had been some loss of canopy between March 2003 and October 2003.

[33] At first instance, the Magistrate found that trees which fell within the definition of protected vegetation had been damaged and poisoned after the council inspections in 2000. The photographic evidence showed marked changes between 2001 and 2003, with the damage being consistent with an attempt to clear the area of all vegetation. The Magistrate did not accept that the trees were killed by accident, but rather found that Mr De Bray intended to destroy them. He found both Mr De Bray and Macefield Pty Ltd "guilty as charged" and proceeded to sentence.

[34] It may be thought that a clear breach of the Local Law had been established on the facts as found. Given that the matter involved a criminal prosecution however, it was necessary for the prosecution to lay a proper charge, to establish that particular charge and to prove that that charge fell within the relevant limitation period. This is where the prosecution ultimately foundered.

[35] Section 24(1) of the Local Law, in providing that "a person must not damage or permit to be damaged protected vegetation", was held to be a single provision providing for two offences - one of damaging protected vegetation and one of permitting protected vegetation to be damaged. The complaint was therefore duplex and the Magistrates finding of "guilty as charged" was ambiguous, because it raised uncertainty as to which act each had been convicted of. While Holmes JA (with whom Chesterman JA and Daubney J concurred) observed that the proper course might have been to allow an amendment of the conviction, to reflect that the case was clearly presented on the basis of damaging protected vegetation (rather than permitting damage to occur), the prosecution also foundered on another basis.

[36] Section 1080 of the *Local Government Act* 1993 (Qld) set the limitation period as within one year after the commission of the offence or within six months after the offence comes to the complainant's knowledge but, in any event, within two years after the commission of the offence. The charge related to a period between December 2000 and November 2003, but the complaints were not made until 12 February 2004 and no evidence was adduced as to when the offence came to the complainant's attention. The effect was that the Crown had to prove that the offence occurred between 13 February 2003 (i.e. 12 months before the date of the complaint) and November 2003. An examination of the evidence revealed that it was incapable of sustaining a finding, beyond reasonable doubt, that protected vegetation had been damaged within that limitation period.

ABUSE OF PROCESS

[37] In addition to being conscious of the varying requirements in establishing a case for criminal prosecution (rather than for civil enforcement orders) it is important for prosecuting agencies not to put themselves in a position where it can be said that they have committed an abuse of process, particularly where parallel proceedings are on foot. It has already been observed that the mere existence of parallel proceedings does not, in itself, constitute an abuse of process. That is not to say however, that abuse may not occur in the way in which particular proceedings are pursued.

[38] In *Scenic Rim Regional Council v Brecevic* [2010] QPEC 003, the Council had "parallel" proceedings on foot. There were criminal proceedings in the Magistrates Court as well as proceedings in the Planning & Environment Court for declarations and consequent enforcement orders. Prior to the criminal prosecution being heard the Council sought orders in the Planning & Environment Court proceedings to obtain access to the property in order to gather additional evidence. That was opposed on the basis that it was sought for an ulterior purpose assisting the

prosecution and was therefore an abusive process. Robin QC DCJ discussed relevant authorities at paragraph 6 of his reasons as follows:

> "Dependency of the criminal proceedings in the Magistrates Court raises the same complication with respect of an order for inspection of private land pursuant to UCPR r 250 as was considered in *Nimmo v Land One Solutions Pty Ltd* [2006] QPEC 55. In *Nimmo*, the respondent relied on the possibility that evidence gathered by a surveyor on an inspection order under r 250 might be used in proceedings for a penalty or for contempt and helped to incriminate the respondent. In *Exagym Pty Ltd v Professional Gymnasium Equipment Company Pty Ltd* [1994] 2 Qd R 6 Ambrose J rejected an application for further and better answers to 'interrogatories delivered by the plaintiff in contempt proceedings taken against the defendants … for breach of an interlocutory injunction'. It was held that interrogatories might be objected to on the ground that answers might tend to incriminate and that in contempt proceedings in particular, a person was not obliged to answer questions that may tend to incriminate him. In the pursuit of the alleged contemnor, a further attempt to obtain evidence as made on an ex parte application to seize documents and other things; and 'Anton Piller' order was made which led to handing over of some material proposed to be used at the hearing of the contempt proceedings, which was imminent. Byrne J set aside the ex parte order, which he noted in *Exagym Pty Ltd v Professional Gymnasium Equipment Pty Ltd (No. 2) [*1994] 2 Qd R 129 at 130 'was not in aid of relief sought against the defendants in the litigation, which … is the justification for the Anton Piller injunction … it was not an order issued for a purpose which incidentally involved some chance of revealing evidence tending to disclose an act of disobedience to a court order. Rather, its … purpose was to facilitate proof of the contempt proceedings'. At 131 his Honour noted that for centuries the courts declined to lend their compulsive process in aid of proceedings to expose persons to punishment or consequences in the nature of a penalty. In *Nimmo*, an order was made under r 250 containing special provisions to ensure that the surveyor's evidence pursuant would not be disseminated or be used outside the specific proceeding in which it was made."

[39] In *Brecevic* Robin QC DCJ was ultimately not persuaded that there was an ulterior purpose. He made an order that the applicant be granted reasonable access, but on the express condition that:

> "Evidence gathered pursuant to this order is not to be used in the separate proceeding commenced against the respondents by complainant summons dated 16 December 2009 or in any other prosecution."

[40] In the *Sustainable Organics* case an allegation of abuse of process was also made, although not ultimately established.

[41] These cases illustrate that a prosecuting authority, although free to institute "parallel" proceedings, needs to be careful to conduct those proceedings in a way which does not attract allegations of abuse of process.

[42] An interesting issue was recently raised by Melanie Simmonds in her paper "If I Were The Minister … Things We Could Do To Improve Access To Environmental Information, Enforcement Processes And Other Things In Queensland" delivered at the 2011 Queensland Environmental Law Association Annual Conference. She reported:

> "There are also troubling reports that the DERM is adopting a somewhat 'robust' definition of 'complainant' for the purposes of calculating the applicable time limit under s 497(b) of the EP Act."

[43] Section 497 of the Environmental Protection Act provides as follows:

> **"Limitation on time for starting summary proceedings**
> A proceeding for an offence against this Act by way of summary proceeding under the *Justices Act 1886* must start –
> (a) within1 year after the commission of the offence; or
> (b) within 1 year after the offence comes to the complainant's knowledge, but within 2 years after the commission of the offence".

[44] This "robust" approach involves calculating the time limit not from when DERM, through one of its duly authorised officers, had notice of the offence, but rather when the particular person within DERM who is ultimately named as the complainant, had knowledge. It is said that where a limitation period has expired after DERM, through one of its officers, has received notice of the offence, the problem can be avoided and the limitation period 'reset' by DERM simply transferring the file to another officer who has no previous knowledge of the matter, and who is then ultimately named as the complainant. Such an approach, if it is followed, is bound to attract challenge. Even if it were found to be technically correct, one can readily anticipate that any prosecution based on a tactic to re enliven an expired limitation period in that way would be challenged as an alleged abuse of process.

[45] Ms Simmonds' article also deals with another relevant aspect to the operation of the criminal jurisdiction in the environmental law field. It has already been noted that the principal roles of the criminal jurisdiction in this area include both bringing offenders to justice and creating a deterrent to offences by others. Each of those roles is furthered by appropriate, consistent and well known decisions on penalties imposed on those convicted. The current position in Queensland however is not entirely satisfactory from this perspective.

[46] As Ms Simmonds points out, many of the prosecutions are in the Magistrates Court, the decisions of which are not reported or available to be searched online. Although DERM has a record of decisions on its prosecutions, the public, defendants and local governments (which are the administrating authority for a number of

environmental offences under the EP Act) do not have general access to those decisions. This led Ms Simmonds to suggest as follows:

> "Indeed, the lack of recording of decisions in environmental prosecutions raises the question as to whether the Planning & Environment Court (a court with specialist jurisdiction) should be given jurisdiction in relation to environmental prosecutions. It would not be unusual in the Australian context for environmental prosecutions to be heard by a specialist environmental court. In New South Wales, for example, the Land & Environment Court is a court that hears the majority of environmental proceedings, including environmental prosecutions. Rather than leaving reporting of 'facts and outcomes' of environmental prosecutions to the DERM, if environmental prosecutions were heard in the Planning & Environment Court, the decisions would be publicly available."

[47] In this respect, the President of the Land & Environment Court of New South Wales, the Honourable Justice Brian Preston described what that court has been able to achieve in this area. In his paper "Operating An Environment Court: The Experience Of The Land And Environment Court Of New South Wales"[5] he said as follows:

> "The court's role in criminal enforcement has also been of importance. The court's decisions have developed a jurisprudence in relation to environmental crime. This is particularly so in relation to sentencing. Environmental crimes have their own unique characteristics which demand special consideration. As a specialist environmental court, the Land & Environment Court is better able to achieve principled sentencing for environmental offences. The court, through its sentencing decisions, strives to achieve consistency and transparency in sentencing for environmental offences. It has been instrumental in establishing the world's first sentencing database for environmental offences."

[48] It has also been observed, by George Pring and Catherine Pring in their publication "Greening Justice - Creating and Improving Environmental Courts and Tribunals"[6] that:

> "… more comprehensive and effective ECT's (Environemntal Courts and Tribunals) have authority to impose civil, administrative, and criminal penalties, including monetary penalties (civil) or fines (criminal), jail terms, and other criminal sanctions that are sufficiently high that they act as an effective deterrent."

[49] Unlike tribunalised systems (such as exist in Victoria (VCAT) and Western Australia (WACAT)) the Planning & Environment Court is a court properly so

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[5] (2008) 25 EPLJ 385 at 389

[6] The Access Initiative, United States, 2009, at p.27, available online at: <http://www.accessinitiative.org/blog/2010/01/greening-justice-creating-and-improving-environmental-courts-and-tribunals>.

called, constituted by judges. There would be no legal impediment to conferring criminal jurisdiction upon it. Further:

(i) the judges who constitute the Planning & Environment Court are drawn from the ranks of District Court judges and all have experience in the criminal jurisdiction of the District Court, in addition to their expertise in planning and environmental law, and

(ii) the Planning & Environment Court already has access to infrastructure, including facilities and registry support, sufficient to support a criminal jurisdiction. The Planning & Environment Court uses the District Court's infrastructure. This includes court houses and the same registry which serves the Supreme Court and the District Court.

[50] While the Planning & Environment Court might not be the appropriate avenue for the more mundane or trivial matters, there are growing calls for criminal jurisdiction to be conferred upon it, for the reasons which have already been noted in this paper. Whether those calls should be heard and acted upon is a policy decision for the government of the day.

CONCLUSION

[51] A critical factor in the operation of the criminal jurisdiction in the ever expanding field of environmental law, is an appreciation of the wider matrix of Statutes, statutory instruments and statutory processes (including statutory processes for civil enforcement) within which the criminal jurisdiction plays its role.

[52] The specialised nature of the jurisdiction and the multiplicity of roles played by relevant agencies (such as assessing authorities, investigating bodies, applicants for civil enforcement orders and prosecuting authorities) means that great care needs to be exercised to ensure that criminal charges are properly formulated and brought, consistently of the requirements of criminal procedure, and are capable of being supported by the evidence gathered. Care must also be taken to ensure that parallel proceedings or administrative decision making processes are not abused in the context of an extant criminal prosecution.

[53] The complexities inherent in this specialised area are exacerbated by the split nature of the civil enforcement and criminal prosecution jurisdictions. This also makes it more difficult to gain access to decisions which give clear guidance in relation to outcomes of criminal prosecutions. There are calls for Queensland to be brought into line with New South Wales by having criminal jurisdiction conferred on the Planning and Environment Court. That is a policy issue.

ME RACKEMANN DCJ

16 JUNE 2011

APPENDIX

SOME OFFENCE PROVISIONS

Act	Section	Max penalty
Sustainable Planning Act 2009 (Qld)- Chapter 7 Appeals, offences and enforcement	**s574**: Carrying out self assessable development without compliance with applicable codes (NB: does not apply to contravention of a standard environmental condition of a code of environmental compliance under the EPA)	165 penalty units (Fine: $16,500)
	s575: Carrying out development without compliance permit	1665 penalty units (Fine: $166,500)
	s576: Contravention of a compliance permit or compliance certificate	165 penalty units (Fine: $16,500)
	s577: Contravention of the requirement to request compliance assessment of a document or work within a certain period	165 penalty units (Fine $16,500)
	s578: Carrying out assessable development without development permit	1665 penalty units (Fine: $166,500)
	s579: Carrying out assessable development without complying with codes	165 penalty units (Fine: $16,500)
	s580: Contravention of a development approval, including any condition in the approval	165 penalty units (Fine: $16,500)
	s581: Carrying out prohibited development (NB: doesn't apply to the carrying out of development under a development approval given for a DA superseded planning scheme or a compliance permit decided under a superseded planning scheme)	1665 penalty units (Fine: $166,500)
	s582: Offences relating to the unlawful use of premises	1665 penalty units (Fine: $166,500)

	s583: Contravention of master plans	1665 penalty units (Fine: $166,500)
	s585: Carrying out emergency tidal works without complying with requirements	1665 penalty units (Fine: $166,500)
	s586: Carrying out of emergency work on heritage places without complying with requirements	1665 penalty units (Fine: $166,500)
	s587: False or misleading documents or declarations provided to assessment manager	1665 penalty units (Fine: $166,500)
	s594: Non-compliance with enforcement notice	1665 penalty units (Fine: $166,500)
	s595: Contravention of requirements of processing application or request required by enforcement or show cause notice	1665 penalty units (Fine: $166,500)
	s611: Obligation on executive officers to ensure that corporations comply with the Act	If a corporation commits an offence, each of the executives also do. Penalty is the penalty for the section contravened
Environmental Protection Act 1994 (Qld) – Part 5, Environmental Protection Orders	**s289**: Providing false or misleading information about Environmental Audits	1665 penalty units (Fine: $166,500) or 2 years imprisonment
	s357(5):Contravening an order of the Court pending application of program notice	3000 penalty units or 2 years imprisonment
	s361: Offence not to comply with Environmental Protection Order (EPO)	Wilfully Contravene EPO - 2000 Penalty Units or 2 years imprisonment. Contravene EPO – 1665 penalty units.
	s363I: Offence not to comply with a clean-up notice	2000 penalty units

	s430: Wilfully contravening a condition of an environmental authority	Level 1 authority – 2000 penalty units or 2 years imprisonment Level 2 authority – 300 penalty units
	s432: Wilfully contravening a requirement of a transitional environmental program	1665 penalty units or 2 years imprisonment
	s434: Wilfully contravening a site management plan	1665 penalty units or 2 years imprisonment
	s435: Wilfully contravening a development condition of a development approval	2000 penalty units or 2 years imprisonment.
	s435A: Wilfully contravening a standard environmental condition of a code of environmental compliance.	2000 penalty units or 2 years imprisonment.
	s437: Wilfully and unlawfully causing serious environmental harm.	4165 penalty units or 5 years imprisonment.
	s438: Wilfully and unlawfully causing material environmental harm.	1665 penalty units or 2 years imprisonment
	s440: Wilfully and unlawfully causing environmental nuisance.	835 penalty units.
	s480: Knowingly providing false or misleading documents to an administering authority. **s480A** – Knowingly providing incomplete documents	1665 penalty units or 2 years imprisonment s480A – same as above.
	s505(12): Contravening a restraint order	3000 penalty units or 2 years imprisonment.
Environmental Protection Regulation 2008 (Qld)	**s21**: Untreated clinical waste disposal.	20 Penalty Units (Fine: $2,000)

Building Act 1975 (Qld)	**s83:** Contravention, by Private Certifier, of granting a Building Development Approval where granting of such approval is not appropriate.	165 Penalty Units (Fine: $16,500)
	s84(1): Building approval by Private Certifier must not be inconsistent with particular earlier approvals or self-assessable development	165 Penalty Units (Fine: $16,500)
	s84(2): The Private Certifier must not approve the application if the application relates to self assessable development under the Planning Act, or the application is inconsistent with the local planning instrument.	165 Penalty Units (Fine: $16,500)
Urbane Land Development Authority Act 2007 (Qld)	**s86:** Contravening an enforcement order	3000 penalty units or 2 years imprisonment.
Marine Parks Act 2004 (Qld)	**s48:** Non compliance with a temporary restricted area declaration.	2 years imprisonment or 3000 Penalty Units
	s50: A person must not wilfully do an act or make an omission that directly or indirectly causes or is likely to cause serious environmental harm to a marine park.	2 years imprisonment or 3000 Penalty Units
	s114: Contravention of an Enforcement Order or an Interim Enforcement Order issued under this Act.	2 years imprisonment or 3000 Penalty Units
Nature Conservation Act 1992 (Qld)	**s62:** Taking, using, keeping, or interfering with a cultural or natural resource of a protected area.	2 years imprisonment or 3000 Penalty Units
	s88: A person must not take a protected animal, unless the person is an authorised person or the taking is authorised under this Act.	Class 1 Offence: 2 years imprisonment or 3000 Penalty Units Class 2 Offence: 1 years imprisonment or 1000 Penalty Units
	s88C: A person must not destroy, drive away, attempt to drive away or disturb a flying-fox roost, unless that person is authorised to do so under the Act.	1 years imprisonment or 1000 Penalty Units
	s89: A person must not take a protected plant that is in the wild, unless that person is authorised to do so under the Act.	Class 1 Offence: 2 years imprisonment or 3000 Penalty Units Class 2 Offence: 1 years imprisonment or 1000 Penalty Units

	s91: A person must not abandon or release international or prohibited wildlife into the wild, unless that person is authorised to do so under the Act.	2 years imprisonment or 3000 Penalty Units
	s92(1): A person must not release a hybrid or mutation of a protected animal into the wild other than under a conservation plan for the protected animal.	1 years imprisonment or 165 Penalty Units
	s97: A person must not take, use, keep or interfere with native wildlife in areas of major interest or critical habitat, unless that person is authorised to do so under the Act	2 years imprisonment or 3000 Penalty Units
Queensland Heritage Act 1992 (Qld)	**s90:** Interfering with an archaeological artefact, unless authorised to do so by the Chief Executive.	1000 Penalty Units (Fine: $100,000)
	s91: Interfering with a ship wreck, unless authorised to do so by the Chief Executive.	1000 Penalty Units (Fine: $100,000)
	s104: A person must not enter or interfere with a protected area, unless that person is acting under an authorised permit, or otherwise has a reasonable excuse.	For Individual: 1700 Penalty Units For Corporations: 17000 Penalty Units
	s156: A person must not state anything to an authorised person that the person knows is false or misleading	500 Penalty Units (Fine: $50,000)
	s157: A person must not give an authorised person a document containing information that the person knows is false or misleading.	500 Penalty Units (Fine: $50,000)
	s158: A person must not obstruct an authorised person in the exercise of a power, unless the person has a reasonable excuse.	200 Penalty Units (Fine: $20,000)
	s158(3): A person must not pretend to be an authorised person.	100 Penalty Units (Fine: $10,000)
	s159: A person of whom a personal details requirement is made must comply with the requirements unless the person has a reasonable excuse.	50 Penalty Units (Fine: $5,000)

Coastal Management Act (Qld)	**s59(6):** Contravening a coastal protection notice.	3000 Penalty Units (Fine: $300,000)
	s60(8): Contravening a tidal works notice.	3000 Penalty Units (Fine: $300,000)
	s69: A person must not damage or remove vegetation on, or damaging a dune forming part of, State coastal land above the high-water mark, unless that person is authorised to do so under the Act.	400 Penalty Units (Fine: $40,000)
	s139: A person must not state anything to an authorised person that the person knows is false or misleading	50 Penalty Units (Fine: $5,000)
	s140: A person must not give an authorised person a document containing information that the person knows is false or misleading.	50 Penalty Units (Fine: $5,000)
	s141: A person must not obstruct an authorised person in the exercise of a power, unless the person has a reasonable excuse.	100 Penalty Units (Fine: $10,000)
	s142: A person must not pretend to be an authorised person.	50 Penalty Units (Fine: $5,000)