

The Protection of the Environment through the Use of Criminal Sanctions: A Comparative Analysis with Specific Reference to South Africa

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Declaration

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any University for a degree.

Signature:

Date:

The protection of the environment through the use of criminal sanctions: A comparative analysis with specific reference to South Africa

Contents

Part One: Introductory Topics

- 1. Introduction**
- 2. Purpose of criminal law generally**

Part Two: The South African status quo

- 3. The Constitutional requirements**
- 4. An examination of environmental offences/crimes and their enforcement (including assessment of current shortcomings) Part A: Pre 1994 national legislation**
- 5. An examination of environmental offences/crimes and their enforcement (including assessment of current shortcomings) Part B: Post 1994 national legislation**
- 6. An examination of environmental offences/crimes and their enforcement (including assessment of current shortcomings) Part A: Provincial and local legislation**

Part Three: The proper role for criminal sanctions in enforcement of environmental law

- 7. Strengths and weaknesses of using criminal sanctions to enforce environmental law**
- 8. Alternatives to criminal law**

Part Four: Strengthening environmental criminal law

- 9. Strict liability**
- 10. Liability of corporate offenders**
- 11. Sentencing environmental crimes.**
- 12. Practical problems etc**

Part Five: Recommendations and Conclusions

- 13. Recommendations and Conclusions**

Table of Contents

Part One Introductory Matters

Chapter 1 Introduction	1
1 Approach	3
2 Parameters	5
2.1 What is environmental legislation and what is not?	6
2.2 Scope of comparative analysis	7
3 Environmental protection: Why and how?	7
 Chapter 2 The Aims of Criminal Law	 11
1 The purpose of criminal law	11
2 The purpose of criminal sanctions in the enforcement of environmental law	15

Part Two The Current Situation in South Africa

Chapter 3 Criminal Law and the Constitution	23
1 The Bill of Rights	23
2 The constitutionality of legislation	26
3 Limitation	27
3.1 Law of general application	28
3.2 Reasonableness and justifiability in an open and democratic society based on human dignity, equality and freedom	29
4 Rights of arrested, detained and accused persons	32
4.1 The gathering of evidence through search and seizure	32
4.2 Statutory presumptions infringing the right to be presumed innocent, to remain silent and not to testify	36

4.3	The right to challenge evidence in cases where scientific evidence may be adduced by means of affidavit or certificate	55
4.4	The right against self-incrimination	57
5	Conclusion	58

Chapter 4 An examination of environmental crimes and their enforcement in South Africa: Part One –

	Pre-1994 National Legislation	59
	Analysis of legislation	60
1	Sea-Shore Act 21 of 1935	60
2	Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947	62
2.1	Acquisition, disposal, sale or use of prohibited substance	64
2.2	Use of remedy for unintended purpose	64
2.3	Forfeiture	65
2.4	Miscellaneous provisions	66
2.5	Vicarious liability	68
2.6	Evaluation	69
3	Water Act 54 of 1956	69
4	Atmospheric Pollution Prevention Act 45 of 1965	70
4.1	Failure to register premises upon which scheduled processes are carried on	70
4.2	Manufacture or import of certain fuel burning appliances and parts therefor	74
4.3	Installation on any premises of fuel burning appliances	74
4.4	Failure to comply with smoke control regulations	76
4.5	Failure to comply with local authority notice	76
4.6	Emission of smoke in smoke control zone	77
4.7	Causing a dust nuisance	77
4.8	Failure to comply with dust control notice	78
4.9	Evaluation	79

5	Mountain Catchment Areas Act 63 of 1970	79
6	Hazardous Substances Act 15 of 1973	80
6.1	Selling a Group I hazardous substance without a licence	81
6.2	Selling etc any Group III hazardous substance	82
6.3	Production etc of Group IV hazardous substances	82
6.4	Furnishing a false or misleading warranty	83
6.5	Miscellaneous provisions	84
6.6	Evaluation	88
7	Sea Birds and Seals Protection Act 46 of 1973	88
7.1	Setting foot or remaining on an island	89
7.2	Pursuing, shooting at, killing or capturing sea birds or seals	89
7.3	Damaging or collecting eggs of sea birds	90
7.4	Failure to comply with permit	90
7.5	Evaluation	91
8	Lake Areas Development Act 39 of 1975	91
8.1	Offences under regulations	91
8.2	Evaluation	92
9	National Parks Act 57 of 1976	92
9.1	Entry or residence in park without permission	92
9.2	Possession of weapon, explosive, trap or poison	93
9.3	Hunting, killing or injuring any animal	94
9.4	Disturbing any animal	95
9.5	Taking, damaging or destroying eggs, nests or honey	96
9.6	Causing a veld fire and damaging objects	96
9.7	Introducing or permitting entry of animal into park	97
9.8	Possession of animal in a park	97
9.9	Cutting, damaging, removing or destroying any tree or plant	97
9.10	Removal of seed	98
9.11	Feeding an animal	99
9.12	Forfeiture	99
9.13	Miscellaneous matters	101

9.14	Evaluation	103
10	Health Act 63 of 1977	103
11	Dumping at Sea Control Act 73 of 1980	104
11.1	Dumping of substances at sea	105
11.2	Contravention of regulations	108
11.3	Procedural aspects	109
11.4	Vicarious liability	110
11.5	Evaluation	110
12	Marine Pollution (Control and Civil Liability) Act 6 of 1981	111
12.1	Discharge of oil	111
12.2	Failure to report discharge	111
12.3	Failure to comply with requirements of Authority	113
12.4	Other offences	115
12.5	Procedural aspects	116
12.6	Evaluation	117
13	Conservation of Agricultural Resources Act 43 of 1983	117
13.1	Prohibition of the spreading of weeds	118
13.2	Failure to comply with control measures	119
13.3	Failure to comply with directions	119
13.4	Failure to comply with conditions for assistance in terms of a scheme	120
13.5	Failure to maintain soil conservation work	121
13.6	Failure to comply with conditions of authorisation	121
13.7	Failure to comply with regulations	121
13.8	Presumptions and evidence	122
13.9	Evaluation	123
14	Marine Pollution (Prevention of Pollution from Ships) Act 2 of 1986	124
14.1	Offences under regulations	124
14.2	Evaluation	125
15	Marine Pollution (Intervention) Act 64 of 1987	125
16	Environment Conservation Act 73 of 1989	125
16.1	Contravention of provision of direction relating to PNE	126

16.2	Offences in respect of special nature reserves	126
16.3	Establishing, providing or operating a disposal site without a permit	127
16.4	Failure to comply with Minister's directions	128
16.5	Unauthorised disposal of waste	129
16.6	Littering	129
16.7	Failure to provide containers	130
16.8	Failure to remove litter	130
16.9	Undertaking prohibited identified activities	130
16.10	Undertaking prohibited activity in limited development area	131
16.11	Failure to comply with direction relating to environmental harm	131
16.12	Miscellaneous provisions	132
16.13	Evaluation	133
17	Game Theft Act 105 of 1991	134
17.1	Entering land with intent to steal game	134
17.2	Dispersing or luring away game	135
17.3	Presumption	135
18	Minerals Act 50 of 1991	136
18.1	Failure to carry out rehabilitation of surface of land	136
18.2	Failure to submit environmental management programme	137
18.3	Failure to comply with directives/conditions	137
18.4	Offences under regulations	138
18.5	Evaluation	139
19	Occupational Health and Safety Act 85 of 1993	140
19.1	Conducting activities which expose public to hazards etc	140
19.2	Doing anything threatening the health or safety of any person	141
19.3	Offences under regulations	141
19.4	Vicarious liability	142
	Evaluation	142

Chapter 5	An examination of environmental crimes and their enforcement in South Africa: Part One – Post-1994 National Legislation	144
	Analysis of the legislation	144
1	Development Facilitation Act 67 of 1995	144
2	Water Services Act 108 of 1997	145
2.1	Wasteful use of water	145
2.2	Prohibited use of water and disposal of effluent	146
2.3	Disposal of effluent	146
2.4	Evaluation	147
3	Marine Living Resources Act 8 of 1998	
3.1	Fishing without permit	147
3.2	Fishing in contravention of conditions of authorisation	149
3.3	Contravention of an international management or conservation measure	150
3.4	Contravention of provisions of high seas fishing licence/permit	150
3.5	Fishing without foreign fishing vessel licence	151
3.6	Possession of prohibited gear	153
3.7	Driftnet fishing	154
3.8	Fishing within a radius of one nautical mile of a fish aggregating device	154
3.9	Stowage of gear	155
3.10	Contravention of any other provision of the Act	155
3.11	Contravention of regulations	158
3.12	Enforcement powers of fishery control officers	158
3.13	Forfeiture	159
3.14	Jurisdiction of courts	159
3.15	Evidentiary matters	160
3.16	Revocation of permit	162
3.17	Evaluation	163
4	National Water Act 36 of 1998	163
4.1	Use of water other than as permitted	164

4.2	Failure to comply with condition attached to permitted water use	168
4.3	Failure to comply with directive	168
4.4	Tampering or interfering with waterwork	171
4.5	Refusal to perform duty	171
4.6	Pollution of water resource	171
4.7	Detrimentially affecting water resource	172
4.8	Failure to comply with temporary restriction	172
4.9	Offences and regulations	173
4.10	Miscellaneous provisions	175
4.11	Evaluation	176
5	National Forests Act 84 of 1998	177
5.1	Failure to take steps relating to sustainable forest management	179
5.2	Cutting, damaging etc indigenous tree	179
5.3	Cutting, damaging etc forest produce in protected area	180
5.4	Contravention of protected area rules	181
5.5	Prohibited activities in respect of protected tree	181
5.6	Prohibited activities in controlled forest areas	182
5.7	Prohibited entry into forest	182
5.8	Contravention of rules relating to access to forests	183
5.9	Making marks or signs	183
5.10	Littering in a forest	183
5.11	Cutting, damaging seven-week ferns	184
5.12	Killing fauna in a forest	184
5.13	Removal of forest produce	185
5.14	Licence contraventions	185
5.15	Miscellaneous provisions	186
5.16	Evaluation	187
6	National Veld and Forest Fire Act 101 of 1998	188
7	National Environmental Management Act 107 of 1998	188
7.1	Private prosecutions	188
7.2	Provisions relating to criminal proceedings	190

7.3	Further comment	187
8	National Heritage Resources Act 25 of 1999	197
8.1	Destroying etc heritage site	198
8.2	Damage etc to any part of a protected area	198
8.3	Damage etc to provisionally protected place or object	199
8.4	Alteration of structure older than 60 years	199
8.5	Compensatory order	200
8.6	Miscellaneous provisions	200
8.7	Alternatives to criminal sanctions	201
8.8	Evaluation	202
9	Nuclear Energy Act 46 of 1999	202
9.1	Failing to discharge duty under s 33	203
9.2	Performing restricted act without authorisation	204
9.3	Possession of restricted matter	206
9.4	Evaluation	207
10	National Nuclear Energy Regulator Act 47 of 1999	207
10.1	Activities of unlicensed nuclear installation	207
10.2	Operation of vessel using nuclear power	208
10.3	Failure to comply with conditions of authorisation	209
10.4	Unspecified offences	209
10.5	Alternative enforcement mechanisms	210
10.6	Evaluation	211
11	World Heritage Convention Act 49 of 1999	211
	Evaluation	211

Chapter 6	An examination of environmental crimes and their enforcement in South Africa: Part Three – Provincial and Local Legislation	213
1	Pre-1994 Provincial Legislation	214
1.1	The Natal Nature Conservation Ordinance 15 of 1974	214

1.2	Orange Free State Nature Conservation Ordinance 8 of 1969	234
1.3	Cape Nature and Environmental Conservation Ordinance 19 of 1974	239
1.4	Transvaal Nature Conservation Ordinance 12 of 1983	242
1.5	Natal and Free State pollution ordinances	247
1.6	Overall evaluation	248
2	Post-1994 Provincial Legislation	249
2.1	KwaZulu-Natal Planning and Development Act 5 of 1998	249
2.2	Western Cape Planning and Development Act 7 of 1999	252
2.3	Mpumalanga Nature Conservation Act 10 of 1998	254
2.4	Evaluation of post-1994 provincial legislation	255
3	Local legislation	255
3.1	Pietermaritzburg-Msunduzi TLC industrial effluent by-laws	256
3.2	Noise control regulations	257
4	Overall evaluation	259

Part Three The Role for Criminal Sanctions in the Enforcement of Environmental Law

Chapter 7	Strengths and weaknesses of using criminal sanctions to enforce environmental law	260
1	Introduction: Inadequate enforcement of environmental law	260
2	Strengths of criminal law	263
2.1	Punishment	263
2.2	Familiarity	264
3	Weaknesses of criminal law	264
3.1	Inherent weaknesses	264
3.2	Contingent weaknesses	269
4	Assessment	271

Chapter 8 Alternatives to the Criminal Sanction 277

1 Alternatives to command and control	277
1.1 The drawbacks of command and control	278
1.2 The advantages of alternative regulatory approaches	279
1.3 What are the alternatives?	280
1.4 The role of criminal sanctions under alternative regulatory approaches	282
2 Alternatives to the criminal sanction	285
2.1 Administrative measures	285
2.2 Civil measures	296
3 Evaluation	305
4 Conclusion	306

Part Four Optimising the Effectiveness of Criminal Sanctions

Chapter 9 The Use of Strict Liability in the Prosecution of Environmental Crimes 307

1 Introduction	307
2 What is strict liability?	308
3 The rationale for the use of strict liability	309
4 Strict liability in South Africa	310
5 Strict liability in the United Kingdom	313
6 Strict liability in the Canada	316
7 Strict liability in the United States of America	322
8 Strict liability in Australia	328
9 Strict liability in New Zealand	331
10 Assessment	334
11 Negligence v strict liability	338
12 Conclusion	339

Chapter 10	Vicarious Liability for Environmental Offences	340
1	South Africa	340
2	United Kingdom	342
3	Australia	343
4	New Zealand	344
5	Canada	345
6	United States of America	346
7	Evaluation	346
Chapter 11	Corporate Liability for Environmental Offences	350
1	Corporate liability for environmental offences	351
1.1	South Africa	352
1.2	United Kingdom	354
1.3	Australia	356
1.4	New Zealand	357
1.5	Canada	357
1.6	United States of America	360
1.7	Evaluation	362
2	Liability of controlling officers	370
2.1	South Africa	370
2.2	United Kingdom	372
2.3	Australia	373
2.4	New Zealand	375
2.5	Canada	376
2.6	United States of America	378
2.7	Evaluation	382
3	Environmental audits and self-incrimination	384
3.1	Australia	385
3.2	Canada	388

3.3	United States of America	389
3.4	Evaluation	392
4	Conclusion	399
 Chapter 12 Sentencing environmental crimes		 400
1	The adequacy of penalties for environmental offences in South Africa	401
2	Types of penalties provided for in South African law	405
2.1	Fine for continuing offence	405
2.2	Compensation order	405
2.3	Reparation order	406
2.4	Fine equivalent to value	407
2.5	Fine equivalent to advantage gained	408
2.6	Forfeiture	409
2.7	Community service	411
2.8	Revocation of licence or permit	412
2.9	Prohibition of further development	412
2.10	Evaluation	413
3	Other sentencing measures	413
3.1	Sentencing guidelines	414
4	Sentencing corporations	418
4.1	Conviction	419
4.2	Fines	419
4.3	Managerial intervention	421
4.4	Community service	422
4.5	Adverse publicity	424
4.6	Redress facilitation	425
4.7	Equity fines	425
4.8	Prohibition of indemnification of corporate officers	427
4.9	Disqualification of government contracts	428
4.10	Evaluation	428

5 Conclusion	431
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Chapter 13 Procedural Aspects	434
--------------------------------------	-----

1 Private prosecution	434
2 Recovery of costs of prosecution	436
3 Payment of fines for environmental offences to organs of state managing the environment	439
4 Conclusion	440

Part Five Conclusion and Recommendations

Chapter 14 Conclusion	441
------------------------------	-----

1 Summary of arguments	441
2 Concrete proposals for legislative reform	444
3 Concluding remarks	458

Bibliography	460
---------------------	-----

Table of Statutes	474
--------------------------	-----

Table of Cases	478
-----------------------	-----

Abstract

The purpose of this work is to examine critically the use of criminal sanctions in the enforcement of environmental law in South Africa. The two principal issues considered are, first, whether criminal sanctions are the best enforcement instrument and, if not, what alternative enforcement tools exist. Second, the thesis considers ways in which the use of criminal sanctions can be made more effective in those cases where it is found that criminal sanctions do have a role to play.

In determining the object of criminal law in the context of environmental regulation, it is concluded that the primary aim is deterrence. The question that this raises is whether deterrence can adequately be achieved through use of alternatives to the criminal sanction.

A comprehensive analysis of South African environmental legislation reveals an overwhelming reliance on the command and control approach to regulation, with criminal sanctions being used in almost all cases as the primary enforcement mechanism. It is argued that there are several shortcomings of criminal law that militate against its use as the default enforcement mechanism and the conclusion reached is that they should be reserved for the most serious contraventions of the environmental law. The thesis examines several viable alternatives to criminal sanctions, both administrative and civil, and makes recommendations as to how these can be used effectively instead of criminal sanctions.

Following this initial conclusion, the focus then shifts onto how the use of criminal sanctions can be improved in those (serious) cases for which they should be reserved. It is argued, first, that the use of strict criminal liability is not necessary. This is followed by an examination of vicarious and corporate liability where recommendations are made for ways in which these aspects can be improved. The issue of sentencing environmental crime is then considered and it is argued that penalties are largely adequate but suggestions are made as to innovative sentencing options. Finally, several procedural improvements are put forward.

In conclusion, a model enforcement chapter for environmental legislation is mooted, taking into account the various recommendations made in the course of the thesis.

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Chapter 1

Introduction

If somebody in South Africa emits effluent into a river, that person must comply with standards provided by regulations in terms of the National Water Act.¹ These standards set down maximum permissible levels for various substances in the effluent. If the person fails to comply with these standards, should he or she be prosecuted for a criminal offence? Alternatively, is there another way by which the transgression can be addressed?

In a second example, an employer at an industrial chemical reprocessing plant orders employees of his company to clean out the sludge at the bottom of a 25,000 gallon storage tank which has contained cyanide and phosphoric acid. The employer took no steps to provide the employees with safety training or protective equipment. One of the employees is overcome by hydrogen cyanide gas, collapses in the tank and suffers severe brain damage. Should this employee be prosecuted for a criminal offence? If so, and if he is convicted, what sort of penalty should be imposed?

These are the sorts of questions that have been faced by regulators since environmental law began to burgeon from the early 1970s. Traditionally, the usual mode of enforcing regulatory provisions, including environmental legislation, has been the so-called 'command and control' model, which approximates the Austinian vision of law as a series of commands backed up by threats. The law may, for example, provide that nobody may litter and back up this prohibition by providing for a certain penalty (usually fine or imprisonment) for contravening the provision. According to this approach, the producer of effluent who breaches the National Water Act regulations in the first example above should be prosecuted.

Recently, however, there has been significant movement away from reliance on the command and control model to more participatory models that often involve the use of economic inducements of various types to persuade, rather than force, the regulated community to carry out the desired behaviour. According to this approach, the effluent producer may be required to pay some sort of charge or fee for exceeding the

¹ Act 36 of 1998.

maximum emission standard, thereby avoiding the cost and inconvenience for everyone involved of a criminal prosecution.

On the other hand, most people would agree that the employer in the second example should be subject to criminal prosecution and that he should be subject to a harsh penalty. This is, in fact, what happened in the case upon which this example was based. In the United States of America, in May 2000, the owner of an industrial chemical reprocessing plant in Idaho, was sentenced to 17 years in prison for knowingly endangering an employee's life. The sentence was at the time the harshest ever imposed for an environmental crime, and the offender was the only employer ever convicted on federal charges of knowingly exposing a worker to hazardous waste.²

These two examples highlight a number of issues relating to the use of criminal sanctions in enforcing environmental law. These issues can essentially be reduced to two fundamental questions. First, when is it appropriate to use criminal sanctions and when would it be better to use alternatives to criminal sanctions in order to ensure compliance with the law? Once this has been decided, the second question is, what does the regulator need to do to ensure that criminal sanctions, when they are used, are most effective? In other words, how does one ensure the highest possible conviction rate without unnecessarily infringing the rights of the offender and, in addition, are the objectives of the use of criminal sanctions met by the sentencing of environmental offenders?

These questions form the essential focus of this thesis. They raise a host of other sub-issues that require discussion, many of which are problems of regulatory enforcement generally, not just for environmental legislation. Regulation of the environment, however, does raise important issues that are unique to that particular enterprise.

The question of the enforcement of environmental law is not only of academic interest. Despite the growing number of environmental laws, particularly in this and other less-developed countries, there is frequently aired discontent with the apparently lax way in which they are enforced.³ This is the principal impulse behind this thesis –

² <http://www.ens.lycos.com/ens/may2000/2000L-05-01-09.html> (accessed 18 July 2001).

³ See, for example, Cheryl Loots 'Making environmental law effective' (1994) 1 *SAJELP* 17; Peter Lazarus, Iain Currie & Rob Short 'The legislative framework: Environmental law, investment and

how can enforcement of environmental law be made more thorough? If the reason for lack of enforcement is a combination of lack of political will, lack of resources and similar shortcomings on the part of the regulator in a particular jurisdiction, there is not a lot of scope for improving the situation by amending the law, which would render a study such as this of little practical usefulness. If, however, the way in which the law provides for enforcement is cumbersome, time-consuming and thereby amounts to a disincentive for regulators to use it, then an analysis of how to improve the enforcement provisions of environmental legislation is a fruitful exercise.

This thesis will show that this is, in many cases, true of South African legislation – it is just not worth the regulators' while to enforce it by means of criminal sanctions, which are often the only enforcement devices provided for. Therefore, the analysis in this thesis of a more workable approach will be of potential practical relevance.

1 Approach

The thesis deals with the protection of the environment through the use of criminal sanctions. In order to address the two questions identified above, it will be necessary first to decide the reason for environmental protection. This will determine the aims behind environmental legislation, which in turn informs the purposes of enforcing that legislation. If the goal of environmental legislation were to prohibit completely all pollution, for example, then any act of pollution would be prohibited, ranging from breathing (adding carbon dioxide to the atmosphere) and flushing waste down the toilet, to the emission of toxic chemicals into the air or water. It is more likely, however, that environmental legislation is aimed at drawing a boundary-line between types of pollution that are acceptable (breathing, for example) and those that are not. Enforcement strategies have to take this boundary-line into account, as well as the line, if any, between those prohibited acts that are serious and those that are less serious. These issues are canvassed in more detail later in this introductory chapter.

Once we have decided why and the extent to which it is necessary to protect the environment, the next preliminary question that has to be decided relates to the use of criminal sanctions in enforcement. If we are eventually to determine the

industrial practice' in Lael Bethlehem & Michael Goldblatt (eds) *The Bottom Line: Industry and the Environment in South Africa* (1997) 9 at 9-10.

circumstances in which criminal sanctions as opposed to other alternatives ought to be used, it is necessary to consider *why* regulators would use criminal sanctions. In other words, the purposes or aims of criminal law will be considered. Of particular importance to this topic is the characteristics of criminal law that distinguish it from other means of enforcement: what can criminal sanctions achieve that cannot be achieved by, say, civil liability? This subject will be covered in Chapter 2.

Having established why criminal sanctions are used, and before examining more of the practicalities of using them, and since the basis of the discussion in the rest of the thesis will be South African environmental law, Part Two of the thesis will examine the status quo in South Africa. It will be shown that South African environmental legislation is, for the most part, firmly rooted in the ‘command and control’ paradigm, with few exceptions. This is dealt with in Chapters 4, 5 and 6 and will involve an analysis of all national legislation and selected provincial and local laws.

In order to facilitate this analysis and the later discussion, the constitutional framework within which the South African criminal law operates will be discussed in Chapter 3. These issues will be referred to frequently later in the thesis when considering various options that may improve on the current situation.

The first of the two basic questions identified at the beginning of this Chapter will be answered in Part Three. In order to determine when to use criminal sanctions and when to use alternatives, first (in Chapter 7) it will be useful to consider the strengths and weaknesses of using the criminal law, bearing in mind the objectives of criminal law identified in Chapter 3. While the strengths of criminal law relate mainly to what distinguishes criminal law from other modes of enforcement, there are several weaknesses that can be identified in the use of criminal sanctions. Several of these are universal – affecting the use of criminal sanctions in all (or at least most) countries. Others, however, are more prevalent in South Africa or countries that share with South Africa certain characteristics like limited government resources.

Chapter 8 will then examine the various alternatives that there are to the use of criminal sanctions, including administrative remedies, civil remedies and economic instruments. Once the strengths and weaknesses of criminal law are identified, together with the alternatives, the question of when to use criminal law can be answered. It will be argued in this thesis that criminal sanctions should not be used as

a matter of course but rather reserved for use in serious or repeat offences. This argument will be expanded on considerably in Part Three.

Once the circumstances in which criminal sanctions are useful have been established, the focus then turns onto how to make the criminal sanctions that are used most effective. To this end, Part Four of the thesis examines the following devices that are used to facilitate the prosecution of environmental offenders:

- strict liability (Chapter 9);
- vicarious liability (Chapter 10);
- liability of corporate officers (Chapter 11).

Considerable analysis will be carried out into the use of these devices in other countries in order to ascertain to what extent similar approaches could be utilised in South Africa.

Whereas the first section of Part Four deals with issues relating to conviction, the latter part also examines the sentencing of environmental offenders. Here the analysis will consider what appropriate sentencing is in the traditional sense (fines and imprisonment), as well as more creative sentencing devices often used in other jurisdictions. This is dealt with in Chapter 12.

Part Four concludes with Chapter 13, dealing with various practical problems identified in Chapter 6 as affecting the use of criminal sanctions. The discussion covers various ways by which these practical problems may be addressed, for instance by means of using in-house counsel to prosecute environmental offences rather than public prosecutors.

The thesis then concludes with recommendations and conclusions in Chapter 14.

2 Parameters

Two further preliminary issues must be addressed at this stage. First, since the focus of this thesis is on the enforcement of environmental legislation, it is necessary to consider what qualifies as environmental legislation. Second, the scope of the comparative analysis will be defined.

2.1 *What is environmental legislation and what is not?*

There is not a universally accepted definition of the scope of environmental law.⁴ For purposes of this work, the pragmatic so-called ‘subject matter’ approach to environmental law will be used.⁵ This approach would regard as environmental legislation any legislation that regulates environmental management or, more specifically, the areas of conservation of natural resources, pollution control and waste management (and the impacts of pollution and waste on public health) and land use control, specifically land use planning.⁶ There would be universal agreement on most statutes that would fall under this umbrella – for example, the National Environmental Management Act,⁷ the National Water Act,⁸ the Atmospheric Pollution Prevention Act,⁹ and various provincial enactments dealing with land use planning.

There are, however, some grey or, as Hart would call them, penumbral areas where there is less consensus. Does legislation that deals with the exploitation of the environment qualify as environmental legislation? Does legislation dealing with the conservation of human-made objects qualify? Does legislation regulating the safety of the work environment qualify?

In this thesis, an inclusive approach is adopted that includes legislation that impacts negatively on the environment (for example, the Minerals Act¹⁰); legislation dealing with the built environment (for example, at least in part, the National Heritage Resources Act¹¹); and legislation regulating the work environment (the Occupational Health and Safety Act,¹² for instance). In each case, only those aspects of the legislation that are relevant to environmental management will be considered.

⁴ See Michael Kidd *Environmental Law – A South African Guide* (1997) 4-8.

⁵ See Kidd *op cit* at 4.

⁶ See Kidd (*ibid*); Gregor I McGregor *Environmental Law and Enforcement* (1994) at 1; and Michael C Blumm (ed) *Environmental Law* (1992) at xi.

⁷ Act 107 of 1998.

⁸ Act 36 of 1998.

⁹ Act 45 of 1965.

¹⁰ Act 50 of 1991.

¹¹ Act 25 of 1999.

¹² Act 85 of 1993.

The ambit of the analysis of the use of criminal sanctions in South African environmental legislation is explained in further detail in Chapters 4, 5 and 6.

2.2 Scope of comparative analysis

In analysing the use of criminal sanctions for the purposes of environmental protection in other jurisdictions, the major focus will be directed at those countries whose criminal law systems are based on the Common Law: the United Kingdom, the United States of America, Canada, Australia and New Zealand. The reason for this is that South African criminal law, although it does have considerable Roman-Dutch origins, is similar in respect of many of the fundamental principles to the law in these countries.

There are other countries who have criminal law regimes based on the Common Law (many African countries, for example) that are not listed here but they are largely excluded, firstly, on the pragmatic basis of lack of available current material and also because the systems used in those countries often do not differ noticeably from the law in the countries listed above. From time to time, mention will be made of approaches adopted in other countries – those with civil law systems or Asian legal systems, for example – where methods or devices used provide interesting lessons for South Africa.

3 Environmental Protection: Why and How?

Although environmental legislation has been in existence for centuries, legislation designed to deal with environmental problems on a comprehensive front is really only a creation of the last thirty years. The growth of environmental law was a result of concern about environmental problems arising from unrestricted industrial growth and similar developments, and increased scientific ability to identify these problems and their possible future effects. Seen in this light, the aim of environmental law must be protection of the environment. There are a number of different philosophies as to why the environment should be protected¹³ and to discuss this question in any detail would

¹³ See, for example, Alexandre Kiss and Dinah Shelton *International Environmental Law* (1991) 9-18; Michael Kidd *Environmental Law: A South African Guide* (1997) at 14-17.

leave no time to deal with the main topic at hand. Most, if not all, environmental legislation throughout the world was devised in order to address the need to conserve resources for the benefit of humans, both living now and future generations, and to protect human health. The rationale is therefore anthropocentric and utilitarian.¹⁴ Such an approach would include economic justifications for environmental regulation.¹⁵

This rationale is important in determining precisely what is meant by ‘protection’ of the environment. The degree of protection afforded by the anthropocentric, utilitarian rationale entails the notion of sustainable use of natural resources and control over pollution in the sense that this envisages a line being drawn between acceptable and unacceptable pollution, given that total prevention of pollution is impossible. The determination of what is acceptable and unacceptable is important in assessing what controls to use in ensuring adherence to the defined standards. In short, then, ‘protection’ is not to be understood in an absolute sense, but rather as contingent on policy goals, both national and international.

If this is considered in the context of regulation and compliance with regulatory instruments, certain difficulties are presented. Consider, for example, the difference between a common law crime, say theft, and an environmental regulatory offence, say exceeding an emission standard. On the one hand, theft is considered to be a crime whether the accused person has stolen two million rand or a slab of chocolate. The nature of the stolen item will probably influence the sentence, but not the question of guilt. Also, the decision may well be taken not to prosecute the person who took the chocolate due to the somewhat trivial nature of the stolen item, but that does not detract from the fact that, were the offender to be prosecuted, he or she would be charged with theft.

On the other hand, the emission offence is somewhat more difficult to quantify. First, in setting emission standards, the legislator is saying that some emissions are acceptable, whilst others are not. Whereas theft is a crime, whatever is stolen, emission of a pollutant into a watercourse may be an offence or not depending on a line drawn by the legislator which is possibly somewhat arbitrary. Much

¹⁴ See RF Fuggle and MA Rabie *Environmental Management in South Africa* (1992) at 8.

¹⁵ See, for example, RH Coase ‘The Problem of Social Cost’ (1960) 1 *Journal of Law and Economics* 1.

environmental legislation, particularly that aimed at addressing pollution and human exposure to harmful substances, is the result of a risk assessment followed by policy decisions as to how to manage such risk.¹⁶ The extent to which such decisions are based on solid scientific analysis, however, is not clear and there may well be some arbitrariness about the lines that are drawn. The emission standard is most likely set on the basis of an assessment of the assimilative capacity of the environmental medium in question which cannot be scientifically precise, given the number of variables involved.

The fact that there is frequently such a fine line between economically productive behaviour which is desirable particularly in developing countries such as South Africa, and behaviour which constitutes an offence, can be problematic. One of the consequences of this is that it is often difficult to foster public attitudes sympathetic to the legislature in proscribing certain environmental offences. It also must influence the manner in which offences are sentenced – it is surely unacceptable to punish severely a polluter who marginally exceeds the line between what is acceptable and what is not. Yet public attitudes would almost certainly favour severe punishment of a polluter who deliberately dumps hazardous substances without regard to public health or the environment.

It is these sorts of considerations that will be examined in more detail later in the work. What is necessary to examine further, for now, however, is on what basis decisions are made to draw lines between acceptable and unacceptable behaviour as regards the environment. It is submitted that such decisions are, or ought to be, grounded on the concept of sustainable development.

Probably the most well-known definition of sustainable development is from the report *Our Common Future* (also known as the Brundtland Report).¹⁷: ‘Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs’. If we consider the rationale for environmental legislation in the light of this concept, the idea should be to ensure that development, which causes pollution and uses natural resources, is carried out sustainably. This means that development should consume

¹⁶ See Richard L Revesz *Foundations of Environmental Law and Policy* (1997) Chapters 3 and 4 and sources therein cited.

¹⁷ World Commission on Environment and Development (WCED). *Our Common Future* (1987) at 43.

resources and introduce pollutants to the extent that the resources of Earth for future generations will not be exhausted or degraded beyond repair.

The lines that legislators draw, therefore, are drawn with this notion in mind. For example, a certain amount of pollution can adequately be assimilated without infringing on the environmental rights of future generations. Anything over this identified amount is unacceptable, either in itself (a major oil spill, for example) or because it is seen as being one contributory source to a bigger problem, albeit relatively minor in itself.

Sustainable development, then, holds the key to the rationale for environmental law. What the purpose of this work is to examine the best manners by which people can be encouraged to remain within the lines drawn by legislators with the aim of sustainable development in mind. It is acceptable for people to use natural resources and it is acceptable for people to emit pollutants into the environment. The bounds of acceptability, however, are, by and large, set down by legislation. One of the ways in which persons are kept within those bounds is by means of the threat of criminal sanctions. There are, however, other means of ensuring people's compliance with environmental legislation. Probably the most important initial question that needs an answer, then, is what is special about criminal law – what are the aims of criminal law and what parts of these objectives cannot be satisfied by alternative measures? This question will be answered in Chapter 2.

Chapter 2

The Aims of Criminal Law

What are the aims of criminal law? This is a question often neglected by authors of criminal law textbooks, and even when not neglected, the answer can be unsatisfactory. Smith and Hogan, for example, in one of the best-known expositions of criminal law, suggest that ‘it is not easy to state confidently what are the aims of the criminal law at the present day’.¹ Despite this being an apparently tough task, it is necessary, in assessing how criminal sanctions ought to be used in the enforcement of environmental law, to consider what the purpose of criminal law is.

In order to do this, the question is first considered in general terms, followed by consideration of whether the general aims of criminal law apply equally in the case of environmental crime which, in many instances, consists of what are known as ‘regulatory offences’.

1 The purpose of criminal law

The basic purpose of the criminal law is often expressed as being the prevention of harm to society. For example,

‘The overall aim of the criminal law is the prevention of certain kinds of behaviour which society regards as either harmful or potentially harmful. The criminal law is applied by society as a defence against harms which injure the interests and values that are considered fundamental to its proper functioning.’²

The aim of environmental legislation – protection against a certain type of harm that society regards as fundamental to its proper functioning - has been addressed in Chapter 1. But statements like that quoted above give only part of the answer. Society also uses

¹ JC Smith and B Hogan *Criminal Law* 7 ed (1992) at 3.

² Mark Findlay, Stephen Odgers & Stanley Yeo *Australian Criminal Justice* 2 ed (1999) at 2. See also Wayne R La Fave *Criminal Law* 3 ed (2000) at 7 and 10; Charles E Torcia *Wharton’s Criminal Law* 15 ed (1993) at 2; John C Klotter *Criminal Law* 2 ed (1986) at 2.

other devices as a defence against the sort of harms described above. The real question, therefore, is what distinguishes criminal sanctions from other modes of enforcement?

According to Henry Hart, 'what distinguishes a criminal sanction from a civil sanction and all that distinguishes it ... is the judgment of community condemnation which accompanies and justifies its imposition'.³ A crime, therefore, is 'conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community'.⁴ Frase expresses a similar view that 'what principally distinguishes the criminal sanction is its peculiar stigmatising quality'.⁵

The stigmatising quality may be, at least according to the views expressed above, the only distinguishing feature of criminal sanctions, but the principal diagnostic feature of the criminal sanction, that which a layperson would identify, is that it involves the threat of 'unpleasant physical consequences, commonly called punishment'.⁶ According to Hart,

'these added consequences take their character as punishment from the condemnation which precedes them and serves as the warrant for their infliction. Indeed, the condemnation plus the added consequences may well be considered, compendiously, as constituting the punishment. Otherwise, it would be necessary to think of a convicted criminal as going unpunished if the imposition or execution of his sentence is suspended'.⁷

Hughes expresses a similar view when he states,

'It is not possible to explain [punishment] in terms of a special kind of deprivation; rather, it can only be understood in the light of special reasons for imposing a deprivation. Whether a deprivation is punishment depends upon the way in which the reason for its imposition is understood by society at a particular time, and upon how close that understanding comes to the central perception that

³ Henry M Hart Jr 'The aims of criminal law' (1958) 23 *Law and Contemporary Problems* 401 at 404.

⁴ Hart op cit at 405. See also Paul H Robinson *Criminal Law* (1997) at 5; Robinson 'The criminal-civil distinction and the utility of desert' (1996) 76 *Boston Univ LR* 201 at 205-6.

⁵ Richard S Frase 'Criminalization and decriminalization' in Sanford H Kadish (ed) *Encyclopedia of Crime and Justice* (1983) Vol 1 438 at 439.

⁶ Hart op cit at 405.

⁷ Ibid.

constitutes the core of the crime. This perception involves the identification of a serious accusation, proof of which elicits a demand for a censorious and retributive response'.⁸

Both authors raise the idea that punishment consists of some kind of deprivation plus a societal attitude that regards the deprivation as punishment.⁹ But would a civil penalty or sanction (at least a serious one) not engender a similar response from society? If so, what distinguishes a civil penalty, in theoretical terms,¹⁰ from a criminal penalty? If civil penalties share the same societal response as criminal penalties, the only difference is that civil penalties cannot include imprisonment. Another distinguishing feature of the criminal law, therefore, is that it is the only mechanism by which a person can be subjected to imprisonment.¹¹ In the absence of community condemnation and the possibility of imprisonment for contravention, however, the only feature which distinguishes 'minor' regulatory offences from civil wrongs is the decision by the lawmaker that they 'shall be criminal offences, attended by criminal procedures and triable in criminal courts'.¹²

Let us, however, return to the notion of punishment. If criminal law is concerned with the imposition of punishment, the question is still begged of *why* punishment is imposed. The justification for the infliction of punishment is a debate which has concerned philosophers for centuries and is one which is central to consideration of the use of criminal sanctions in the enforcement of environmental law. Essentially, the debate is between retributivists and utilitarians, the latter including those who see the purpose of punishment as being deterrence. This is not the place to cover the debate in detail, but it is useful to consider in broad terms the current state of thinking about the aims of

⁸ Graham Hughes 'The concept of crime' in Sanford H Kadish (ed) *Encyclopedia of Crime and Justice* (1983) Vol 1 294 at 299.

⁹ See also Mark A. Cohen 'Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes' (1992) 82 *Journal of Criminal Law* 1054 at 1057.

¹⁰ Obviously there are a number of distinguishing features from the point of view of procedure and rights of the person subject to the sanctions. These are considered in more detail later in the thesis.

¹¹ And, in some jurisdictions, more severe sanctions such as capital punishment.

¹² Andrew Ashworth *Principles of Criminal Law* (1991) at 2.

punishment. Most South African criminal lawyers express the view that punishment is applied for purposes of retribution.¹³ According to Rabie and Maré,

‘As long as criminal punishment is regarded as an instrument through which society expresses its condemnation and disapproval of the offender’s act, and is associated with the authoritative infliction of suffering on account of a crime which has been committed, retribution is the only true theory of punishment. It is only with reference to retribution that the criminal sanction can be adequately distinguished from other sanctions. In short, criminal law - and punishment, with which it is inextricably interwoven - derives its very essence from retribution’.¹⁴

The acceptability of this view, however, depends on whether the crimes being punished are that which would attract society’s ‘condemnation and disapproval’. This would certainly be true for common law crimes like murder, theft and rape, but is it true of environmental crimes? We will return to the justification for punishment in the next section, when considering the question in the context of environmental crime.

Finally, in considering general justification for criminal law, there may, in addition, be a further purpose for criminal law. According to many commentators, criminal law not only *reflects* public morality and norms, but can also be used to contribute to the fashioning of norms.¹⁵ According to Cohen, ‘some scholars have argued that the criminal sanction serves [this] purpose - to shape preferences and "educate" the public (i.e., potential violators) about the moral consequences of their actions’.¹⁶ Yet it is important that this objective is not taken too far. As Packer states,

¹³ This view is not necessarily shared by criminal lawyers from other countries. Ashworth, for example, states that ‘the overall or justifying aim of the criminal law is general prevention or deterrence – to induce people, by the threat and imposition of punishment, not to cause harms of certain kinds’ (Ashworth op cit at 11). See also La Fave op cit at 3.

¹⁴ Rabie and Strauss *Punishment: An Introduction to Principles* 5 ed by MA Rabie and MC Maré (1981) at 46-7. See also Jonathan Burchell and John Milton *Principles of Criminal Law* 2 ed (1997) at 49.

¹⁵ See Susan Hedman ‘Expressive Functions of Criminal Sanctions in Environmental Law’ (1991) 58 *George Washington Law Review* 889 at 891 and references cited there.

¹⁶ Cohen op cit at 1060.

‘it is by no means clear that we can persuade the public to view conduct as wrongful by making it criminal. If we make criminal that which society regards as acceptable, either nullification occurs or, more subtly, people’s attitude towards criminality undergoes a change’.¹⁷

The views outlined above are based on what me may call ‘mainstream’ legal philosophy. There is, however, another perspective that may be worth considering here, and that is the economic theory of criminal law. Probably the best known exposition of economic theory is that posited by Richard Posner, who argues that the major function of criminal law in a capitalist society is to prevent people from bypassing the system of ‘voluntary, compensated exchange’, or ‘the market’.¹⁸ Many instances of bypassing the market could be deterred by the law of delict, but ‘the optimal damages that would be required for deterrence would so frequently exceed the offender’s ability to pay that public enforcement and non-monetary sanctions such as imprisonment are required’.¹⁹ The significance of this view is that the criminal sanction should be reserved for only those cases where non-criminal modes of enforcement (including delict and interdicts) are inadequate. The economic approach has great relevance to environmental offences, which are often the by-products of socially-beneficial activities. This will be discussed in more detail in the next section.

The above discussion provides some idea of how criminal law theorists view the aims of criminal law in general terms. What is of more immediate concern for present purposes, however, is whether these purposes are compelling when used to justify criminal enforcement of environmental offences.

2 The purpose of criminal sanctions in the enforcement of environmental law

In considering the aims of criminal law, many commentators feel it necessary to make qualifications to their general justification when it comes to so-called regulatory

¹⁷ Herbert L Packer *The Limits of the Criminal Sanction* (1968) at 359. See also Ashworth op cit at 28, Findlay et al op cit at 12-13; P Robinson and J Darley *Justice, Liability and Blame* (1994).

¹⁸ Richard A Posner ‘An economic theory of the criminal law’ (1985) 85 *Columbia LR* 1193 at 1195.

¹⁹ Ibid.

offences.²⁰ The general thrust of these views is that regulatory offences are less serious than other crimes. Where do environmental offences fit in to the picture?

Surveys have been conducted in several countries which have indicated that people in those countries regard environmental crime, where human health is put at risk, as seriously as they do crimes like armed robbery.²¹ There have been no equivalent surveys in South Africa, but it is doubtful that public attitudes are the same here as in more developed countries. Certainly people in South Africa would be outraged by pollution offences where people were killed, or where there was a clear and immediate health risk, but without any obvious threat to human health it is unlikely that there would be strong antipathy towards pollution offences, even if intentionally committed. This is in part due to a relatively undeveloped 'environmental ethic' amongst the South African population, but is also attributable to the huge problem of the general prevalence of crime in the country. It is understandable that people are not going to be channelling their disapproval towards polluters and other environmental offenders when there are hosts of murderers, rapists, car hijackers, armed robbers and the like committing crimes daily without apprehension.

²⁰ Nicola Lacey, Celia Wells & Dirk Meure *Reconstructing Criminal law* (1990) 5; Ashworth op cit at 51; Findlay et al op cit at 6; Hughes op cit at 296.

²¹ In a survey conducted by the US Department of Justice *Bureau of Justice Statistics Bulletin* (January 1984), cited by Judson W Starr 'Countering Environmental Crimes' (1986) 13 *Boston College Environmental Affairs LR* 379 at 379-80, 60,000 people were asked to rank the severity of particular crimes. In seventh place, after murder, but ahead of heroin smuggling and skyjacking, was environmental crime. According to the study, industrial criminal polluters are considered to be worse in the public's eye than armed robbers or those who bribe public officials. See also Environment Opinion Study Inc *A Survey of American Voters: Attitudes towards the Environment* (1990) cited by Susan Hedman 'Expressive Functions of Criminal Sanctions in Environmental Law' (1991) 58 *George Washington Law Review* 889 at 889. Similar findings were made in Australia: see Duncan Chappell & Jennifer Norberry 'Deterring Polluters: The Search for Effective Strategies' (1990) 13 *University of New South Wales Law Journal* 97 at 98: 2,500 Australians questioned about their attitudes to 13 offences including murder, heroin trafficking, and a factory knowingly discharging polluted wastes in a way that contaminated a city's water supply leading to the death of 1 person. Pollution was ranked as the third most serious crime.

Public attitudes towards environmental crime are important because the retributive theory of punishment is basically grounded on public sentiment. Hence retribution may explain visiting criminal sanctions on serious environmental crimes that lead to public outrage, but does it really make sense to regard punishment of a person who has exceeded an emission limit by a slight amount to be based on retribution?²² Smith has suggested, correctly it is submitted, that ‘at the moment environmental crimes are punished chiefly because of the potential for social harm that they pose, not because of deep underlying conceptions of moral wrongfulness of conduct on individual victims’.²³ Much of the reason for this is that the harm sought to be prevented is often harm caused by accretion – where individual offenders contribute to the overall harm by numerous individual contributions.²⁴ This means that, often, the actual harm done by the person who infringes a regulation is, in itself, ‘miniscule or nonexistent’.²⁵ Yet another factor that would serve to influence the public’s attitude towards environmental wrongs is that many corporate activities prohibited by regulation (including environmental offences) are not easily distinguishable from business activities that are tolerated, and in some cases even lauded, by the community.²⁶

The question of public attitudes towards environmental crime is, it is submitted, closely linked with the time-honoured distinction between offences which are regarded as *mala in prohibita* and those which are seen as *mala in se*. The former are regulatory offences (also referred to as public welfare²⁷ or economic offences) which are identified

²² See Kathleen F Brickey ‘Environmental crime at the crossroads: The Intersection of environmental and criminal law theory’ (1996) 71 *Tulane LR* 487 at 489, where she says, ‘Although few would object to criminally prosecuting midnight dumpers, there is a vague sense of uneasiness about the extent to which the intersection of criminal law and environmental law is appropriate in the context of less egregious conduct’.

²³ Susan L Smith ‘An Iron Fist in a Velvet Glove: Redefining the Role of Criminal Prosecution in Creating an Effective Environmental Enforcement System’ (1995) 19 *Criminal Law Journal* 12 at 18.

²⁴ Gerhard OW Mueller ‘An essay on environmental criminality’ in Sally M Edwards et al *Environmental Crime and Criminality: Theoretical and Practical Issues* (1996) 3 at 21.

²⁵ Hughes op cit at 296.

²⁶ SH Kadish ‘Some observations on the use of criminal sanctions in enforcing economic regulations’ (1963) 30 *Univ of Chicago LR* 423.

²⁷ Francis B Sayre ‘Public Welfare Offences’ (1933) 33 *Columbia LR* 55 at 68.

by, inter alia, the fact that the prohibited conduct lacks moral turpitude.²⁸ Many environmental offences would fall under this category of statutory offence. According to Packer, 'there is essentially only one reason why the criminal sanction is invoked to deal with so-called economic offences and that is deterrence'.²⁹ This idea is supported, perhaps from a less theoretical and more empirical perspective, by Chambliss. He suggests, based on observation of different types of offences, that 'instrumental' offences – those where the offender commits the offence as a means to an end, rather than as an end in itself (an 'expressive' offence) – are more likely to be deterred by punishment.³⁰ Many environmental offences would be instrumental – pollution often occurs, for example, as a side effect of production and to save costs.

The significance of this view is that, other than for those environmental offences which give rise to society's moral condemnation or disapproval, and for which retribution may be regarded as a legitimate justification for invoking the criminal law, criminal sanctions are used in response to all other environmental offences as a deterrent.³¹ It is in the light of this consideration that the role of criminal law in protection of the environment should be evaluated.

If the criminal sanction is used for the purposes of deterrence, the idea is that the offender and the general public are to be deterred from committing environmental offences. These two purposes are encapsulated in the ideas of special or specific

²⁸ JRL Milton and MG Cowling *South African Criminal Law and Procedure* Vol III: Statutory Offences (1988) Chapter 1 at 8. See also Mueller op cit at 8.

²⁹ Herbert L Packer *The Limits of the Criminal Sanction* (1968) at 356.

³⁰ William J Chambliss 'Types of deviance and the effectiveness of criminal sanctions' (1967) *Wisconsin LR* 703.

³¹ See Chappell & Norberry op cit at 102: 'Belief in deterrence underlies political and judicial, as well as public, approaches to pollution offences' (expressing an Australian view). For most authors in the United States, this point is not made explicitly, but frequent comments are made about the deterrent effect of environmental criminal law which suggests that this is the underlying rationale: see, for example, Susan L Smith 'Doing time for environmental crimes: The United States approach to criminal enforcement of environmental laws' (1995) 12 *Environmental Planning & Law Jnl* 168 at 168-9; Richard J Lazarus 'Assimilating environmental protection into legal rules and the problem with environmental crime' (1994) 27 *Loyola of LA LR* 867 at 883.

deterrence (deterrence of the individual in question) and general deterrence (deterrence of society at large). It is widely recognised that deterrence, both specific and general, depends on a combination of the following factors: the likelihood of apprehension, prosecution, conviction and significant penalty.³² Effective enforcement is important when deterrence is the goal, and the public must be aware of penalties being utilised since ‘ultimately, one cannot fear what turns out to be a paper threat’.³³ Moreover, laws that are not enforced promote ‘cynicism and disrespect for the law, particularly the criminal law’.³⁴ At the same time, it is important that the threatened penalty corresponds with the harm sought to be prevented. If relatively minor offences are punished by heavy penalties, this will lead to disrespect for the law, especially in a society where there is a perception that ‘real’ criminals are either avoiding arrest and prosecution altogether, or are being treated leniently by the legal system. On the other hand, if penalties are too low, the goals of deterrence will be undermined, especially in the case of corporate offenders. As Lazarus suggests, ‘absent the possibility of criminal sanctions, particularly those directed at individuals, companies may view sanctions for violating environmental laws as mere costs of doing business’.³⁵

Deterrence, however, is not the sole preserve of the criminal law. As Hedman says, ‘innovative civil penalty schemes ... can deter polluters at least as effectively as and at lower cost - both in terms of economics and civil liberties - than criminal laws’.³⁶ The factors that she raises, economics and civil liberties, will be discussed in a later Chapter,³⁷ but the point she makes, which cannot be faulted, is that the use of criminal sanctions in the enforcement of environmental law must be justified by more than simply reasons of

³² C Reasons ‘Crimes against the environment: Some theoretical and practical concerns’ (1991) 34

Criminal Law Quarterly 86 at 97; See also David Farrier ‘In search of real criminal law’ in Tim Bonyhady (ed) *Environmental Protection and Legal Change* (1992) 79 at 96.

³³ Smith op cit n23 at 14. See also Farrier op cit at 86.

³⁴ Sanford M Kadish ‘The crisis of overcriminalization’ (1967) 374 *Annals of the American Academy of Political and Social Science* 157 at 160. See also Ashworth op cit at 28.

³⁵ Lazarus op cit at 880.

³⁶ Hedman op cit n5 at 896.

³⁷ Chapter 7.

deterrence, because other mechanisms can also deter. It may be argued that South Africa does not have a well-developed system of civil or administrative penalties, but that does not dilute the persuasiveness of Hedman's argument. If such tools can also fulfil the deterrence objective, why not use alternatives to the criminal sanction, especially if they do not suffer from the same drawbacks that criminal sanctions do?

Perhaps the economic approach can provide an answer to this question. Environmental offences are often by-products of activities that society does not wish to prohibit entirely. In these cases, if sanctions are overly harsh, there is a risk that people (certainly those that are risk-averse) will curtail their activities to avoid penalty, with the result that there is less than the socially desirable amount of the desired activity. In order to appreciate fully this view and its significance for regulatory offences, the distinction drawn by economists between 'conditionally' and 'unconditionally' deterred activities is instructive:

(T)he function of legal remedies, viewed in an economic perspective, is to impose costs on people who violate legal rules. This is as true of simple damages for breach of contract as it is of imprisonment for rape. The difference is that the deterrent purpose in the first case is only conditional. We want to deter only those breaches of contract in which the costs to the victim of the breach are greater than the benefits to the breaching party. The correct amount of deterrence is obtained by requiring the breaching party to pay the victim's costs. . . . But society does not want to deter only those rapes in which the displeasure of the victim is shown to be greater than the satisfaction derived by the rapist from his act. A simple damages remedy would therefore be inadequate.³⁸

Regulatory offences are usually 'conditionally deterred', since the underlying activity from which the offence originates is beneficial to society. Economists are concerned that excessive sanction will lead to 'overdeterrence' of activities that society does not wish to prohibit entirely. Looked at from a slightly different perspective, it is possible to view this as distinguishing between activities that society wishes to *price* as opposed to those that it wishes to *prohibit or sanction*.³⁹

Economists tend to ignore the moral component of criminal law (the societal attitude towards criminal law discussed above) and see the only difference between civil and

³⁸ Richard A Posner *Economic Analysis of Law* (1972) at 357-8. This passage does not appear in later editions.

³⁹ Robert Cooter 'Prices and sanctions' (1984) 84 *Columbia LR* 1523.

criminal sanctions as being incarceration. As Cohen says, ‘a dollar fine costs the firm one dollar whether it is called a “cleanup cost”, “restitution”, “civil penalty” or “criminal fine”’.⁴⁰ For economists, then, if incarceration is not justified, non-criminal modes of enforcement are preferable, given that there are several costs to criminal sanctions that are not incurred by alternative means. In addition, care should be taken that the consequences (whether civil or criminal) of conditionally deterred activities (which would cover most environmental offences) are not set at levels that would tend to overdeter.⁴¹

It has been argued that retribution and deterrence are both relevant to differing degrees in justifying enforcement of environmental laws through criminal sanctions, in part depending on the nature and seriousness of the particular offence. What about the educative or expressive function of criminal law? In South Africa, this function of criminal law in the environmental context is not likely to justify criminalization of offences that would not also be justified by arguments of retribution or deterrence. Where it does have a role to play, it is submitted, is in creating more uniformity in public attitudes towards environmental crimes. Certain crimes, which would be regarded in other countries as very serious, would, for various reasons, probably only be regarded as serious by certain sectors of South African society today. By visiting criminal sanctions on serious environmental offences (as justified also by arguments of retribution and deterrence), public attitudes could be shaped in such a way that people who would not at the moment regard such offences as serious might change their viewpoint.

Recognising that criminal law also has an expressive function will probably not have a significant effect on the practical approach to criminalisation that is chosen. The reason for this is that the educative role of the criminal law operates in a similar fashion to the deterrent effect. The imposition of small penalties for minor offences is not going to serve either purpose. Smith expresses this point aptly when she states,

‘Criminal prosecutions can have a profound educative or preference-shaping effect - reinforcing public values that equate deliberate environmental offences with serious offences against persons - and thus creating a corporate and public environmental ethic that promotes voluntary compliance.

⁴⁰ Cohen op cit at 1066.

⁴¹ See Cohen op cit at 1102.

Criminal prosecutions accomplish these tasks in the United States for one reason: corporate managers and directors who do not ensure environmental compliance by their organisations can be placed in a federal penitentiary for two or more years'.⁴²

The expressive justification for criminal law, then, does not take us any further than the deterrence justification does in the South African context. If deterrence can be provided by means other than the criminal sanction, should these alternative means not be utilised? It will be shown later that there are significant shortcomings associated with use of the criminal law, which suggests that, if the sole purpose of enforcement is deterrence, the replacement of criminal sanctions with other enforcement mechanisms is advisable.

There is significant support among criminal law theorists for movement away from reliance on criminal sanctions in the case of regulatory-type offences, particularly those where the harm involved is relatively insignificant.⁴³ This is not to say that there is no role for the criminal law – criminal sanctions will be important at least in those cases where there are serious or repeat contraventions of the law or other aggravating factors.⁴⁴ This issue will be canvassed more fully in Chapter 8. Before continuing with the analytical aspects of this thesis, however, we now turn to examination of the current position in South Africa. Chapter 3 considers the constitutional framework within which criminal law and procedure operates in South Africa. This will help to inform the analysis in Chapter 4 of the criminal provisions in South Africa's environmental legislation.

⁴² Smith op cit at 12-13.

⁴³ Frase op cit at 446; Ashworth op cit at 51; Findlay et al at op cit at 6; Brickey op cit at 511. See also J Rowan-Robinson and P Watchman *Crime and Regulation* (1990).

⁴⁴ See Frase op cit at 447.

Chapter 3

Criminal law and the Constitution

Before the introduction of the new Constitutional dispensation, the ruling constitutional doctrine was one of parliamentary sovereignty. Consequently, the legislature, in attempting to avoid undue difficulty in securing the conviction of accused persons, often relied on various presumptions in order to require the accused to disprove something rather than to put the state to the burden of proving the same element of the defence. As will be shown in the next Chapter, South African environmental legislation is riddled with such devices.

The new Constitution,¹ however, entrenches in the Bill of Rights various accused persons' rights, which place these presumptions on very shaky ground. This Chapter examines in detail the Constitutional requirements relating to accused persons, particularly in respect of legislative presumptions but also in respect of other aspects that may affect the criminal enforcement of environmental law. Essentially the central question that needs answering in this Chapter is whether the provisions in environmental legislation that relate to the criminal prosecution of offenders conform with the Constitution or not. This Chapter considers the issues in general. Chapter 5 consists of an analysis of South African environmental legislation in which the constitutionality of the specific legislation in question will be one of the considerations raised.

1 The Bill of Rights

The two sections in the Bill of Rights around which the discussion in this Chapter will turn are sections 35 and 36. They read as follows:

Arrested, detained and accused persons

35. (1) Everyone who is arrested for allegedly committing an offence has the right

¹ The Constitution of the Republic of South Africa, Act 108 of 1996.

- a. to remain silent;
 - b. to be informed promptly
 - i. of the right to remain silent; and
 - ii. of the consequences of not remaining silent;
 - c. not to be compelled to make any confession or admission that could be used in evidence against that person;
 - d. to be brought before a court as soon as reasonably possible, but not later than
 - i. 48 hours after the arrest; or
 - ii. the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
 - e. at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
 - f. to be released from detention if the interests of justice permit, subject to reasonable conditions.
- (2) Everyone who is detained, including every sentenced prisoner, has the right
- a. to be informed promptly of the reason for being detained;
 - b. to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
 - c. to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - d. to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
 - e. to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
 - f. to communicate with, and be visited by, that person's
 - i. spouse or partner;
 - ii. next of kin;
 - iii. chosen religious counsellor; and
 - iv. chosen medical practitioner.
- (3) Every accused person has a right to a fair trial, which includes the right
- a. to be informed of the charge with sufficient detail to answer it;
 - b. to have adequate time and facilities to prepare a defence;
 - c. to a public trial before an ordinary court;
 - d. to have their trial begin and conclude without unreasonable delay;
 - e. to be present when being tried;
 - f. to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
 - g. to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

- h. to be presumed innocent, to remain silent, and not to testify during the proceedings;
 - i. to adduce and challenge evidence;
 - j. not to be compelled to give self-incriminating evidence;
 - k. to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
 - l. not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
 - m. not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
 - n. to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
 - o. of appeal to, or review by, a higher court.
- (4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.
- (5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

Limitation of rights

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
- a. the nature of the right;
 - b. the importance of the purpose of the limitation;
 - c. the nature and extent of the limitation;
 - d. the relation between the limitation and its purpose; and
 - e. less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

According to de Waal et al,² there are four main ways in which the Bill of Rights impacts on the criminal justice system:

² Johan de Waal, Iain Currie & Gerhard Erasmus *The Bill of Rights Handbook* 4 ed (2001) at 585.

1. The circumstances under which a person may be punished. For example, punishing sodomy offends against the right to equality since it discriminates unfairly on the basis of sexual orientation.³
2. Certain rights like privacy, dignity and freedom place limits on how crime may be investigated.
3. Section 35, dealing with the rights of accused and detained persons, address the fairness of the criminal trial and the procedure followed in the trial.
4. The right not to be subject to cruel, inhuman or degrading treatment or punishment affect the sentencing options available to criminal courts.

Of these 4, the first and fourth are of little if any relevance to environmental crime. The issues relating to investigation of crime are universally applicable, but are unlikely to have a significant impact on the constitutionality of existing environmental legislative provisions. The third point, however, is very significant. As pointed out in the introduction to this Chapter, there are many presumptions in environmental legislation that may fall foul of section 35. This will form a major part of the examination in this Chapter.

2 The constitutionality of legislation

Since the Constitution is the supreme law of the Republic, any law or conduct inconsistent with it is invalid.⁴ If it is alleged that a particular enactment is unconstitutional (and therefore invalid), the Court will follow a two-part inquiry: first, does the provision under scrutiny infringe the Bill of Rights? If so, the Court must consider the second question – is the infringement nevertheless permissible in terms of section 36 of the Constitution, the so-called limitations clause. The applicant bears the onus of establishing the first question and, if successful, the state (or whoever is relying

³ Section 9(3).

⁴ Section 2.

on the legislation) must then satisfy the limitations test. The process is well described by Ackermann J in *Ferreira v Levin NO*:⁵

The task of determining whether the provisions of [an] Act are invalid because they are inconsistent with the [Bill of Rights] involves two stages, first, an enquiry as to whether there has been an infringement of the ... right; if so, a further enquiry as to whether such infringement is justified under ... the limitation clause. The task of interpreting the ... rights rests, of course, with the Courts, but it is for the applicants to prove the facts upon which they rely for the claim of infringement of the particular right in question. Concerning the second stage, [it] is for the legislature or the party relying on the legislation to establish this justification, and not for the party challenging it, to show that it was not justified.

Whether individual provisions in environmental legislation are infringements of the Constitution will be considered in Chapter 5. This will necessarily have to be carried out on a provision-by-provision basis. The rights which are most likely to be infringed by environmental legislation, particularly section 35, and the manner in which they have been interpreted by the Courts, will be examined in further detail later in this Chapter.

As far as the limitation enquiry is concerned, however, the approach that the Courts have adopted to this test is the next topic to be considered.

3 Limitation

The reason why there is a limitation enquiry is that not all infringements of rights in the Bill of Rights are unconstitutional. If an infringement can be justified in terms of section 36, the provision will pass constitutional muster. It must be borne in mind, however, that section 36 (the limitations clause) sets down quite stringent requirements that have to be satisfied for an infringement to be seen as a justified limitation of the rights in the Bill of Rights. These requirements will now be considered in further detail.

According to section 36(1), the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. There are two elements to this test – the first is that it must be a law of general

⁵ 1996 (1) SA 984 (CC) at para 44.

application, the second that it must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

3.1 *Law of general application*

The Courts have not laid down a definitive interpretation of what a ‘law of general application’ is. Based on certain judicial dicta, de Waal et al suggest that this requirement is not a ‘particularly exacting’ requirement,⁶ but that it merely requires the following:

‘Besides a requirement that the rule has the character of law, that it derives from a source with lawful authority to issue the rule, and a formal requirement that the law is clear, accessible and precise, the rule must also apply generally in the sense of not being unequal or arbitrary in its application’.⁷

This approach does not make it clear whether an administrative act qualifies as ‘law of general application’, but the case of *Premier of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal*⁸ suggests that administrative action that is not legislative in character cannot qualify as law of general application. It may also indicate that departmental guidelines or directives lack the generality sufficient to pass the test.⁹

As far as environmental legislation is concerned, where there may be some scope for dispute in the light of this requirement is in respect of permit or licence conditions. In some areas of environmental law, significant regulation of activities is exercised by means of conditions in authorisations. For example, the manner in which the operator of a waste disposal site carries on the operations of the site is prescribed by the permit issued by the Department of Water Affairs and Forestry in terms of section 20 of the Environment Conservation Act.¹⁰ The Act itself merely prohibits the operation of a

⁶ De Waal et al op cit at 151.

⁷ De Waal et al op cit at 152.

⁸ 1999 (2) SA 91 (CC).

⁹ See de Waal et al at 153-4; Stuart Woolman ‘Limitation’ in M Chaskalson et al *Constitutional Law of South Africa* (1999 update) at 12-29.

¹⁰ Act 73 of 1989.

disposal site without the necessary permit. Would the conditions in such a permit qualify as law of general application?

It is submitted that they would – the permit conditions have the character of law since the legislation under which the permit is issued usually requires compliance with the conditions, and the formal requirements are likely to be satisfied in that the conditions are made known to the affected individuals. Provided that the conditions are not unequal in application or arbitrary, it would appear that they would satisfy this requirement. In any event, the question is somewhat academic in that the permit conditions would be unlikely to contain anything that infringed the Constitution – this would be more likely to be in the principal Act itself.

3.2 Reasonableness and justifiability in an open and democratic society based on human dignity, equality and freedom

Section 36 sets out certain ‘relevant factors’ to be taken into account in determining this leg of the limitation enquiry. This list is not exhaustive. The factors are:

- a. the nature of the right;
- b. the importance of the purpose of the limitation;
- c. the nature and extent of the limitation;
- d. the relation between the limitation and its purpose; and
- e. less restrictive means to achieve the purpose.

These factors correspond with the considerations expressed by the Constitutional Court in *S v Makwanyane*,¹¹ which decided the matter on the basis of the interim Constitution, where the Court suggested that the limitation test should involve the question of proportionality.¹² This test has been summarised as follows in a later decision:

‘In sum, therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on

¹¹ 1995 (3) SA 391 (CC)

¹² See para 104.

the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be'.¹³

The five factors listed in section 36 are all factors which must be considered in order to perform this balancing act. Each is now considered in turn:

(a) the nature of the right.

The first consideration concerns the right that is being infringed. This factor indicates that some rights weigh more than others. If the right being infringed is one of the 'weightier' rights, this will require a more substantial justification for its infringement than would be the case with another right.¹⁴ For example, in *Makwanyane*, the Constitutional Court expressed the view that 'rights to life and dignity are the most important of all human rights, and the source of all other personal rights'.¹⁵

(b) the importance of the purpose of the limitation

The operation of this factor is well described by de Waal et al as follows:

'At a minimum, reasonableness requires the limitation of a right to serve some purpose. Justifiability requires that purpose to be one that is worthwhile and important in a constitutional democracy. A limitation of rights that serves a purpose that does not contribute to an open and democratic society based on human dignity, equality and freedom cannot therefore be justifiable'.¹⁶

According to Woolman, if the purpose of the limitation cannot justify the infringement of the right in question, that resolves the limitation enquiry against the limitation. It will not be necessary to consider the other factors.¹⁷ Purposes that the Constitutional Court has held to be justifiable include the protection of the administration of justice;¹⁸ the general

¹³ *S v Bhulwana* 1996 (1) SA 388 (CC) at para 18.

¹⁴ See Woolman op cit at 12-48 – 12-49.

¹⁵ *S v Makwanyane* (supra) at para 144.

¹⁶ De Waal et al op cit at 158.

¹⁷ Woolman op cit at 12-49.

¹⁸ For example, *Shabalala v Attorney-General (Transvaal)* 1996 (1) SA 725 (CC). See de Waal et al 158-9.

prevention, detection, investigation and prosecution of crime;¹⁹ and the upholding of the provisions of the Constitution.²⁰ These purposes are all potentially relevant to environmental legislation.

(c) the nature and extent of the limitation

This factor is relatively self-explanatory: a serious infringement of a right requires more justification than a relatively minor one. Any infringement of rights ought not to be more extensive than is justified by the objective that the limitation seeks to achieve.

(d) the relation between the limitation and its purpose

A limitation must have a rational connection to its purpose. If a law does not serve, or only partially serves, the purpose that it is stated to have, then it will not justify a limitation of rights. For example, in *Makwanyane*, one of the main objectives of the death penalty, the constitutionality of which was being challenged in this case, was argued to be general deterrence. Since it was not possible for the defenders of the death penalty to indicate a connection between the death penalty and general deterrence, the Court was not satisfied that there was adequate relation between the limitation on the right to life (amongst others) and the purpose of the death penalty.²¹

(e) less restrictive means to achieve the purpose

This factor pursues the proportionality theme. If less restrictive means – that is, means that either do not infringe the right or infringe it to a lesser extent - will be as effective as the limitation, then the limitation will not be justified.

¹⁹ For example, *S v Manamela* 2000 (3) SA 1 (CC). See de Waal et al at 159.

²⁰ For example, *South African National Defence Force Union v Minister of Defence* 1999 (4) SA 469 (CC). See de Waal et al at 159.

²¹ *S v Makwanyane* (supra) at para 184.

4 Rights of arrested, detained and accused persons

The rights set out in section 35 of the Constitution may impact on environmental legislation's criminal enforcement provisions in the following areas:²²

1. the gathering of evidence through search and seizure;
2. statutory presumptions infringing the right to be presumed innocent, to remain silent and not to testify;
3. the right to challenge evidence in cases where scientific evidence may be adduced by means of affidavit or certificate; and
4. the right against self-incrimination.

Each of these will be examined in turn.

4.1 *The gathering of evidence through search and seizure*

Several environmental offences require for their proof either the search of the alleged perpetrator's person, vehicle, buildings or land, or the seizure of certain items, or both. For example, the capture of certain species of fauna is prohibited under several enactments. If a person is suspected of having captured such species, it may be necessary to search that person's premises to establish if she has specimens in her possession. If so, the authorities would probably need to seize the specimens in question as evidence for a possible trial. Such search and seizure, however, must conform to the requirements of the Constitution.

It is not only section 35 that is relevant to search and seizure – section 35(5) provides that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice – but also the right to privacy in section 14:

Everyone has the right to privacy, which includes the right not to have

²² This is not to say that the other requirements of section 35 (for example, the right to legal representation and the right to be informed of this right) are not relevant in the prosecution of environmental offences. The four areas identified for further examination may possibly be infringed by current environmental legislative provisions and it is for this reason that they have been singled out.

- a. their person or home searched;
- b. their property searched;
- c. their possessions seized; or
- d. the privacy of their communications infringed.

Search and seizure would in most cases infringe section 14, depending on the meaning of ‘property’ and ‘possessions’. Search and seizure would, therefore, need to satisfy the limitations clause.²³ The general rule for legitimate search and seizure is that they must be conducted in terms of legislating clearly empowering the right to search and seize, and they must be aimed at achieving ‘compelling public objectives’.²⁴ They must also, as a rule, be authorised by a warrant issued by an independent authority, who must be persuaded by evidence under oath that there are reasonable grounds for conducting the search.²⁵

In providing for search and seizure, the empowering legislation must clearly identify the purpose of the search and seizure and provide lucid guidelines identifying the parameters of the powers. Wide, discretionary powers to search and seize were struck down in the case of *Mistry v Interim Medical and Dental Council of South Africa*.²⁶ This does not mean that the functionaries have no discretion – the paramount factor is that the purpose of the statute is clearly identified, in which case certain discretionary powers may be countenanced.²⁷

In *Park-Ross v Director, Office for Serious Economic Offences*,²⁸ the Cape High Court laid down criteria for reasonable searches and seizures in the investigation of a criminal offence:

1. The power to authorise a search and seizure should be given to an impartial and independent [judicial authority] who is bound to act judicially in discharging that function.

²³ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2000 (10) BCLR 1079 (CC) at para 20.

²⁴ De Waal et al op cit at 277.

²⁵ *South African Association of Personal Injury Lawyers v Heath* 2000 (10) BCLR 1131 (T) at 1165A.

²⁶ 1998 (4) SA 1127 (CC).

²⁷ De Waal et al op cit at 278.

²⁸ 1995 (2) SA 148 (C).

2. The evidence must satisfy the [judicial authority] that the person seeking the authority has reasonable grounds for suspecting that an offence has been committed.
3. The evidence must satisfy the judicial authority that the person seeking the authority has reasonable grounds to believe, at common law, ... that something that will afford evidence of an offence may be recovered.
4. There must be evidence on oath before [the judicial authority].²⁹

Warrants are not always necessary. There are two situations where their absence may be legitimate. First, in a situation where a warrant would have been issued had application been made, but where the object of the search or seizure would be frustrated by a delay, a warrant is not necessary. Provision for this is often made in legislation.³⁰ Second, the exercise of periodic regulatory inspections of business premises in order to enforce so-called public welfare laws, of which environmental laws are a prime example, do not require warrants.³¹

As far as the requirement for reasonable grounds for conducting the search is concerned, if there is a reasonable suspicion that an offence has been committed, this would satisfy the requirement.³² The Constitutional Court has said that not all searches are subject to the requirement that there be a reasonable suspicion of an offence having been committed.³³ Ultimately, however, the criterion of reasonableness is the determining factor.

The discussion in the preceding paragraphs relates to the constitutionality of search and seizure provisions. A second important consideration is whether evidence gleaned from search and seizure operations has been lawfully gathered and whether such evidence is admissible. Section 35(5) of the Constitution is important in this situation – it requires that the court must exclude evidence obtained in a manner which violates a right in the Bill of Rights if the admission of the evidence would render the trial unfair or otherwise be detrimental to the administration of justice. If the search is lawful (empowered by legislation and carried out with the necessary warrant), there will be no problem with the

²⁹ At 170A-C, citing *Hunter v Southam Inc* (1985) 14 CCC (3d) 97 SCC.

³⁰ For example, s 21(b) of the Criminal Procedure Act 51 of 1977.

³¹ De Waal et al op cit at 281.

³² *Hyundai* (supra) at para 28.

³³ Ibid.

admissibility of the evidence so gathered. If, however, the search is unlawful, then the question of whether the right to privacy has been infringed becomes critical. Not every search and seizure will infringe the right to privacy – the test is whether there is a reasonable expectation of privacy in respect of the searched area and the seized item.³⁴ This expectation exists for the person and the home, but is not necessarily present for other possessions. For example, as far as motor vehicles are concerned, it has been suggested that ‘the licensing requirement and the extensive regulation of vehicles result in a significantly reduced expectation of privacy’.³⁵ Even if there is an infringement of the right to privacy, however, evidence gathered as a result of such infringement will only be excluded if admission of the evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

There have been cases where the Courts have decided that there was an infringement of the right to privacy but that nevertheless the evidence so gathered was not inadmissible, because of the particular circumstances of the case. In *S v Madiba*,³⁶ Hurl J interpreted section 35(5) as follows:

A trial in which a judge is bound by the absence of any discretion to close the door on evidence on the basis that it was procured in circumstances constituting a relatively unimportant infringement of a fundamental right may plainly be as unfair in a trial in which he admits evidence procured in deliberate disregard of an important right, it seems to me that the section was plainly aimed at imposing a duty on the court, in the course of a trial, to make a decision which is fair to both sides and not aimed only at considerations of fairness or advantage to the accused.³⁷

In the circumstances, the Court decided that ‘the extent of the infringement of the right to privacy was such as to pale into insignificance compared with the importance of achievement of the object which the police had in the course of their duties’.³⁸

³⁴ De Waal et al op cit at 283.

³⁵ Nico Steytler *Constitutional Criminal Procedure* (1999) at 101.

³⁶ 1998 (1) BCLR 38 (D).

³⁷ At 44G-H.

³⁸ At 45D.

4.2 *Statutory presumptions infringing the right to be presumed innocent, to remain silent and not to testify*

Every accused person has a right to a fair trial, which includes the right to be presumed innocent, to remain silent, and not to testify during the proceedings.³⁹ These rights may be infringed by statutory presumptions that require the court to presume the existence of a certain fact if another fact is proved. Often, such presumptions cast the onus of disproving the presumed fact upon the accused – so-called ‘reverse onus’ provisions. There are certain clear principles that have been laid down by court decisions dealing with such presumptions, but, at the same time, an unambiguous general approach to presumptions has not been forthcoming. In order to draw the general conclusions that are possible, it is necessary to examine the jurisprudence. This will be done chronologically.

The first of the cases to deal with the constitutionality of presumptions was *S v Zuma and others*,⁴⁰ a ‘sound and elegantly reasoned decision’.⁴¹ Under challenge in this case was section 217(b)(2), which provided that a confession would be presumed to have been made freely and voluntarily unless the contrary was proved. This is a good example of a reverse-onus provision, or one ‘where the presumed fact must be disproved on a balance of probabilities instead of by the mere raising of evidence to the contrary’⁴²: the onus is on the accused to show that the confession was *not* freely and voluntarily made.

The unanimous judgment of the Court was delivered by Kentridge AJ, who considered the ‘rational connection’ test used in the United States⁴³ and decided that it was a ‘useful

³⁹ Section 35(3)(h) of the Constitution.

⁴⁰ 1995 (2) SA 642 (CC).

⁴¹ David Zeffertt ‘Law of Evidence’ (1995) *Annual Survey of South African Law* at 665.

⁴² *R v Downey* (1992) 90 DLR (4th) 449 at 456.

⁴³ In *Tot v The United States* 319 US 463 (1943), the Supreme Court decided that the test for presumptions would be ‘rational connection between the facts proved and the fact presumed. . . . But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of the courts’ (at 467-8). Later, in *Leary v United States* 395 US 6 (1969), the Court stated: ‘a criminal statutory presumption must be regarded as “irrational” or “arbitrary” and hence unconstitutional, unless it can at least be said with

screening test, but not a conclusive one'.⁴⁴ Instead, Kentridge AJ preferred the approach of the Canadian Supreme Court, because of the Court's 'persuasive reasoning' and the similarity of the limitations clauses of the two countries' constitutions,⁴⁵ and he accordingly adopted the reasoning of the Canadian Court in *Downey*,⁴⁶ where the court per Cory J set out the principles applicable to reverse-onus provisions. The two principles in particular held by Kentridge AJ to be applicable⁴⁷ are:

I. The presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt.

II. If by the provisions of a statutory presumption, an accused is required to establish, that is to say to prove or disprove, on a balance of probabilities either an element of an offence or an excuse, then it contravenes [the Constitutional presumption of innocence]. Such a provision would permit a conviction in spite of a reasonable doubt.⁴⁸

The Court held in casu that the practical effect of the presumption was that the accused may be required to prove a fact on the balance of probabilities in order to avoid conviction.⁴⁹ In other words, there could be a conviction despite the existence of reasonable doubt. This amounted to an infringement of the right to be presumed innocent. The provision was also not saved by the limitations clause, since the objectives behind the presumption were not compelling. According to Kentridge AJ, 'the argument from convenience would only have merit in situations where accused persons plainly have more convenient access to proof, and where the reversed burden does not create undue hardship or unfairness',⁵⁰ which was not the case here.

The Court also stresses that it is just this presumption that is declared invalid by this judgment:

substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend' (at 36).

⁴⁴ At para [21].

⁴⁵ Ibid.

⁴⁶ (Supra).

⁴⁷ At para [35].

⁴⁸ *Downey* (supra) at 461.

⁴⁹ At para [27].

⁵⁰ At para [38].

It is important, I believe, to emphasise what this judgment does not decide. It does not decide that all statutory provisions which create presumptions in criminal cases are invalid. This Court recognises the pressing social need for the effective prosecution of crime, and that in some cases the prosecution may require reasonable presumptions to assist it in this task. Presumptions are of different types. Some are no more than evidential presumptions, which give certain prosecution evidence the status of prima facie proof, requiring the accused to do no more than produce credible evidence which casts doubt on the prima facie proof. ...This judgment does not relate to such presumptions. Nor does it seek to invalidate every legal presumption reversing the onus of proof. Some may be justifiable as being rational in themselves, requiring an accused person to prove only facts to which he or she has easy access, and which it would be unreasonable to expect the prosecution to disprove. Or there may be presumptions which are necessary if certain offences are to be effectively prosecuted, and the State is able to show that for good reason it cannot be expected to produce the evidence itself. This is not such a case. Nor does this judgment deal with statutory provisions which are in form presumptions but which in effect create new offences.⁵¹

The next decision by the Constitutional Court was in *S v Bhulwana*.⁵² The presumption under attack in this case, in the Drugs and Drug Trafficking Act⁵³ was to the effect that, if in the prosecution of any person for an offence relating to dealing in certain substances, including dagga, it is proved that the accused was found in possession of dagga exceeding 115 grams; it shall be presumed, until the contrary is proved, that the accused dealt in such dagga. Having decided that the provision in question imposed a reverse onus, and not an evidential burden, the Court (per O'Regan J), decided that the provision did infringe the presumption of innocence and was not rescued by the limitations clause. The Court decided that it was not possible to 'read down' the presumption as an evidential burden. In this regard, O'Regan J stated that it was not necessary for the Court to decide on the proposition that the imposition of an evidential burden upon the accused would give rise to no constitutional complaint.⁵⁴

⁵¹ At para [41].

⁵² *S v Bhulwana, S v Gwadiiso* 1996 (1) sa 388 (CC).

⁵³ Act 140 of 1992. Section 21(1)(a)(i).

⁵⁴ At para [29].

This decision was followed in *S v Julies*,⁵⁵ where the slight difference was that the case concerned possession of mandrax and not dagga. The Court did not lay down any further applicable principles.

In *S v Mbatha*,⁵⁶ the constitutionality of section 40(1) of the Arms and Ammunition Act⁵⁷ was considered. This section provides:

‘Whenever in any prosecution for being in possession of any article contrary to the provisions of this Act, it is proved that such article has at any time been on or in any premises, including any building, dwelling, flat, room, office, shop, structure, vessel, aircraft or vehicle or any part thereof, any person who at that time was on or in or in charge of or present at or occupying such premises, shall be presumed to have been in possession of that article at that time, until the contrary is proved’.

Following the approach used in earlier cases involving presumptions, discussed above, the Court held, not surprisingly, that the provision infringed the right to be presumed innocent. As far as the limitation test was concerned, the Court was sympathetic to the seriousness of the problem of control of firearms in the country, but felt that, on balance, the provision did not satisfy the limitations test. The Court, per Langa J, held that there was no logical or rational connection between the facts proved and the presumed facts,⁵⁸ and that it was possible for the objectives of the legislation to be met by means less invasive of an accused person’s rights – an evidentiary burden, for example.⁵⁹

In *S v Ntsele*,⁶⁰ the Constitutional Court followed a similar approach to find invalid a presumption in the Drugs and Drug Trafficking Act⁶¹ to the effect that a person in charge of lands on which dagga plants were found was presumed to be dealing in those plants, confirming a decision to this effect by the Natal High Court.

This approach was continued in *Scagell v Attorney-General of the Western Cape*.⁶² The impugned provisions in this case were in section 6 of the Gambling Act.⁶³ The

⁵⁵ (1996) 4 SA 313 (CC).

⁵⁶ *S v Mbatha, S v Prinsloo* 1996 (2) SA 464 (CC).

⁵⁷ Act 75 of 1969.

⁵⁸ At para [21].

⁵⁹ At para [26].

⁶⁰ 1997 (11) BCLR 1543 (CC).

⁶¹ 140 of 1992.

⁶² 1997 (2) SA 368 (CC).

provisions in question, as well as the principal offence created by subsection (1), read as follows:

‘(1) Subject to the provisions of ss (2), no person shall permit the playing of any gambling game at any place under his control or in his charge and no person shall play any such game at any place or visit any place with the object of playing any such game.

(3) When any playing-cards, dice, balls, counters, tables, equipment, gambling devices or other instruments or requisites used or capable of being used for playing any gambling game are found at any place or on the person of anyone found at any place, it shall be prima facie evidence in any prosecution for a contravention of ss (1) that the person in control or in charge of such place permitted the playing of such game at such place and that any person found at such place was playing such game at such place and was visiting such place with the object of playing such game.

(4) If any policeman authorised to enter any place is wilfully prevented from or obstructed or delayed in entering such place, the person in control or in charge of such place shall on being charged with permitting the playing of any gambling game, be presumed, until the contrary is proved, to have permitted the playing of such gambling game at such place.

(5) Upon proof at the trial of any person charged with contravention of ss (1), that any gambling game was played or intended to be played, it shall be presumed, until the contrary is proved, that such game was played or intended to be played for stakes.

(6) Any person supervising or directing or assisting at or acting as banker, dealer, croupier or in any like capacity at the playing of any gambling game at any place and any person acting as porter, doorkeeper or servant or holding any other office at any place where any gambling game is played, shall be deemed to be in control or in charge of such place.

The Court held that subsection (4) infringed the presumption of innocence and, given the absence of any compelling evidence as to how it assisted the police in investigating such offences, was not saved by the limitations clause.

Subsection (3) casts an evidentiary burden, and this presented the first opportunity for the Constitutional Court to consider the validity of such a provision. This operates in such a way as to require the accused person to raise ‘evidence sufficient to give rise to a reasonable doubt to prevent conviction’.⁶⁴ O’Regan J stated that section 6(3) ‘does not give rise to the possibility that an accused person may be convicted despite the existence of a reasonable doubt as to his or her guilt’.⁶⁵ The sweeping nature of section 6(3), which

⁶³ 51 of 1965.

⁶⁴ *Scagell* at para [12].

⁶⁵ *Ibid.*

could have the effect of persons being charged with an offence and ‘put on their defence merely upon proof of a fact [for example, possession of a pack of cards] which itself is not suggestive of any criminal behaviour’,⁶⁶ was held to be in breach of the right to a fair trial. As Schwikkard points out, the effect of this decision is that the subsection was declared invalid because it could lead to a person being convicted despite the existence of reasonable doubt, which contradicts the judge’s comments about evidentiary burdens in general made earlier.⁶⁷

An evidentiary burden may well, however, infringe the presumption of innocence by relieving the prosecution of its duty to prove all the elements of the offence charged. This, as well as the possibility of conviction in the presence of reasonable doubt, could both be constitutional shortcomings of evidentiary burdens. However, the fact that an evidentiary burden is less of an infringement of the presumption of innocence than a full reverse onus is could be an important factor in ascertaining whether the infringement met the requirements of the limitations clause.⁶⁸

As for section 6(5), the subsection appears to be tautologous. The presumption would only arise once the fact that is presumed (the presence of a stake) has already been proved, which means that there is no danger that a person could be convicted on the basis of the subsection despite the existence of a reasonable doubt. As the Court points out, ‘the fact that s 6(5) appears to be ineffective does not automatically give rise to constitutional complaint’.

Finally, subsection (6) was also found not to infringe the Constitution. The Court found that the word ‘deemed’ indicated that the presumption was irrebuttable, but that the subsection had the effect of a definition, and did not relieve the prosecution of proving all the elements of the offence.⁶⁹

⁶⁶ At para [16].

⁶⁷ PJ Schwikkard *Presumption of Innocence* (1999) at 117.

⁶⁸ See Schwikkard *op cit* at 131.

⁶⁹ At para [30].

The united front presented by the Constitutional Court in presumption cases up until this stage began to crumble in *S v Coetzee*.⁷⁰ Two sections in the Criminal Procedure Act⁷¹ were under scrutiny: sections 245 and 332(5). They read as follows:

245: If at criminal proceedings at which an accused is charged with an offence of which a false representation is an element, it is proved that the false representation was made by the accused, he shall be deemed, unless the contrary is proved, to have made such representation knowing it to be false.

332(5): When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor.

The Court unanimously decided that section 245 was unconstitutional, following the same line of reasoning adopted in earlier cases. They were also *ad idem* that the presumption relating to ‘servants’ in section 332(5) was invalid as well. That, however, is where the consensus ended.

The majority of the Court held that section 332(5) failed constitutional muster, but this result came via several different routes. Langa J found that ‘whether s 332(5) creates a form of statutory liability, with a shift in onus in respect of a part thereof or a new crime with a special defence, the proof of which rests on the defence, the final effect is the same’: a breach of the presumption of innocence.⁷² He also decided that it was not saved by the limitations clause, the Court not being convinced as to the possibility of achieving the objective of the legislation by other means. He found that it was not possible to sever words from the subsection to render it valid, which was an approach adopted by some of the other judges.

Mahomed DP, Kriegler J concurring, held that the subsection was a breach of the presumption of innocence, since ‘if at the end of the case the court has a reasonable doubt

⁷⁰ 1997 (3) SA 527 (CC).

⁷¹ Act 51 of 1977.

⁷² At para [40].

as to whether or not the accused took part in the commission of the offence by the corporate body, or a reasonable doubt as to whether or not the accused could have prevented the commission of that offence, the court would nevertheless be required to convict such an accused'.⁷³ The learned judge continues to find that the wide ambit of the subsection fails to save it under the limitations clause. Consequently, he decided that it was unnecessary to decide whether the subsection infringed the right to freedom in section 11 of the interim Constitution, in respect of its possible interpretation (as per Kentridge AJ's judgment) as a strict liability clause.

Didcott J, in a separate judgment, concurs with the decisions of Langa J and Mahomed DP. Sachs J, also in a separate judgment, essentially concurs with Langa J but he takes the analysis somewhat further.

Kentridge J's is the first judgment that disagrees with the majority. He views s 332(5) as creating a form of vicarious liability which allows the accused to raise the defence of due diligence. He suggests that, in the absence of the sub-phrase in the subsection beginning with the word 'unless', the section would impose a form of strict liability, which would not infringe the presumption of innocence or the accused's right to silence, although it may infringe the right to freedom in section 11.⁷⁴

As far as this is concerned, Kentridge AJ concludes that section 322(5) is designed 'to induce those who control corporate bodies to ensure that those bodies keep within the law',⁷⁵ and that

A corporate body can act and thus commit criminal offences only through human agents, but the identity of those agents cannot always be ascertained. Moreover the agent through whom the criminal offence is committed may hold a lowly position. In view of the dominant role played by corporate bodies in modern society it seems to me to be a legitimate objective of government to ensure that the persons who control such bodies are not entirely immune from criminal liability for offences committed by servants of that body in furtherance of its objectives. An absolute liability for the crimes of the corporate body would be so extreme as to be regarded by reasonable persons as unfair or oppressive. But the subsection is not absolute. It provides a defence for the controllers of the corporate body which, as I have already pointed out, is considerably less burdensome than the

⁷³ At para [60].

⁷⁴ At para [86].

⁷⁵ At para [97].

requirement of proof of due diligence referred to in the Canadian cases. I see nothing unfair in placing that limited burden upon the controllers of the corporate body. They are the ones who may be expected to be aware of the internal workings of the corporation. They are the ones in the best position to give evidence of their own lack of participation and knowledge. The prosecutor does not know what goes on in the boardroom; the director does. The provision ensures or attempts to ensure that a person in the position of director of a company will understand that he has responsibility for its conduct. The inducement to responsible corporate conduct is enhanced by placing personal criminal liability on the shoulders of those in control, subject to a burden of proof not unduly difficult for the innocent to discharge. The corporation itself can be punished only by a monetary penalty, a penalty which may not seriously affect those in control.

He accordingly found that the section did not infringe the right to freedom in section 11.

For essentially the same reason, Kentridge AJ held that, in the event he was mistaken as to his conclusions on the section's infringement of the Bill of Rights, the section would nevertheless satisfy the limitations clause. He held that the limitation effected by section 332(5) was not only reasonable and justifiable but also necessary because

any lesser burden of proof such as an evidential burden of proof would not achieve the legitimate aims of the legislation. It would be only too easy for an accused, for example by a bare denial, to raise some doubt whether he knew of the corporation's offence and could have prevented it. The burden of proof which would then revert to the prosecution would be in most cases well-nigh impossible to discharge.⁷⁶

Kentridge AJ concludes by indicating that the parts of the section that the majority of the Court find unconstitutional can be severed, but on this finding he is also in the minority. O'Regan J, whose judgment is discussed below, also holds that severance can save the section, but severs different parts than does Kentridge AJ.

Madala J agrees with Kentridge AJ that the section is not unconstitutional, but for different reasons. He agrees with the majority that the section infringes the presumption of innocence, but holds that this limitation meets the requisite limitations test. His reasons are the interest of the state in bringing corporate offenders to book, the director's consent to the responsibilities inherent in that office, and the practical difficulties of proof and the high cost of enforcing regulatory mechanisms, which, in his decision, the subsection is designed to address.⁷⁷

⁷⁶ At para [105].

⁷⁷ At paras [126]-[132].

O'Regan J concurred with Langa J as to the section's unconstitutionality, but held that severance of the infringing words could save the section. She held that, on her interpretation of the section, which was influenced by the interpretation of the Appellate Division in *S v Kloppe*,⁷⁸ the section did not infringe section 11 (the right to freedom). In her words

Imposing criminal liability upon a director who knows of the commission of an offence by the company and who is in a position to prevent the commission of that offence but does not do so is not in any sense egregious. Actual knowledge coupled with the ability to prevent the commission of the offence by a director who is in a position of control in the corporate body renders the failure to do so sufficiently culpable to warrant criminal liability.⁷⁹

However, she found that the section infringed the presumption of innocence because it could lead to an accused's being found guilty despite the existence of a reasonable doubt as to his or her guilt.⁸⁰ The lack of compelling reasons for this limitation led her also to conclude that the section was not saved by the limitations clause.

Ackermann J and Mokgoro J concurred, both in separate judgments, with O'Regan J, save for her finding as to severability of the subsection, where Ackermann J disagreed with her.

It is rather difficult to draw clear principles from this decision due to the Court's marked lack of consensus, not necessarily on the overall findings, but on the manner in which the individual justices reached their conclusions. What is clear is that, once again, the Court (or the majority, at least) struck down reverse onus provisions. There was also general consensus that the effect of section 332(5) was that an accused could be convicted despite the existence of reasonable doubt. Other noteworthy aspects of the various judgments are as follows.

Although not all the judges followed this process, it is submitted that analysis of section 332(5) was best carried out by means of examining both its compliance with the right to freedom, and with the presumption of innocence. In other words, the Court should examine the offence itself, and whether the offence is in compliance with the Bill

⁷⁸ 1975 (4) SA 773 (A).

⁷⁹ At para [183].

⁸⁰ At para [190].

of Rights (the freedom question) and examine how the offence is prosecuted (the presumption of innocence question). This approach would not be necessary in all cases, since in many circumstances it will be only the second question that is relevant.

Several of the judges dealt with the question of whether the presumption in section 332(5) was a qualification of or exemption from the main offence – thus constituting a defence, or whether it was a separate offence. It is submitted that the best approach to this question is one which was adopted by O'Regan J, who held that it is irrelevant whether the presumption is part of a defence or part of the main offence, the crucial question is whether reliance on the presumption could lead to conviction despite reasonable doubt and/or relieve the prosecution of the duty of proving all the elements of the offence.⁸¹

Another consideration that was raised by some of the judges in *Coetzee* was the distinction between regulatory offences and other offences.⁸² It was argued that the presumption was justifiable because it applied to regulatory offences. In the circumstances, this was not a compelling argument. It is submitted the fact that it is a regulatory offence in which a presumption such as the one in section 332(5) is used does not affect the question of whether the provision infringes the presumption of innocence, but it may well be an important factor in assessing whether it is a justifiable limitation.⁸³ It could well be argued that the use of such a presumption in a regulatory offence, where the stigma of prosecution is less and the penalty unlikely to be severe, coupled with the frequent difficulty of proving such offence, is justifiable in the circumstances.

*S v Meaker*⁸⁴ is the first of the decisions under scrutiny here which was not decided by the Constitutional Court. It is also the first that considers the question of constitutionality of a statute in the context of the 1996 Constitution rather than the interim 1994 Constitution. The significance of this difference lies in the limitations test. There are

⁸¹ At paras [188]-[189]. See also Langa J at para [38].

⁸² Langa J at paras [41]-[43]; Kentridge AJ at paras [91]-[96]; Mokgoro J at para [138]; O'Regan J at paras [193]-[197] and Sachs J at paras [213]-[219].

⁸³ See Schwikkard op cit at 131-2.

⁸⁴ 1998 (8) *BCLR* 1038 (W).

significant differences between the final and interim Constitutions in this regard. They are:

1. Under the interim Constitution, a limitation to a right of arrested persons had, in addition to being reasonable and justifiable, also to be 'necessary'. This requirement is excluded in the 1996 Constitution.
2. Under the interim Constitution, no limitation could 'negate the essential content of the right in question'. This requirement has also been dropped.
3. Human dignity has been added to the basis of the society in which the limitation must be adjudged reasonable and justifiable.
4. The 1996 Constitution lists 5 factors which must be taken into account in determining whether the limitation passes the requisite test.⁸⁵

In *Meaker*, the presumption under attack was section 130 of the Road Traffic Act:⁸⁶

Where in any prosecution under the common law relating to the driving of a vehicle on a public road, or under this Act, it is material to prove who was the driver of the vehicle, it shall be presumed, until the contrary is proved, that such vehicle was driven by the owner thereof.

Cameron J, following the line of Constitutional Court cases, decided that the provision did infringe the presumption of innocence. When it came to the question of limitation, however, his approach was a novel one. According to the Court, the following considerations, which may overlap, are relevant:

1. Is it in practice impossible or unduly burdensome for the State to discharge the onus of proving all the elements pertaining to the offence beyond reasonable doubt...? Cases envisaged appear to include those where:
 - 1.1 the facts and circumstances sought to be proved are peculiarly within the knowledge of the accused ...; and
 - 1.2 the accused is required to prove only facts to which he or she has easy access, and which it is would be unreasonable to expect the prosecution to disprove ...
2. Is there a "logical connection" between the fact proved and the fact presumed ... and is the presumed fact something which is more likely than not to arise from the basic facts proved ...? ... does application of the presumption entail such interference with "the ordinary process of inferential reasoning" as to create "a risk of a conviction despite a reasonable doubt as to guilt in the mind of the trier of fact"?

⁸⁵ See above, § 3.2.

⁸⁶ 29 of 1989.

3. Does the application of the common-law rule relating to the State's onus cause substantial harm to the administration of justice...? Cases envisaged appear to include those where the presumption is necessary if the offence is to be effectively prosecuted, and the State shows that for good reason it cannot be expected to produce the evidence itself...
4. Generally, is the presumption in its terms cast to serve only the social need it purports to address, or is it disproportionate in its impact...? Specifically, having regard to its terms and ambit, what is the extent of the danger that innocent people may be convicted...?
5. Could the State adequately achieve its legitimate ends by means which would not be inconsistent with the Constitution in general and the presumption of innocence in particular...?⁸⁷

Taking these considerations into account, the Court decided that

'section 130 pursues the conviction of road traffic offenders by means of a presumption that conduces precisely to that purpose. It is an eminently reasonable device, which accords with practical common sense and in its application produces equitable results.'⁸⁸

This is the first presumption in this analysis that has passed constitutional muster. All that have been declared invalid to this point have failed the limitations test, but the Court in *Meaker* have set out a sensible approach to the matter and correctly, it is submitted, decided that this particular presumption is a limitation on an accused's rights that is acceptable. If there is any criticism that can be made of this decision, however, it is why the Court did not consider the possibility of an evidentiary burden rather than the full reverse onus, which would constitute a lesser inroad into the presumption of innocence.⁸⁹

*S v Mello*⁹⁰ was another case involving a presumption in the Drugs and Drug-Trafficking Act.⁹¹ Section 20 of the Act provided that 'if in the prosecution of any person for an offence under this Act it is proved that any drug was found in the immediate vicinity of the accused, it shall be presumed, until the contrary is proved, that the accused was found in possession of such drug'. The Court unanimously decided that the provision infringed the presumption of innocence and that there was no justification for the presumption that would satisfy the limitations test. This decision, then, was in keeping with the Constitutional Court jurisprudence up until this point.

⁸⁷ At 1053B-F.

⁸⁸ At 1057J.

⁸⁹ See PJ Schwikkard 'Evidence' (1999) 12 *SACJ* 118 at 119.

⁹⁰ 1998 (3) SA 712 (CC).

⁹¹ 140 of 1992.

The next case under discussion is not, strictly speaking, one that involves a presumption, but the decision does cast further light on the Constitutional Court's approach to the constitutionality of criminal provisions, so it warrants examination. In *Osman and another v Attorney-General, Transvaal*⁹² the appellants challenged the constitutionality of section 36 of the General Law Amendment Act,⁹³ which provides:

Any person who is found in possession of any goods, other than stock or produce as defined in s 1 of the Stock Theft Act 57 of 1959, in regard to which there is a reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft.

The challenge was based on the allegation that this provision breached the right to silence. According to the Court, per Madala J, the elements of the offence were (a) the accused person must actually be found in possession of goods; (b) a suspicion founded on reasonable grounds must exist in the mind of the finder (or possibly some other person) that the goods had been stolen; and (c) there must be an inability on the part of the person found in possession to give a satisfactory account of such possession.⁹⁴ The third aspect was under attack.

The Court decided that the provision did not have any effect on the onus of proof and the duty of the prosecution to prove the offence. The accused was not compelled by the section to produce any information. If, however, the accused chose not to speak, then he or she would have to bear the risk of such choice, in the face of the evidence that the state had led. The situation was, in effect, the same as any other when the accused chose to remain silent – in certain circumstances; the court would be justified in drawing an adverse inference from the accused's failure to provide an explanation that would cast reasonable doubt on the state's evidence.⁹⁵

This decision, while it does not cast any new light on the Court's approach to presumptions, does show how it is possible to formulate an offence in this type of situation which does not (on the approach adopted in *Osman*) fall foul of the Bill of

⁹² 1998 (4) SA 1224 (CC).

⁹³ Act 62 of 1955.

⁹⁴ At para [8].

⁹⁵ See para [23] in particular.

Rights. The decision has been criticised, however, on the basis that the accused's silence 'will always be an item of evidence that will be taken into account in determining whether the State has discharged its duty in presenting a prima facie case'.⁹⁶ It would seem, therefore, that the provision under scrutiny in *Osman*, does infringe the presumption of innocence. Whether it would meet the requirements of the limitations clause, however, is not clear.

In *S v Fransman*⁹⁷ the accused was charged with, inter alia, being in possession of an unlicensed firearm. The judgment was in response to an application for discharge. The defence contended that the state had not led any evidence relating to the absence of a licence, but were relying on a presumption in section 250(1) of the Criminal Procedure Act⁹⁸ to the effect that:

If a person would commit an offence if he-

(c) owned or had in his possession or custody or used any article;...

without being the holder of a licence, permit, permission or other authority or qualification (in this section referred to as the 'necessary authority') an accused shall at criminal proceedings upon a charge that he committed such an offence, be deemed not to have been the holder of the necessary authority unless the contrary is proved.

The defence contended that this presumption was unconstitutional as it infringed the presumption of innocence.

The Court, per Fevriar AJ, held that the presumption was not unconstitutional. The reasons the Court gave were that the state still had to lead evidence that the accused possessed the firearm; that it is easy for the accused to discharge the onus by simply producing the licence; and that the question whether there is a licence or not is peculiarly within the accused's knowledge. In the light of this, and the fact of the proliferation of unlicensed firearms, the Court decided that the presumption was 'both rebuttable and reasonable'.⁹⁹

⁹⁶ PJ Schwickard 'A dilution of the presumption of innocence and the right to remain silent? *Osman v Attorney-General, Transvaal*' (1999) 116 *SALJ* 462 at 462-3.

⁹⁷ 1999 (9) BCLR 981 (W).

⁹⁸ Act 51 of 1977.

⁹⁹ At 984I.

Although the effect of this decision cannot be faulted, it is submitted that the Court was wrong in the way it reached the conclusion. The provision probably does infringe the presumption of innocence, but it may well be saved by the limitations clause. The Court, however, did not consider it in this light.¹⁰⁰ Nevertheless, this is an important decision for environmental legislation, since there are several environmental offences that hinge on the possession of a valid licence or authority, and this presumption would assist in proving such offences.

Returning to the Constitutional Court, the case of *S v Manyonyo*¹⁰¹ follows earlier decisions and does not add anything new to the jurisprudence. The Court was once again faced with the constitutionality of provisions in the Drugs and Drug Trafficking Act.¹⁰² One of the impugned provisions has already been struck down in the *Mello* case. The second provision, in section 21(1)(c),¹⁰³ had been declared invalid by the Northern Cape High Court in *S v Mjezu*.¹⁰⁴ The Constitutional Court confirmed this finding, making it clear that their decision would be binding on the whole country.

The final case in this analysis, and one in which there was again some dissent in the Constitutional Court, is *S v Manamela*.¹⁰⁵ This case involved a presumption as to onus contained in s 37(1) of the General Law Amendment Act 62 of 1955. The section reads:

Any person who in any manner, otherwise than at a public sale, acquires or receives into his possession from any other person stolen goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959, without having reasonable cause, *proof of which shall be on such first-mentioned person*, for believing at the time of such acquisition or receipt that such goods are the property of the person from whom he receives them or that such person has been duly authorized by the owner thereof to deal with or to dispose of them, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of receiving stolen property

¹⁰⁰ See P-J Schwikkard 'Evidence' (2000) *SACJ* 238 at 245.

¹⁰¹ 1999 (12) BCLR 1438 (CC).

¹⁰² Act 140 of 1992.

¹⁰³ This subsection reads: If in the prosecution of any person for an offence referred to in section 13(e) or (f) it is proved that the accused conveyed any drug, it shall be presumed, until the contrary is proved, that the accused dealt in such drug.

¹⁰⁴ 1996 (2) SACR 594 (NC).

¹⁰⁵ 2000 (3) SA 1 (CC).

knowing it to have been stolen except in so far as the imposition of any such penalty may be compulsory.¹⁰⁶

The issue before the Court was essentially the constitutionality of this subsection, particularly the phrase placing the onus on the accused to prove, on a balance of probabilities, that he or she had reasonable cause to believe that the goods were, in effect, not stolen goods.

The Court considered the clause in the light of the right to silence and the presumption of innocence. The Court held that both rights were infringed by the clause. As far as the right to silence is concerned, the Court held that the effect of the provision was to compel the accused to produce evidence. In the words of the Court, ‘for the accused to remain silent is not simply to make a hard choice which increases the risk of an inference of culpability’. The effect would be that the accused would ‘surrender to the prosecution’s case and provoke the certainty of conviction’.¹⁰⁷ The presumption of innocence was found to be infringed due to the possibility of an accused being found guilty despite the presence of reasonable doubt.¹⁰⁸

In assessing the justification of the clause in the light of the limitations clause, the Court held that ‘there are convincing reasons for an incursion into the right to silence, but not for a reverse onus which would unduly increase the risk of innocent persons being convicted’.¹⁰⁹ The limitation of the right to silence was held to be justified because of the extreme difficulty for the state to prove absence of reasonable cause, whereas asking the accused, who had already been shown to be in possession stolen goods, to produce evidence as to the reasonable cause was not ‘unreasonable, oppressive or unduly intrusive’.¹¹⁰

As for the presumption of innocence, the Court essentially found that the relation between the reverse onus and the objective of the legislation were not proportionate and they were not convinced that there were not less restrictive means available.

¹⁰⁶ Emphasis added.

¹⁰⁷ At para [24].

¹⁰⁸ Paras [25] and [26].

¹⁰⁹ At para [37].

¹¹⁰ At para [38].

Consequently, the Court declared invalid the phrase ‘proof of which shall be on such first-mentioned person’ and added in a new last sentence reading ‘In the absence of evidence to the contrary which raises a reasonable doubt, proof of such possession shall be sufficient evidence of the absence of reasonable cause’.¹¹¹ The effect of the judgment is thus to cast an evidential burden on the accused, the onus of proof in the strict sense resting on the State throughout.

The minority of the Court,¹¹² however, was of the opinion that the reverse onus provision did satisfy the requirements of the limitations clause, essentially finding that the majority had overstated the risk of unfair convictions under the subsection. Moreover, the minority were not convinced that the alternative of the evidential burden would ‘still fully achieve’ the purpose of section 37(1), which ‘seeks to impose an obligation upon members of the public, where stolen goods are acquired otherwise than at a public sale, to produce probable proof to escape criminal conviction’.¹¹³

The decision in *Manamela* does not break any new jurisprudential ground but is important in illustrating the way in which the Constitutional Court considers the various factors influencing the justification of provisions that infringe fundamental rights. The Court observed in the judgment that ‘this Court has so far not found an impugned reverse onus provision to pass constitutional muster’¹¹⁴ and *Manamela* followed this pattern. However, the Court did stress that it ‘has been at pains to articulate that there are circumstances in which such measures may be justifiable’¹¹⁵ and that the Court has ‘expressly kept open the possibility of reverse onus provisions being justifiable in certain circumstances’.¹¹⁶ In the light of these comments, the Court gives examples of instances in which reverse onus provisions may be justified, which are of broad relevance to environmental legislation:

¹¹¹ Para [59].

¹¹² O’Regan J and Cameron AJ.

¹¹³ At para [97].

¹¹⁴ At para [27].

¹¹⁵ Ibid.

¹¹⁶ At para [27].

A broad context in which the use of reverse onus provisions might be justified concerns “regulatory offences”, as opposed to “pure criminal offences”. Thus, regulatory statutes dealing with licensed activity in the public domain, the handling of hazardous products, or the supervision of dangerous activities, frequently impose duties on responsible persons, and then require them to prove that they have fulfilled their responsibilities. The objective of such laws is to put pressure on the persons responsible to take pre-emptive action to prevent harm to the public. Although censure might be acute, there is generally not the same stigma or the severe penalties as for common-law offences. Similarly, there are cases involving the existence or authenticity of public documents or licences, where practicalities and common sense dictate that, bearing in mind the reduced risk of error involved, it would be disproportionately onerous for the State to be obliged to discharge its normal burden in order to secure a conviction. Traffic regulation provides a further example, such as when a statute states that the owner of a car is presumed to be the person who parked it illegally; in the great majority of cases, there is simply no way in which the State could prove who parked the car.¹¹⁷

This is a clear recognition by the Court that reverse onus provisions in ‘public welfare’ offences would stand a good chance of passing constitutional muster.

What conclusions can be drawn from this line of cases? Where there is a presumption of the nature of a reverse onus provision, which has the effect of relieving the state of its duty to prove all of the elements of the offence and/or where the use of the presumption may result in the accused’s conviction despite the presence of reasonable doubt, then the presumption of innocence in section 35(3)(h) will be infringed. The decisions discussed above have been consistent as to this aspect.

The fact that there is an infringement of the presumption of innocence is not the end of the matter, however. It is then necessary to determine whether the limitation is acceptable in terms of the limitations clause – section 36. While the Constitutional Court has been consistent as to the principle involved - that there be a balancing of the relevant factors – and the factors to be taken into account, there has been some dissent as to exactly how the limitations test is applied, notably in *Coetzee* and *Manamela*. Despite the lack of unanimity shown in the odd case, the Constitutional Court has yet to find a reverse onus provision valid, although the High Court in *Meaker* did.

What a case like *Manamela* shows, in the face of a convincing minority judgment that found the impugned provision to be valid, is that the majority of the Constitutional Court

¹¹⁷ At para [29].

is very strict when it comes to application of the limitations clause. The reasons for the limitation will have to be compelling indeed for that limitation to pass muster. On the other hand, the Court appears, on the basis of *Manamela*, to be prepared to countenance an infringement of section 35 rights by means of an evidentiary burden rather than a reverse onus.

A number of considerations followed by the Court in these cases have been identified as Chaskalson¹¹⁸ as being among the more important considerations in the evaluation of a reverse onus provision, and it is useful to list these here:

- (1) Whether the mischief aimed at by the reverse onus is one of social importance.
- (2) The severity of the offence and the consequences for the accused if convicted.
- (3) Whether the offence is “truly criminal” or merely “regulatory” in nature.
- (4) Whether the effect of the presumption is to cast upon the accused an evidentiary burden or the full burden of proof...
- (5) The significance of the fact to be assumed. Is it an essential ingredient of the offence or a defence, excuse or exception? ...
- (6) The relative ease with which the prosecution and defence respectively can discharge the evidential burden or burden of proof....
- (7) Whether the presumption operates whenever the presumed fact is in issue or only upon proof of other basic facts ...
- (8) The likelihood in the ordinary course that the issue would be in dispute....
- (9) Having regard to all the circumstances, whether the presumption introduces any real risk of conviction of an innocent person.

These considerations will have to be borne in mind when considering the current South African environmental legislation and the presumptions contained therein, in the following chapters.

4.3 The right to challenge evidence in cases where scientific evidence may be adduced by means of affidavit or certificate

Many environmental cases would have as an important element the consideration of scientific evidence. For example, in a case where a particular emission standard is

¹¹⁸ Matthew Chaskalson ‘Evidence’ in M Chaskalson et al *Constitutional Law in South Africa* (1999 update) at 26-12 - 26-12B.

alleged to have been breached, it would be necessary for the state to produce evidence of the concentration of the prohibited substance in the effluent or similar. In order to facilitate this, certain statutes contain provisions allowing for such evidence to be produced by affidavit or certificate and provide for its prima facie acceptance.¹¹⁹ The question as to whether this type of provision is constitutionally acceptable will now be considered.

The question was considered in *S v van der Sandt*.¹²⁰ This was a case involving a charge of drunken driving and in issue was section 212(4) of the Criminal Procedure Act.¹²¹ This subsection allows the submission of a certificate or affidavit as prima facie proof of any fact established by any examination or process requiring any skill in various scientific fields named in the subsection (like chemistry or ballistics, for example). The defence contended that this section infringed the right to cross-examination and was therefore unconstitutional. The Court disagreed, holding that evidence does not have to be presented orally. In addition, evidence produced in terms of this subsection is usually formal evidence that is not challenged and the subsection promotes the efficient administration of justice. In any event, section 212(12) allows the court to call the deponent in question to testify orally, and the accused may himself or herself call the deponent to testify.

This decision was followed in *S v Sishi*,¹²² where the Court decided that the failure of a court to explain fully to an unrepresented accused the effect of the certificate/affidavit would be an irregularity undermining the fairness of the trial.

In essence, the effect of the two cases is that the affidavit or certificate, as the case may be, must contain all the necessary information,¹²³ and that the accused must be informed that the document is merely prima facie proof of its contents. The accused may

¹¹⁹ For example, section 23(b) of the Hazardous Substances Act 15 of 1973.

¹²⁰ 1997 (2) SACR 116 (W).

¹²¹ Act 51 of 1977.

¹²² [2000] 3 All SA 56 (N).

¹²³ For details of which, see the judgment of Du Plessis J in *Van der Sandt* (supra) at 138C-J.

therefore call the author of the certificate to testify in regard to the facts contained in the document in question.

4.4 *The right against self-incrimination*

In environmental law, the issue of self-incrimination has been examined in the context of privilege (particularly corporate privilege) over auditing results. The basic question that is in issue is whether the auditing results that a person accused of an environmental offence (most often a company) has itself collected, may be admitted into evidence against that person. For example, results of emission level examinations could potentially be used against a company being charged with exceeding the maximum emission levels. This debate is considered further in Chapter 11, but for now it is necessary to consider the approach of the South African courts to self-incrimination in the context of the constitutional right to a fair trial.

The real issue here does not concern self-incrimination during the trial, but whether the accused's right may be infringed in the admission of self-incriminating evidence gathered before the trial. This would arise in the context of environmental auditing results discussed above. In *Ferreira v Levin NO*,¹²⁴ the Constitutional Court was called upon to consider the validity of section 417(2)(b) of the Companies Act.¹²⁵ This section permitted incriminating evidence gathered under compulsion in a liquidation enquiry to be used against the person under examination in any subsequent criminal trial. The majority of the Court held that the section was unconstitutional due to the infringement of the right against self-incrimination and its failure to be saved by the limitations clause. The effect of the decision, however, is not to render liquidation enquiries invalid but to prevent the use of information gathered during such enquiries from being used in subsequent criminal proceedings.¹²⁶

¹²⁴ *Ferreira v Levin NO & othes; Vryenhoek v Powell NO & others* 1996 (1) SA 984 (CC).

¹²⁵ Act 61 of 1973.

¹²⁶ See Frank Snyckers 'Criminal Procedure' in M Chaskalson et al *Constitutional Law of South Africa* (1999 update) at 27-45.

5 Conclusion

The conclusions drawn in this Chapter will be relevant to several matters discussed later in this work. The first of such circumstances will arise in an examination of South Africa's current environmental legislation, which is covered in the next Chapter.

Chapter 4

An examination of environmental crimes and their enforcement in South Africa:

Part One – Pre-1994 National Legislation

There are numerous offence provisions in South African environmental legislation but reported cases dealing with environmental prosecutions are few. One of the major reasons for this is that there have been so few prosecutions for contravention of environmental law in South Africa. Another reason is that most environmental offences, given their relatively small maximum penalties, would be prosecuted in the Magistrates' Courts, for which there are no reported judgments.

The purpose of the following three Chapters is to examine the way in which South Africa's environmental legislation is intended to be enforced by means of analysis of the offence provisions. If it is possible to draw any general trends, this will be done. Available judgments, court reports will be used to demonstrate the way in which certain provisions are used in prosecutions. In addition, and especially where there are no available judgments dealing with the provisions in question, suggestions as to the strengths and weaknesses of provisions will be made.

Most statutes contain provisions relating to administration of the Act, and make it an offence to do things like obstruct officials and the like. These offences will not be the primary focus of the analysis, which will consider in detail what might be referred to as the 'substantive' offence provisions. Where, however, the 'administrative' provisions contain interesting approaches or where there is an important link between these and the substantive provisions, these will be examined in more detail.

As far as the scope of the analysis is concerned, all national legislation that is directly relevant to environmental management will be considered. This would include the obvious enactments dealing with air pollution and water, as well as those dealing with subjects like nuclear energy and occupational health and safety, but will exclude legislation that could be used for purposes of environmental management like income tax

legislation. The intention is to illustrate the general approach, rather than to ensure that no possible enactment avoids scrutiny.

Provincial and local legislation, on the other hand, will be examined somewhat more selectively. All post-1994 provincial legislation that has come into force will be examined. Older legislation in the four erstwhile provinces was often very similar (one thinks, for example, of the nature conservation ordinances), so where such legislation is still in force, this will be examined if it can contribute to identification of significant general trends.

National legislation enacted before the arrival of the new Constitutional era in 1994 is the subject of this Chapter. Chapter 5 will cover post-1994 national legislation and Chapter 6 provincial and local legislation. The purpose of splitting these up is mainly practical – one Chapter would simply be too unwieldy. There may, however, be some identifiable characteristics of the three categories of legislation so selected.

Analysis of legislation

The legislation will be analysed chronologically.

1 Sea-Shore Act 21 of 1935

This Act is concerned with the use of the seashore, seemingly more with the objective of maintaining the access of the general public to the seashore than with the environmental integrity of the seashore, but the latter is an objective. The Act provides for the leasing of portions of the seashore for certain activities (for example, boathouses, pipes, sewerage lines etc)¹ and provides for removal of material from the seashore subject to ministerial permission.² Section 10 empowers the Minister to make regulations dealing with items like the use of the seashore and deposit of waste on the seashore.

According to section 12A (offences and penalties),

¹ Section 3(1).

² Section 3(2).

- (1) Any person who-
- (a) uses any portion of the sea-shore or sea of which the State President is by section 2 declared to be the owner, for any of the purposes mentioned in section 3 (1), without that portion having been leased to him for that purpose;
 - (b) removes any material contemplated in section 3 (2) from the sea-shore or sea of which the State President is by section 2 declared to be the owner, without a permit granted under section 3 (2); or
 - (c) contravenes or fails to comply with a condition imposed by or under section 3 (1) or (2),
- shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.
- (2) If a person who erected a structure in contravention of subsection (1) is convicted in respect thereof under that subsection, the court may order that person to remove that structure at his own cost and within such time as the court may determine.
- (3) In the event of a conviction mentioned in subsection (1) the court may, in addition to imposing a sentence in respect of the offence and making an order under subsection (2), order the person convicted to repair any damage caused to the sea-shore by the act constituting the offence, to the satisfaction of the Minister.

In addition, section 10(2), provides for the penalty for contravention of regulations as follows: ‘The regulations may provide that any person contravening or failing to comply with any provision thereof shall be guilty of an offence and liable on conviction to such fine, not exceeding five hundred rand, or to imprisonment for such period, not exceeding one year, as may be specified therein, or to both such fine and such imprisonment’.

There are two sets of regulations³ that are applicable generally (as opposed to regulations made under the Act that apply to specific parts of the seashore, under the jurisdiction of local authorities) and that essentially reiterate the prohibitions in the Act itself – prohibiting the use of the seashore for erection of structures etc; prohibiting the removal of material (sand, shells etc) from the seashore; and depositing material/disposing waste on the seashore. Both sets of regulations prescribe penalties that are less than provided for by section 10(2), which was amended in 1984 and hence overrides the penalty provisions in the regulations.

³ GN 1720 GG 5542 of 2 September 1955 and GN R2513 GG 7318 of 5 December 1980.

The Sea-Shore Act is an example of an enactment that uses the classic ‘command and control’ type of enforcement approach, declaring certain activities to be offences and providing for a maximum penalty, of the traditional fine and/or imprisonment type, for contravention thereof.

In addition to the standard criminal provisions described above, however, the Act also contains a clause allowing the court to order the accused to remove any structure that has been erected in breach of the Act,⁴ and also contains what will be described in this Chapter as a ‘remediation clause’, allowing the court to order the accused to repair any damage caused to the seashore by his or her illegal act.⁵ Both these clauses apply only once the person in question has been convicted of an offence under the Act, so can be regarded as provisions which supplement the criminal sanction, rather than alternatives to it.

There is one reported judgment that concerns a prosecution for contravention of a regulation made under section 10 of the Act, but it concerns a regulation setting aside portions of the seashore for the exclusive use of one race group under South Africa’s erstwhile apartheid policies, rather than illegal damage to or exploitation of the seashore and therefore is not relevant to the current enquiry.⁶

2 Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947

This Act regulates the use of fertilisers, farm feeds, agricultural remedies and stock remedies in South Africa. Pesticides would be regarded as agricultural⁷ or stock

⁴ Section 12A(2).

⁵ Section 12A(3).

⁶ The case is *S v Naicker, S v Attawari* 1963 (4) SA 610 (N).

⁷ ‘Agricultural remedy’ is defined in section 1 as any chemical substance or biological remedy, or any mixture or combination of any substance or remedy intended or offered to be used-

(a) for the destruction, control, repelling, attraction or prevention of any undesired microbe, alga, nematode, fungus, insect, plant, vertebrate, invertebrate, or any product thereof, but excluding any chemical substance, biological remedy or other remedy in so far as it is controlled under the Medicines and Related Substances Control Act, 1965 (Act 101 of 1965), or the Hazardous Substances Act, 1973 (Act 15 of 1973); or

remedies.⁸ It would seem that the primary object of regulation is health and safety, although clearly the environmental impact of pesticides is of importance, as will be illustrated below.

The Act regulates these substances by means of providing for registration of the products and the users of the products (pest control operators). The Act also provides for the deregistration of products the use (or sale etc) of which is no longer regarded as being in the public interest.⁹ The Act empowers the Minister to prohibit the acquisition, disposal, sale or use of fertilizers, farm feeds, agricultural remedies or stock remedies; or to make such prohibition subject to conditions specified in the notice or in a permit issued by the registrar of fertilizers, farm feeds, agricultural remedies or stock remedies.¹⁰ Two sets of substances that have been prohibited under this section – firstly, DDT, Dieldrin and Aldrin,¹¹ and, second, certain hormonal herbicides,¹² were clearly prohibited because of their detrimental environmental impact. The dangers of DDT are well-known,¹³ and the prohibition of hormonal herbicides only in certain specified areas in the KwaZulu-Natal midlands, followed allegations by vegetable farmers in the region of damage caused to their crops by drift of the herbicide.¹⁴

The offences under this Act are as follows:

(b) as plantgrowth regulator, defoliant, desiccant or legume inoculant, and anything else which the Minister has by notice in the Gazette declared an agricultural remedy for the purposes of this Act:

⁸ ‘Stock remedy’ is defined in section 1 as a substance intended or offered to be used in connection with domestic animals, livestock, poultry, fish or wild animals (including wild birds), for the diagnosis, prevention, treatment or cure of any disease, infection or other unhealthy condition, or for the maintenance or improvement of health, growth, production or working capacity, but excluding any substance in so far as it is controlled under the Medicines and Related Substances Control Act, 1965 (Act 101 of 1965).

⁹ Section 7A.

¹⁰ Section 7bis.

¹¹ GN R928 GG 7566 of 1 May 1981.

¹² GN R2370 GG 13536 of 27 September 1991.

¹³ See, for example, <http://www.chem.ox.ac.uk/mom/ddt/ddt.html> (accessed 2 August 2001); <http://agen521.www.ecn.purdue.edu/AGEN521/epadir/wetlands/ddt.html> (accessed 2 August 2001).

¹⁴ See Michael Kidd *Environmental Law: A South African Guide* (1997) at 148.

2.1 Acquisition, disposal, sale or use of prohibited substance

Offences and penalties are provided for in section 18 of the Act, which contains several relatively technical offences relating to registration, hindrance of officials etc. It also includes a prohibition of the acquisition, disposal, sale or use of fertilizers, farm feeds, agricultural remedies or stock remedies contrary to a prohibition issued under section 7bis.¹⁵ Section 18 does not explicitly refer to a fault requirement.

The penalty is a fine not exceeding one thousand rand or imprisonment for a period not exceeding two years or both such fine and such imprisonment.¹⁶ This penalty was introduced by a 1980 amendment to the Act,¹⁷ but since then the penalties have not been updated, and the original penalty (for certain other offences) has not been amended since the Act's enactment.

2.2 Use of remedy for unintended purpose

An offence under this Act arises where a person uses a remedy for a purpose for which it is not intended: there is a prohibition of the acquisition, disposal, sale or use of an agricultural remedy or stock remedy for a purpose or in a manner other than that specified on the label on a container thereof or on such container.¹⁸ The Act provides that any person who (sic) agricultural remedies or stock remedies contrary to a prohibition issued under section 7bis is guilty of an offence.¹⁹ It appears that the word 'uses' has been omitted. The offences and penalties section fails to indicate what the penalty is for contravention of this prohibition, but the penalties for other offences are either a

¹⁵ Section 18(1)(c)*bis* and (d).

¹⁶ Section 18(1)(l)(ii).

¹⁷ Act 4 of 1980.

¹⁸ GN R1716 GG 13424 of 26 July 1991. This regulation was made under s 7bis.

¹⁹ Section 18(1)(d).

maximum of a five hundred rand fine and/or twelve months imprisonment²⁰ or a maximum of one thousand rand fine and/or two years imprisonment.²¹

This prohibition was the subject matter of the case of *Flexichem CC v Patensie Citrus Co-operative Ltd.*²² This was a civil case involving a claim for payment for chemicals sold by the plaintiff to the defendant. The defendant refused to pay and wished to return the goods to the seller, alleging that the chemicals that had been sold to them were sold to them for purposes for which they were not intended. The substance in question was a fertiliser, and it was sold to the defendant for purposes of combating fungus on young citrus trees – as a fungicide (agricultural remedy), in other words. The defendant sought to set aside the sale on this basis.

The court decided that the transaction did involve the sale of a fertiliser as an agricultural remedy and that therefore it was a prohibited sale and unlawful.²³ In deciding whether to set aside the contract, the court held that the peremptory terms of the Act in prohibiting not only the ‘contract of sale of chemical substances for use as an agricultural remedy in the absence of due registration’, but also the prohibition of ‘the initial offer to sell and the subsequent execution of the contract’,²⁴ indicated that the intention was to vitiate the contract. Moreover, upholding the contract would also ‘have the effect of furthering the very evil which the Legislature wishes to avoid, namely the uncontrolled use of chemical substances in agriculture’.²⁵

2.3 Forfeiture

There is also a forfeiture provision that operates once the accused is convicted. It provides that the court convicting any person of an offence under this Act, may, upon the

²⁰ Section 18(1)(l)(i).

²¹ Section 18(1)(l)(ii).

²² 1994 (1) SA 491 (SE).

²³ At 496J.

²⁴ At 497B.

²⁵ At 497D.

application of the prosecutor, declare any fertilizer, farm feed, agricultural remedy or stock remedy in respect of which the offence has been committed and all fertilizers, farm feeds, agricultural remedies or stock remedies of a similar nature to that in respect of which such person has been convicted, and of which such person is the owner, or which are in his possession, to be forfeited to the State.²⁶

This is a provision of a type often employed in environmental legislation. There have been no Constitutional challenges to forfeiture provisions, so no guidance from the judiciary is available. The first part of the forfeiture provision relates to the substance ‘in respect of which the offence has been committed’. This is unproblematic since the state has a compelling interest in removing ‘contraband’ from circulation.²⁷ The provision in question also, however, requires forfeiture of all substances regulated by the Act ‘of a similar nature to that in respect of which such person has been convicted, and of which such person is the owner, or which are in his possession’. The objective behind this is unclear, since it targets neither the ‘contraband’ itself, nor the proceeds of the offence. It also seems not to be concerned with what may be called the ‘instrumentalities’ of the offence – objects used or involved in the commission of the offence.²⁸ Consequently, this portion of the provision may well be problematic. It could be contended that this is a breach of the right to property in the Constitution,²⁹ and, since it does not have any apparent compelling purpose, is unlikely to be regarded as a justifiable limitation.

2.4 Miscellaneous provisions

In addition, there are provisions relating to evidence and special defences. Section 20 provides that, in any criminal proceedings under the Act, any quantity of a fertilizer, farm

²⁶ Section 18(2).

²⁷ Similar examples would be weapons or traps used in poaching or (outside the environmental sphere) drugs possessed in contravention of narcotics legislation.

²⁸ For example, firearms used in the illegal shooting of an animal. See André van der Walt ‘Civil forfeiture of instrumentalities and proceeds of crime and the Constitutional property clause’ (2000) 16 *SAJHR* 1 at 3.

²⁹ Section 25 of Act 108 of 1996.

feed, agricultural remedy or stock remedy in or upon any premises, place, vessel or vehicle at the time a sample thereof is taken pursuant to the provisions of this Act shall, unless the contrary be proved, be deemed to be of the same composition, to have the same degree of efficacy and to possess in all other respects the same properties as that sample.³⁰ Along similar lines, the Act provides for the power to take samples of substances regulated by the Act,³¹ and allows that a certificate stating the result of an analysis or test carried out in pursuance of the provisions of the Act and purporting to be signed by the analyst who carried out such analysis or test shall be accepted as prima facie proof of the facts stated therein.³² A copy of this certificate must be given to the accused person at least 21 days before the institution of a prosecution.³³

The presumption as to the prima facie proof of scientific evidence is not likely to be problematic since it is similar to section 212(4) of the Criminal Procedure Act that was held to be acceptable in *S v van der Sandt*.³⁴

Further assistance to the state in prosecuting offences under this Act is a presumption to the effect that any statement or entry contained in any book or document kept by any manufacturer, importer or owner of a regulated substance, or by the manager, agent or employee of such person, or found upon or in any premises occupied by, or any vehicle used in the business of such person, shall be admissible in evidence against him as an admission of the facts set forth in that statement or entry, unless it is proved that that statement or entry was not made by such person, or by any manager, agent or employee of such person in the course of his work as manager, or in the course of his agency or employment.³⁵

A special defence relating to mistake of fact is provided for by section 21.³⁶

³⁰ Section 20(1)(a).

³¹ Section 15.

³² Section 20(1)(c).

³³ Section 20(2).

³⁴ 1997 (2) SACR 116 (W). See discussion above, at Chapter 3 §4.3.

³⁵ Section 20(1)(d).

³⁶ The full text of the provision reads:

2.5 Vicarious liability

The Act provides for vicarious liability, placing the onus on the manufacturer, importer or owner to prove that the manager, agent or employee was acting without the connivance of the principal, and that all reasonable steps were taken by the principal to prevent any act or omission of the kind in question; and that the activity in question was outside the scope of employment of the manager, agent or employee.³⁷ The latter may also be prosecuted

It shall be a sufficient defence for a person charged with the sale of any fertilizer, farm feed, agricultural remedy or stock remedy in contravention of section 7 (1) (d) if he proves to the satisfaction of the court-

- (a) that he purchased such fertilizer, farm feed, agricultural remedy or stock remedy under a registered name or mark as being the same in all respects as the article which he purported to sell;
- (b) that he had no reason to believe at the time of the sale that it was in any respect different from such article;
- (c) that he sold it in the original container and in the state in which it was when he purchased it; and
- (d) that the container thereof complied with the prescribed requirements and was sealed and labelled or marked in the prescribed manner with the prescribed particulars.

³⁷ Section 22(1), which reads in full:

(1) Whenever any manager, agent or employee of any manufacturer, importer or owner of a fertilizer, farm feed, agricultural remedy or stock remedy does or omits to do any act which it would be an offence under this Act for such manufacturer, importer or owner to do or omit to do, then unless it is proved that-

- (a) in doing or omitting to do that act the manager, agent or employee was acting without the connivance or the permission of the manufacturer, importer or owner; and
- (b) all reasonable steps were taken by the manufacturer, importer or owner to prevent any act or omission of the kind in question; and
- (c) it was not under any condition or in any circumstance within the scope of the authority or in the course of the employment of the manager, agent or employee to do or to omit to do acts whether lawful or unlawful of the character of the act or omission charged,

the manufacturer, importer or owner, as the case may be, shall be presumed himself to have done or omitted to do that act and be liable to be convicted and sentenced in respect thereof; and the fact that he issued instructions forbidding any act or omission of the kind in question shall not, of itself, be accepted as sufficient proof that he took all reasonable steps to prevent the act or omission.

as the manufacturer, importer or owner;³⁸ or in addition to the manufacturer, importer or owner.³⁹

The vicarious liability clause in section 22(1) bears resemblance to section 332(5) of the Criminal Procedure Act that was held unconstitutional in *S v Coetzee*.⁴⁰ It is likely, following this decision, that section 22(1) would also fall foul of the Constitution, there appearing to be no reasons, different from those raised in *Coetzee*, compelling enough for the limitation to be regarded as acceptable.

2.6 Evaluation

In this Act, therefore, there is again the standard ‘command and control’-type provision, without alternative modes of enforcement. The penalties have been overtaken by inflation, as is the case with several other environmental enactments discussed later in this Chapter. In addition to the standard offence/penalty provisions, there is provision for forfeiture of material involved in an offence; presumptions as to the veracity of scientific evidence (laboratory analysis); and vicarious liability including reverse onus provisions. The presence of a defence allowing the accused to raise mistake of fact strongly suggests that the legislature did not intend for liability under the Act to be strict.⁴¹

3 *Water Act 54 of 1956*

The Water Act has been replaced by the National Water Act.⁴² There were no reported judgments relating to criminal prosecutions under the 1956 Act, although there were prosecutions in the Magistrates’ Courts. This Act will not be discussed here since offences relating to water are now provided for by the new Act, which is discussed in the following Chapter.

³⁸ Section 22(2).

³⁹ Section 22(3).

⁴⁰ 1997 (3) SA 527 (CC). See discussion above, at 42ff.

⁴¹ On strict liability, see detailed discussion in Chapter 9.

⁴² Act 36 of 1998.

4 Atmospheric Pollution Prevention Act 45 of 1965

This Act regulates air pollution by addressing noxious and offensive gases (Part II), smoke (Part III), dust (Part IV) and emissions from motor vehicles (Part V). The offences under the Act that are directly related to environmental protection (in other words, excluding offences relating to obstruction of officials and failure to allow access to premises and the like) are as follows:⁴³

4.1 Failure to register premises upon which scheduled processes are carried on

According to section 9 of the Act,

It is an offence for a person, within a controlled area, to:

- (a) carry on a scheduled process in or on any premises, unless-
 - (i) he is the holder of a current registration certificate authorizing him to carry on that process in or on those premises; or
 - (ii) in the case of a person who was carrying on any such process in or on any premises immediately prior to the date of publication of the notice by virtue of which the area in question is a controlled area, he has within three months after that date applied for the issue to him of a registration certificate authorizing the carrying on of that process in or on those premises, and his application has not been refused; or
- (b) erect or cause to be erected any building or plant, or alter or extend or cause to be altered or extended any existing building or plant, which is intended to be used for the purpose of carrying on any scheduled process in or on any premises, unless he is the holder of a provisional registration certificate authorizing the erection, alteration or extension of that building or plant for the said purpose; or
- (c) alter or extend or cause to be altered or extended an existing building or plant in respect of which a current registration certificate has been issued unless he has, before taking steps to bring about the proposed alteration or extension, applied to the chief officer for provisional registration of the proposed alteration or extension or unless such alteration or extension will not affect the

⁴³ For the full list and discussion of offences, see Michael Kidd 'Pollution Offences' in JRL Milton and MG Cowling *South African Criminal Law and Procedure* Vol III: Statutory Offences (1988). The discussion in the current work is based on this chapter.

escape into the atmosphere of noxious or offensive gases produced by the scheduled process in question.⁴⁴

The penalty for contravention of this provision is, in the case of a first conviction, a fine not exceeding five hundred rand or imprisonment for a period not exceeding six months, and in the case of a second or subsequent conviction a fine not exceeding two thousand rand or imprisonment for a period not exceeding one year.⁴⁵

The elements of the offence are: (i) in a controlled area (ii) carrying on a scheduled process (iii) in or on any premises (iv) without a current registration certificate.

(i) in a controlled area

A 'controlled area' is any area which has under section eight been declared to be a controlled area.⁴⁶ Any area may be declared to be a controlled area by the Minister of Health, after consideration of a report by the National Air Pollution Advisory Committee,⁴⁷ and after consultation with the Minister by notice in the *Gazette*.⁴⁸ The Minister has declared the whole of the Republic to be a controlled area.⁴⁹

(ii) carrying on a scheduled process

A 'scheduled process' is any works or process specified in the Second Schedule of the Act.⁵⁰ This Schedule comprises a list of 69 processes which are generally regarded as producing 'noxious or offensive gases'.⁵¹ Examples are chlorine processes,⁵² tar processes,⁵³ power generation processes,⁵⁴ and paper and paper pulp processes.⁵⁵

⁴⁴ Section 9.

⁴⁵ Section 46.

⁴⁶ Section 1.

⁴⁷ Established by section 2.

⁴⁸ Section 8.

⁴⁹ GN R1776 *Reg Gaz* 1026 of 4 October 1968.

⁵⁰ Section 1.

⁵¹ Section 9 falls under a Part II of the Act headed 'Control of noxious or offensive gases'. 'Noxious or offensive gases' are defined as any of the following groups of compounds when in the form of gas, namely,

(iii) on any premises

‘Premises’ means any building or other structure together with the land on which it is situated and any adjoining land occupied or used in connection with any activities carried on in such building or structure, and includes any land without any buildings or other structures and any locomotive, ship, boat or other vessel which operates or is present within the area of a local authority or the precincts of any harbour.⁵⁶

(iv) without a current registration certificate⁵⁷

The Act provides that the chief air pollution control officer⁵⁸ shall, after consideration of an application for a registration certificate, if he is satisfied that the best practicable means⁵⁹ are being adopted for preventing or reducing to a minimum the escape into the

hydrocarbons; alcohols; aldehydes; ketones; ethers; esters; phenols; organic acids and their derivatives; halogens, organic nitrogen, sulphur and halogen compounds; cyanides; cyanogens; ammonia and its compounds; inorganic acids; fumes containing antimony, arsenic, beryllium, chromium, cobalt, copper, lead, manganese, mercury, vanadium or zinc or their derivatives; cement works fumes and odours from purification plants, glue factories, cement works and meat, fish or whale processing factories; and any other gas, fumes or particulate matter which the Minister may by notice in the Gazette declare to be noxious or offensive gas for the purpose of this Act; and includes dust from asbestos treatment or mining in any controlled area which has not been declared a dust control area in terms of section twenty-seven (section 1).

⁵² Second Schedule #6.

⁵³ Second Schedule #16.

⁵⁴ Second Schedule #29.

⁵⁵ Second Schedule #68.

⁵⁶ Section 1.

⁵⁷ A ‘registration certificate’ is a registration certificate issued under s 10(2)(a)(i) or s 10(3): s 1.

⁵⁸ Appointed under s 6, hereinafter referred to as the chief officer.

⁵⁹ Defined in s 1 in respect of the prevention of the escape of noxious or offensive gases, as including the provision and maintenance of the necessary appliances to that end, the effective care and operation of such appliances, and the adoption of any other methods which, having regard to local conditions and circumstances, the prevailing extent of technical knowledge and the cost likely to be involved, may be

atmosphere of noxious or offensive gases produced or likely to be produced by the scheduled process in question, grant the application and issue to the applicant a registration certificate.⁶⁰ If he is not satisfied, the chief officer shall require the applicant by written notice to take the necessary steps within a period specified in the notice to meet the objectives stated above.⁶¹ Once these requirements have been complied with a registration certificate shall be issued in terms of s 10(3).

The registration certificate typically incorporates guidelines, which have been laid down by the Department of Health for the process in question, and which become legally binding on the industry once part of a certificate.⁶² In terms of s 12(1), a registration certificate shall be subject to the condition, inter alia, that all necessary measures are taken to prevent the escape into the atmosphere of noxious or offensive gases.

The derisory maximum penalty provided for in the Act for this offence (it has not been increased since the Act was promulgated) is one of the main reasons why there have been few prosecutions for this offence.⁶³ Indeed, recently the Department of Health, instead of prosecuting offenders using the criminal law, have applied to the High Court for interdicts against the continuation of carrying on a scheduled process without the necessary certificate. In two reported cases, the Department was successful and the offenders were interdicted from continuing their illegal activity.⁶⁴ This approach is clearly effective – the objective of the legislation is better achieved by means of closing down polluters than issuing them fines that are likely to have not significant deterrent effect.

reasonably practicable and necessary for the protection of any section of the public against the emission of poisonous or noxious gases.

⁶⁰ Section 10(2)(a)(i).

⁶¹ Section 10(2)(a)(ii).

⁶² RF Fuggle & MA Rabie (eds) *Environmental Management in South Africa* (1996) at 441.

⁶³ See Fuggle and Rabie op cit at 454.

⁶⁴ *Minister of Health and Welfare v Woodcarb (Pty) Ltd and another* 1996 (3) SA 155 (N) and *Minister of Health v Drums and Pails Reconditioning CC t/a Village Drums and Pails* 1997 (3) SA 867 (N).

4.2 Manufacture or import of certain fuel burning appliances and parts therefor

It is an offence for a person to manufacture or import any fuel burning appliance for use in a dwelling-house⁶⁵ which does not comply with the requirements prescribed by regulation under section 44; or any part for such an appliance which does not comply with the requirements so prescribed, unless he has previously obtained written authority for the manufacture or import thereof from the chief officer.⁶⁶ It is also an offence to fail to comply with any conditions set down by the chief officer in such authority.⁶⁷

4.3 Installation on any premises of fuel burning appliances

It is an offence⁶⁸ for any person to install or cause or permit to be installed in or on any premises-

(a) any fuel burning appliance,⁶⁹ unless such appliance is so far as is reasonably practicable capable of being operated continuously without emitting dark smoke⁷⁰ or smoke of a colour darker than may be prescribed by regulation: Provided that in applying the provisions of this paragraph due allowance shall be made for the unavoidable

⁶⁵ A 'dwelling-house' is any building or other structure intended for use or used as a dwelling for a single family, and any outbuildings appurtenant thereto: s 1.

⁶⁶ Section 14A(3) read with s 14A(1). The chief officer may in his discretion grant or refuse such authority any such authority shall be subject to such conditions as may be prescribed by regulation under section 44 and to such supplementary conditions as may be determined by the chief officer and set out in the authority concerned: s 14A(2).

⁶⁷ Section 14A(3).

⁶⁸ Section 15(6).

⁶⁹ 'Appliance' means any one mechanical stoker or any one burner on which there may be more than one stoker, but does not include a single chimney through which the products of several burners or furnaces may be discharged; and 'stoker' means any mechanism or other means intended for feeding fuel into any place for the purpose of burning it in such place; and 'burner' means any furnace, combustion chamber, grate or other place to which fuel is fed by one or more stokers or manually for the purpose of burning such fuel in such furnace, combustion chamber, grate or other place: s 15(4).

⁷⁰ 'Dark smoke' means smoke which, if compared in the prescribed manner with a chart of the kind shown in the First Schedule, appears to be of a shade not lighter than shade 2 on that chart: s 1.

emission of dark smoke or smoke of a colour darker than may be so prescribed during the starting up of the said appliance or during the period of any breakdown or disturbance of such appliance;⁷¹ or

(b) any fuel burning appliance designed to burn pulverised solid fuel;⁷² or to burn solid fuel in any form at a rate of one hundred kilograms or more per hour;⁷³ or to subject solid fuel to any process involving the application of heat,⁷⁴ unless such appliance is provided with effective appliances to limit the emission of grit and dust to the satisfaction of the local authority or the chief officer, as the case may be.

It is also an offence for a person to install any fuel burning appliance of a type referred to in the previous paragraph,⁷⁵ in or on any premises unless prior notice in writing has been given to the local authority or the chief officer, as the case may be, of the proposed installation of such appliance.⁷⁶

The abovementioned provisions do not apply in respect of the installation of any fuel burning appliance in any dwelling house;⁷⁷ or in respect of any fuel burning appliance if the installation thereof was commenced or any agreement for the acquisition thereof was entered into prior to the fixed date.⁷⁸ Moreover, a fuel burning appliance which has been installed in accordance with plans and specifications approved by the local authority concerned, shall not for the purposes of s 15(1) be deemed to have been installed in contravention of the provisions of that sub-section.⁷⁹

⁷¹ Section 15(1)(a).

⁷² Section 15(1)(b)(i).

⁷³ Section 15(1)(b)(ii).

⁷⁴ Section 15(1)(b)(iii).

⁷⁵ The wording of the Act is 'any fuel burning appliance in respect of which sub-section (1) applies'.

⁷⁶ Section 15(2) read with s 15(6).

⁷⁷ Defined above, n???

⁷⁸ Section 15(3).

⁷⁹ Section 15(5), but note that nothing in this sub-section shall be construed as precluding any action under ss 17 or 19 in respect of any such fuel burning appliance.

4.4 Failure to comply with smoke control regulations

The Act provides for a local authority to make regulations on a number of matters relating to smoke control.⁸⁰ Local authorities are empowered to prohibit certain actions, inter alia, the emission of smoke darker than a specified colour,⁸¹ the installation in any premises of a fuel burning appliance which does not comply with specified requirements,⁸² and the use and sale for use of solid fuel.⁸³ The Act provides that the regulations may provide for penalties for any contravention of or failure to comply with such regulations, but not exceeding, in the case of the first offence, a fine of two hundred rand or, in default of payment, imprisonment for a period of six months and in the case of a second or subsequent offence, a fine of one thousand rand or, in default of payment, imprisonment for a period of one year.⁸⁴

4.5 Failure to comply with local authority notice

If smoke is emitted or emanates from any premises in contravention of any regulation made under section 18, the local authority concerned may cause to be served on the owner or occupier of such premises, a notice in writing calling upon him to bring about, within a period specified in the notice, the cessation of the emission or emanation of such smoke from those premises.⁸⁵ It shall be an offence for a person to fail to comply with such notice.⁸⁶

⁸⁰ Section 18.

⁸¹ Section 18(1)(a).

⁸² Section 18(1)(b).

⁸³ Section 18(1)(c).

⁸⁴ Section 18(4).

⁸⁵ Section 19(1).

⁸⁶ Section 19(5).

4.6 Emission of smoke in smoke control zone

It is an offence to contravene or fail to comply with an order under section 20(1).⁸⁷ This subsection provides that a local authority may by order confirmed by the Minister after consultation with the National Air Pollution Advisory Committee, and promulgated by the Minister by notice in the *Gazette*, declare the area within its jurisdiction or any part of that area to be a smoke control zone,⁸⁸ and prohibit the emanation or emission from any premises in that zone of smoke of a darker colour or greater density or content than is specified in the order.⁸⁹

4.7 Causing a dust nuisance

The Act provides that any person who in a dust control area-

- (a) carries on any industrial process the operation of which in the opinion of the chief officer causes or is liable to cause a nuisance to persons residing or present in the vicinity on account of dust originating from such process becoming dispersed in the atmosphere; or
- (b) has at any time or from time to time, whether before or after the commencement of this Act, deposited or caused or permitted to be deposited on any land a quantity of matter which exceeds or two or more quantities of matter which together exceed twenty thousand cubic metres in volume, or such lesser quantity as may be prescribed, and which in the opinion of the chief officer causes or is liable to cause a nuisance to persons residing or present in the vicinity of such land on account of dust originating from such matter becoming dispersed in the atmosphere, shall take the prescribed steps or (where no steps have been prescribed) adopt the best practicable means⁹⁰ for preventing such dust from becoming so dispersed or causing such nuisance.⁹¹

⁸⁷ Section 20(11).

⁸⁸ Section 20(1). For a full list of declared smoke control zones, see PGW Henderson *Environmental Laws of South Africa* (1996) LA-9.

⁸⁹ Section 20(1)(b).

⁹⁰ 'Best practicable means' includes in any particular case any steps within the meaning of that expression as defined in section one which may be determined by the chief officer and specified in a notice signed by him and delivered or transmitted by registered post to the person who is required to adopt such means: s 28(2).

⁹¹ Section 28.

It is an offence for any person to fail to comply with the above provisions.⁹²

(i) Dust control area

This offence is applicable only in a dust control area. A 'dust control area' may be declared by the Minister after consideration of a report by the National Air Pollution Advisory Committee and after consultation with the Minister of Industries, Commerce and Tourism, by notice in the *Gazette*.⁹³ There are currently at present 88 areas which have been declared dust control areas.⁹⁴

(ii) Nuisance

'Nuisance' is not defined in the Act. According to common law, a nuisance is an unreasonable interference with the use and enjoyment of another person's land.⁹⁵

4.8 Failure to comply with dust control notice

Whenever in the opinion of the chief officer dust originating on any land in a dust control area and in relation to which the provisions of s 28(1) do not apply, is causing a nuisance to persons residing or present in the vicinity of that land, he may by notice in writing delivered or transmitted by registered post to the owner or occupier⁹⁶ of the land require such owner or occupier to take the prescribed steps or (where no steps have been

⁹² Section 28(3).

⁹³ Section 27(1).

⁹⁴ For full list, see Henderson *op cit* at LA-13.

⁹⁵ See JRL Milton 'Nuisance' in WA Joubert (ed) *The Law of South Africa* (1983).

⁹⁶ No requirement shall be imposed under this section upon an occupier of land who is not the owner thereof, unless the chief officer is of the opinion that the dust in question is caused by activities carried on by such occupier or that it is equitable, having regard to the duration of the period for which he is entitled to remain in occupation of such land or other relevant circumstances, to require him to take any steps or adopt any means contemplated in the section: s 29(2).

prescribed) adopt the best practicable means for the abatement of such nuisance.⁹⁷ It is an offence for any person to fail to comply with the requirements of any such notice⁹⁸

4.9 Evaluation

As pointed out above, there are several other offences under the Act that relate to the administration of the Act and these will not be discussed here. The Atmospheric Pollution Prevention Act also demonstrates the command and control approach, although the control likely to be exercised by the paltry penalties is somewhat dubious. There is provision in parts of the Act for abatement control measures to be exercised before use of the criminal sanction (see sections 19 and 29) and this is certainly a sensible approach since it potentially leads to the cessation of the undesirable activity with minimal administrative burden. The inadequacy of the criminal sanctions provided by this Act have, as has been pointed out above, led to the relevant authorities using alternative, and seemingly more effective, means (ie an interdict) of ensuring compliance with this Act.

5 *Mountain Catchment Areas Act 63 of 1970*

The objective of this Act is to provide for the conservation, use, management and control of land situated in mountain catchment areas. The Act empowers the competent authority to issue directions relating to the conservation, use, management and control of land within a declared mountain catchment area and the prevention of soil erosion, the protection and treatment of the natural vegetation and the destruction of vegetation which is, in the opinion of the Minister, intruding vegetation; and any other matter which he considers necessary or expedient for the achievement of the objects of this Act in respect of such land; and in the case of land outside a mountain catchment area but within five kilometres of the boundary of such an area, the destruction of vegetation which is, in the

⁹⁷ Section 29(1).

⁹⁸ Section 29(4).

opinion of the Minister, intruding vegetation.⁹⁹ The Act also provides for fire protection committees¹⁰⁰ and fire protection plans.¹⁰¹

Section 14, the penalties provision, provides:

Any person who-

- (a) contravenes or fails to comply with any provision of this Act or any regulation;
 - (b) refuses or fails to comply with any direction;
 - (c) obstructs or hinders any person referred to in section 11 in the execution of his duties or the performance of his functions;
 - (d) damages, or without the permission of the Director-General alters, any fire-belt or any other works constructed under this Act;
 - (e) contravenes or fails to comply with any provision of a fire protection plan;
 - (f) alters, moves, disturbs or wilfully damages or destroys any beacon erected under section 2A (1),
- shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

These offences are all relatively self-explanatory. No alternative measures for compliance with the Act are provided for, although the principal mode of enforcement is probably the issue of directions in terms of section 3.

6 Hazardous Substances Act 15 of 1973

The Hazardous Substances Act regulates hazardous substances by means of categorising hazardous substances depending on the substances' characteristics and applying appropriate regulatory provisions accordingly by means of regulation.¹⁰² The Act itself largely regulates the sale of Group I and III hazardous substances;¹⁰³ the letting, use, operation, application and installation of Group III, hazardous substances;¹⁰⁴ and the

⁹⁹ Section 3.

¹⁰⁰ Section 7.

¹⁰¹ Section 8.

¹⁰² Section 29.

¹⁰³ Section 3.

¹⁰⁴ Ibid.

production, acquisition, disposal, and importation and exportation, of Group IV hazardous substances.¹⁰⁵

Group I and II hazardous substances are any substance or mixture of substances which, in the course of customary or reasonable handling or use, including ingestion, might, by reason of its toxic, corrosive, irritant, strongly sensitizing or flammable nature or because it generates pressure through decomposition, heat or other means, cause injury, ill-health or death to human beings.¹⁰⁶ Group III hazardous substances are electronic products declared to be hazardous.¹⁰⁷ Group IV hazardous substances comprise radioactive material.¹⁰⁸

The following are offences under the Act (excluding administrative-type offences):

6.1 Selling a Group I hazardous substance without a licence

No person shall sell any Group I hazardous substance unless he is the holder of a licence issued to him in terms of section 4(a); and otherwise than subject to the conditions prescribed or determined by the Director-General.¹⁰⁹ The Minister may declare certain

¹⁰⁵ Section 3A.

¹⁰⁶ Section 2(1)(a). The distinction between Group I and Group II substances appears, from the declarations themselves, to be that the former comprise the toxic or poisonous substances whilst the latter contain those substances that are hazardous for other reasons. Group I hazardous substances were declared in GN R452 GG 5467 of 25 March 1977, as amended. Group II hazardous substances were declared in GN R1382 GG 15907 of 12 August 1994.

¹⁰⁷ Section 2(1)(b).

¹⁰⁸ Section 1. The full definition is 'radioactive material which is outside a nuclear installation as defined in the Nuclear Energy Act, 1999, and is not a material which forms part of or is used or intended to be used in the nuclear fuel cycle, and-

(a) has an activity concentration of more than 100 becquerels per gram and a total activity of more than 4 000 becquerels; or

(b) has an activity concentration of 100 becquerels or less per gram or a total activity of 4 000 becquerels or less and which the Minister has by notice in the Gazette declared to be a Group IV hazardous substance, and which is used or intended to be used for medical, scientific, agricultural, commercial or industrial purposes, and any radioactive waste arising from such radioactive material'.

¹⁰⁹ Section 3(1)(a).

hazardous substances not to be subject to the section and may exempt persons from the application of the section.¹¹⁰ There is also a clause excluding the liability of a person who sells such a substance within a specified period after the declaration of the substance as a Grouped hazardous substance.¹¹¹ The penalty for this offence is a fine or imprisonment for a period not exceeding two years or both.¹¹²

6.2 Selling, letting, using, operating, applying, installing or keeping installed any Group III hazardous substance

No person shall sell, let, use, operate or apply any Group III hazardous substance unless a licence under section 4 (b) is in force in respect thereof, and otherwise than subject to the conditions prescribed or determined by the Director-General.¹¹³ Also, no person shall install or keep installed any Group III hazardous substance on any premises unless a licence under section 4 (c) is in force in respect of such premises, and otherwise than subject to the conditions prescribed or determined by the Director-General.¹¹⁴ The same exemptions discussed in the previous paragraph apply.¹¹⁵ The penalty for this offence is a fine or imprisonment for a period not exceeding six years or both.¹¹⁶

6.3 Production, acquisition, disposal, and importation and exportation, of Group IV hazardous substances without authority

No person shall produce or otherwise acquire, or dispose of, or import into the Republic or export from there, or be in possession of, or use, or convey or cause to be conveyed, any Group IV hazardous substance, except in terms of a written authority under section

¹¹⁰ Section 3(1A).

¹¹¹ Section 3(2).

¹¹² Section 19(1)(c).

¹¹³ Section 3(1)(b).

¹¹⁴ Section 3(1)(c).

¹¹⁵ Sections 3(1A) and 3(2).

¹¹⁶ Section 19(1)(b).

3A(2) and in accordance with the prescribed conditions; and such further conditions (if any) as the Director-General may in each case determine.¹¹⁷ There is also an exemption clause in this section.¹¹⁸ The prescribed penalty for this offence is a fine or imprisonment for a period not exceeding 10 years or both.¹¹⁹

6.4 Furnishing a false or misleading warranty

According to section 14, no person shall be convicted on a charge of selling or importing¹²⁰ a Group I or Group II hazardous substance in contravention of any provision of this Act, if he proves that he or his employer or principal acquired or imported the grouped hazardous substance in question under a written warranty complying with the provisions of section 15 and furnished to him or to his employer or principal; and in the case of a sale of the grouped hazardous substance in question, that he sold it in the condition in which he acquired or imported it, or, if it was acquired or imported by his employer or principal, that he at no relevant time had reason to suspect that it was in any other condition than that in which it was so acquired or imported. Section 15 provides for the formalities in respect of the warranty, including the requirement that it guarantee that any substance to which it applies, is not a grouped hazardous substance in respect of which any prohibition in terms of the regulations applies.¹²¹ Any person who furnishes a warranty for the purposes of this Act which is false or misleading in any respect, shall be guilty of an offence,¹²² the penalty for which is a fine or imprisonment for a period not exceeding two years or both.¹²³

¹¹⁷ Section 3A.

¹¹⁸ Section 3A(5).

¹¹⁹ Section 19(1)(a).

¹²⁰ This is a somewhat strange provision since the *import* of a Group I or II hazardous substance is not an offence in terms of the Act itself and nor is the *sale* of a Group II hazardous substance.

¹²¹ Section 15(1)(c).

¹²² Section 15(2).

¹²³ Section 19(1)(c).

6.5 Miscellaneous provisions

There are several further provisions in the Act that relate to or augment the basic offence/penalty provisions. First, there is a vicarious liability clause very similar to that in the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act.¹²⁴ The employer, mandatory or principal will be liable for the act or omission which amounts to an offence under the Act carried out by an employee, mandatory or agent.¹²⁵ The onus is on the employer, mandatory or principal to prove that the employee, mandatory or agent was acting without the connivance of the former, and that all reasonable steps were taken by the principal to prevent any act or omission of the kind in question; and that the activity in question was outside the scope of employment of the employee. For the reasons set out above, when discussing the similar provision in the Fertilizers Act, this provision will probably fall foul of the Constitution.¹²⁶

¹²⁴ See above, text relating to n37.

¹²⁵ Section 16, which reads in full:

(1) An act or omission of an employee, mandatory or agent which constitutes an offence under this Act shall be deemed to be the act or omission of his employer, mandator or principal, and the said employer, mandator or principal may be convicted and sentenced in respect of it unless he proves-

- (a) that he did not permit or connive at such act or omission; and
- (b) that he took all reasonable measures to prevent an act or omission of the nature in question; and
- (c) that an act or omission, whether legal or illegal, of the nature in question did not under any conditions or in any circumstances fall within the course of the employment or the performance of the mandate or the scope of the authority of the employee, mandatory or agent concerned.

(2) For the purposes of subsection (1) (b) the fact that an employer or principal forbade an act or omission of the nature in question shall not by itself be regarded as sufficient proof that he took all reasonable measures to prevent such an act or omission.

(3) The provisions of subsection (1) shall not relieve the employee, manager or agent concerned from liability to be convicted and sentenced in respect of the act or omission in question.

(4) Whenever an employee, mandatory or agent does anything or fails to do anything which would have been an offence in terms of this Act if the employer, mandator or principal concerned had done it or had failed to do it, such employee, mandatory or agent shall be guilty of such offence.

¹²⁶ See above, at 69.

Second, there is a forfeiture clause, allowing the court to order the forfeiture to the state of any goods used in the commission of the offence.¹²⁷ This provision applies once the accused has been convicted. As pointed out above,¹²⁸ the forfeiture of goods that constitute the 'contraband' in the offence in question is unlikely to be problematic. This provision, however, also clearly considers instrumentalities to be subject to forfeiture as well. It has been suggested that the only real problem with forfeiture of instrumentalities is that the forfeiture does not constitute unfair and excessive punishment (in addition to the basic sentence).¹²⁹ In such cases, according to van der Walt, 'proportionality jurisprudence can be employed to indicate whether it is reasonable and justifiable to forfeit the property in question, given the court's findings on the facts, the nature of the property forfeited, the guilt of the defendant and the sentence already imposed'.¹³⁰

Added to these considerations, is the requirement that there be a necessary connection between the use of the instrumentality in question and the commission of the offence. If something is used only incidentally to the commission of the offence, then forfeiture of that item will not be countenanced. In *S v Vermeulen*,¹³¹ under scrutiny was the Drugs and Drug Trafficking Act,¹³² section 25(1)(b) of which requires mandatory forfeiture of 'any animal, vehicle, vessel, aircraft, container or other article which was used for the purpose of or in connection with the commission of the offence; or for the storage, conveyance, removal or concealment of any scheduled substance, drug or property by means of which the offence was committed or which was used in the commission of the offence. The Court held that the fact that the accused was found with prohibited drugs in his motor vehicle did not warrant the forfeiture of the motor vehicle because the link

¹²⁷ Section 21. The precise wording of s 21(1) is, 'the court convicting any person of an offence under this Act may declare any grouped hazardous substance, appliance, product, or other object in respect of which the offence has been committed or which was used for, in or in connection with the commission of the offence, to be forfeited to the State'.

¹²⁸ See above, discussion of forfeiture clause in Fertilizers etc Act: at §2.3.

¹²⁹ André van der Walt 'Civil forfeiture of instrumentalities and proceeds of crime and the Constitutional property clause' (2000) 16 *SAJHR* 1 at 7.

¹³⁰ *Ibid.*

¹³¹ *S v Vermeulen* 1995 (2) SACR 439 (T).

¹³² Act 40 of 1992.

between the use of the motor vehicle and the crime was not sufficiently strong. The finding in this case, it is submitted, would apply equally strongly to a permissive forfeiture clause.

Moving back to the Act, one of the difficulties of prosecuting an offence involving chemical substances is that it is often necessary to rely on scientific analysis as evidence and, if this requires using the analyst as an expert witness, there is the concomitant expense that has to be taken into account. In an attempt to circumvent this, the Hazardous Substances Act provides that a copy of any certificate or report by an analyst which the prosecutor intends to produce in evidence in any prosecution under this Act, shall be served on the accused with the summons,¹³³ and, if the accused has within three days after having been so served with a copy of a certificate or report, demanded in writing that the analyst who furnished the certificate or report be called as a witness at the trial, and has paid or tendered to the prosecutor a sum of money sufficient to defray the expenses incidental to the calling and attendance of the said analyst as a witness, and if the prosecutor produces the certificate or report in evidence at the trial, the prosecutor shall call the said analyst as a witness at such trial.¹³⁴ The Act gives the accused another option of, instead of requiring the calling of the said analyst as a witness, submitting to him written interrogatories approved by the court, and such interrogatories and any reply thereto, purporting to be a reply from the said analyst, shall be admissible in evidence in the proceedings.¹³⁵ The impact of this is that the accused will either accept the analyst's evidence or, if he wishes to challenge it, he must bear the cost of introduction of the evidence in question, rather than the state. This is a useful provision for this type of case, and is unlikely to fall foul of the Constitution given the decision in *S v van der Sandt*.¹³⁶

The Act also provides for several presumptions:

- (1) A copy of or extract from a book, statement or other document, made by an inspector under the Act and certified by him to be true and correct, shall, unless the contrary is proved, be presumed to be a true and correct copy of or extract from the relevant book,

¹³³ Section 22(3).

¹³⁴ Section 22(4).

¹³⁵ Section 22(5).

¹³⁶ 1997 (2) SACR 116 (W). See discussion above, at Chapter 3 §4.3.

statement or other document, and shall on its production in court be prima facie proof of any entry to which it relates.¹³⁷

(2) A certificate or report on the analysis or examination of a sample and purporting to be signed by an analyst, shall on its production in court be prima facie proof of the facts stated in it.¹³⁸

(3) Any quantity of a substance in or upon any premises at the time a sample of it is obtained by an inspector for the purpose of this Act, shall, unless the contrary is proved, be presumed to be in the same condition or possess the same properties as such sample.¹³⁹

(4) A sample of a substance obtained by an inspector for analysis or examination in terms of this Act, shall be presumed to have been sold to him by the person selling the substance of which it is a sample.¹⁴⁰

(5) If it is proved that any person has manufactured or imported any grouped hazardous substance it shall be presumed, unless the contrary is proved, that he manufactured or imported it for use in the Republic.¹⁴¹

(6) Any substance, appliance or other object found in or upon any premises where any grouped hazardous substance is manufactured, treated, packed, labelled, stored, conveyed, applied, used, operated or administered, shall, unless the contrary is proved, be presumed to be used for, in or in connection with the manufacture, treatment, packing, labelling, storage, conveyance, application, use, operation or administration of such grouped hazardous substance.¹⁴²

(7) Any person who sells, manufactures or imports any substance which contains any grouped hazardous substance or in or on which any grouped hazardous substance is

¹³⁷ Section 23(a).

¹³⁸ Section 23(b).

¹³⁹ Section 23(c).

¹⁴⁰ Section 23(d).

¹⁴¹ Section 23 (e).

¹⁴² Section 23(f).

present, shall be presumed to sell, manufacture or import, as the case may be, such grouped hazardous substance.¹⁴³

While some of these presumptions are understandable, the rationale for others is far from clear. Since none of them appear to be presumptions that would relieve the prosecution of proving the essential elements of any of the offences under the Act, they would not be problematic constitutionally. None of them have been considered judicially.¹⁴⁴

6.6 Evaluation

The offences provided for in the Hazardous Substances Act are the primary mode of enforcement. This is another example of a ‘command and control’ statute. Liberal use of made of questionable presumptions, and there are several other provisions that are susceptible to constitutional scrutiny, although several are probably safe from being struck down for the reasons given in the detailed discussion in the previous paragraphs.

7 *Sea Birds and Seals Protection Act 46 of 1973*

This Act provides for the control over certain islands and rocks; for the protection, and the control of the capture and killing, of sea birds and seals; and for the disposal of the products of sea birds and seals and for related matters. The terms ‘sea bird’ and ‘seal’ are both defined in the Act as comprising certain specified species of sea bird and seal respectively.¹⁴⁵ The offences provided for by this Act are as follows:

¹⁴³ Section 23(g).

¹⁴⁴ At least in reported judgments.

¹⁴⁵ A ‘sea bird’ is any penguin (Spheniscidae), gannet (Sulidae), cormorant (Phalacrocoracidae), gull (Laridae), tern (Sternidae), pelican (Pelicanidae), albatross (Diomedidae), petrel (Procellariidae, Thalassidromidae or Oceanitidae), dabchick (Podicipidae), ibis (Threskiornithidae), skua (Stercorariidae), wader (Charadriidae), oystercatcher (Haematopodidae), phalarope (Phalaropidae), flamingo (Phoenicopteridae) or sheathbill (Chionidae). A ‘seal’ is any Cape Fur seal (*Arctocephalus pusillus*), Antarctic seal, also known as Southern Elephant seal (*Mirounga leonina*), Leopard seal (*Hydrurga*

7.1 Setting foot or remaining on an island

It is an offence to set foot on or remain on any island, except in the performance of his or her duties under the Act or under the authority and subject to the conditions of an exemption granted by or under the Act, or of a permit.¹⁴⁶ 'Island', in terms of the Act, means any island or rock or any group of islands or rocks specified in Schedule 1 or any island specified in Schedule 2. Schedule 1 contains a number of islands/rocks, primarily off the coasts of the Western Cape, Eastern Cape and Namibia. Schedule 2 consists of Marion Island and Prince Edward Island. The maximum penalty, which is the penalty provided for all contraventions of this Act, is a fine not exceeding two hundred rand or imprisonment for a period not exceeding three months or both.¹⁴⁷ The fault requirement is not specified in the Act, but it is submitted that it would probably be intention. Given the purpose of this prohibition, which would appear to be protection of the habitat of seals and sea birds, there would not appear to be much reason to prosecute negligent contraventions. Section 3 of the Act has not been considered in any reported judgments.

7.2 Pursuing, shooting at, killing or capturing sea birds or seals

It is an offence, upon any island¹⁴⁸ or within the territorial waters or fishing zone of the Republic or along the coast of the Republic between the low-water mark and the highwater mark,¹⁴⁹ to pursue or shoot at or wilfully disturb, kill or capture any sea bird or seal except in the performance of his or her duties under the Act or under the authority and subject to the conditions of an exemption granted by or under this Act, or of a permit.¹⁵⁰ The penalty is as for the previous offence. The inclusion of the word

leptonyx), Weddel seal (*Leptonychotes weddelli*), Crabeater seal (*Lobodon carcinophagus*), Ross seal (*Ommatophoca rossi*) and Southern Fur Seal (*Arctocephalus* spp.

¹⁴⁶ Section 3(a). Permits are issued in terms of section 4.

¹⁴⁷ Section 12.

¹⁴⁸ As defined above.

¹⁴⁹ Both terms defined in s 1 of the Sea-shore Act 21 of 1935.

¹⁵⁰ Section 3(b).

‘wilfully’ as a qualification to the verbs ‘disturb, kill or capture’ serves to exclude the negligent disturbance of a sea bird or seal as an offence. Whether the exclusion of other qualifying adverbs relating to fault means that the other acts prohibited by this section (pursuing or shooting at) can be committed negligently or without fault is not clear. Whereas it is difficult to conceive of the possibility of negligently ‘pursuing’ something (the verb itself connotes intention), shooting at something could conceivably be carried out negligently, or even without fault. This would be subject to the court’s interpretation and it is submitted that the express inclusion of the word ‘wilfully’ where it does appear suggests that the legislature did not require intention as a requirement for the acts of pursuing or shooting at seabirds or seals.

7.3 Damaging or collecting eggs of sea birds

Nobody may wilfully damage the eggs of any sea bird upon any island or collect upon or remove from any island any such eggs or the feathers of any sea bird or any guano except in the performance of his or her duties under the Act or under the authority and subject to the conditions of an exemption granted by or under the Act, or of a permit.¹⁵¹ The penalty is as for the previous offences under this Act. It should be noted that the Act once again expressly provides that the mens rea requirement for this offence is intention by use of the word ‘wilfully’.

7.4 Failure to comply with permit

Any person who contravenes or fails to comply with any direction in a permit issued or lawfully transferred to him or her is guilty of an offence and liable to the same penalty as for the offences discussed above.¹⁵² Permits under the Act can be granted authorizing the

¹⁵¹ Section 3(c).

¹⁵² Section 12(b).

performance of any act which, under the Act, may be performed under the authority of a permit.¹⁵³ This would include capturing and killing of sea birds and seals.

7.5 Evaluation

The offences under this Act are the main enforcement mechanism (other than the permitting process) provided for by this Act and are relatively self-explanatory. The effectiveness of these compliance mechanisms, however, is likely to be undermined by the extremely low maximum penalties provided for by the Act.

8 *Lake Areas Development Act 39 of 1975*

This Act is concerned with the establishment of lake development areas and the institutional structures for management thereof. There are no prohibitions and offences provided for in the Act itself, but there is provision for offences to be created by means of regulation. Section 23(6) provides that any regulation made may prescribe penalties for any contravention of or failure to comply with its provisions, not exceeding a fine of two hundred rand or imprisonment for a period of one year or both. It is also provided that any regulation may provide that fines collected in pursuance of the regulation shall accrue to the Lake Areas Development Board.¹⁵⁴

8.1 Offences under regulations

There are two sets of regulations under the Act, one dealing with the Wilderness Lake Area¹⁵⁵ and one with the Knysna Lake Area.¹⁵⁶ Each set of regulations, which are all but identical, contain several prohibitions relating to issues such as prohibited developments with lake areas, equipment on vessels and contravention of rules for waterskiing. The

¹⁵³ Section 4(1).

¹⁵⁴ Section 23(4).

¹⁵⁵ GN R311 in GG 6862 of 22 February 1980.

¹⁵⁶ GN R2774 in GG 10036 of 13 December 1985.

maximum penalty for contravention of these offences is as provided in the Act, and provision is made in the regulations for payment of fines to the Board.

8.2 Evaluation

There is nothing remarkable about the enforcement provisions under the Lake Areas Development Act. Those offences that are provided are applicable only to limited geographical areas of the country.

9 *National Parks Act 57 of 1976*

This Act, according to the long title, consolidates laws relating to national parks. The national parks are possibly the most important (certainly the most high-profile) of the protected area system in South Africa, and this Act deals with a variety of issues concerning the parks: establishment of parks, issues relating to the National Parks Board and its employees, and regulation of activities in national parks. It is in respect of the last aspect that there are several offences that would fall under the umbrella of environmental offences. There is one offence relating to driving of motor vehicles in a park in the Act itself and several such offences contained in regulations made under the Act, but these will not be discussed here.

9.1 Entry or residence in park without permission

No person other than an officer or employee acting under the authority of the board may enter or reside in a park without the permission of the board or any officer or employee authorised to grant such permission.¹⁵⁷ Permission may be granted subject to such conditions as may be deemed necessary and shall be granted only for certain stated purposes, including study or recreation.¹⁵⁸ The penalty for this offence is a maximum

¹⁵⁷ Section 21(1)(a).

¹⁵⁸ Section 23.

fine of R1 000 or, in default of payment of the fine, to imprisonment for a maximum of three months or, in the case of a previous conviction under the subsection in question, to a fine not exceeding R2 000 or imprisonment for a maximum of six months.¹⁵⁹

In *S v Le Roux*,¹⁶⁰ the issue was whether this offence was one of strict liability. The Court held that it did not provide for an absolute prohibition but that the state must prove that the accused's unintentional crossing of the park boundary was at least due to his or her negligence or carelessness. The Court decided that the accused had been negligent *in casu*.

9.2 Possession of weapon, explosive, trap or poison

No person other than an officer or employee acting under the authority of the board may convey into a park or within a park be in possession of any weapon, explosive, trap or poison.¹⁶¹ 'Weapon' is defined as any fire-arm (*sic*) or ammunition for a fire-arm, or any other instrument by means of which a projectile can be propelled or used in such a manner that any animal can be killed or injured thereby.¹⁶² In *S v Msubo*,¹⁶³ the Court correctly held that a cane knife fell within this definition.¹⁶⁴ 'Trap' is any device or substance with which or by means of which an animal can be captured.¹⁶⁵ 'Poison' includes any substance that can be used to immobilise an animal.¹⁶⁶ The penalty is as for the previous offence discussed above.

¹⁵⁹ Section 24(8).

¹⁶⁰ 1969 (3) SA 745 (T).

¹⁶¹ Section 21(1)(b).

¹⁶² Section 1.

¹⁶³ 1965 (4) SA 266 (N).

¹⁶⁴ The case did not concern the definition in the National Parks Act, but an identical definition in a Natal Ordinance of 1955.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

9.3 Hunting, killing or injuring any animal

No person other than an officer or employee acting under the authority of the board may within a park hunt or otherwise wilfully or negligently kill or injure any animal.¹⁶⁷ ‘Hunt’ is defined as follows: with reference to an animal, to kill, shoot at, capture or attempt to capture, or to follow or to search for or lie in wait for with intent to kill, shoot or capture.¹⁶⁸ In *R v Carter*,¹⁶⁹ it was decided that ‘searching for’ animals does not have to take place immediately before the shooting or killing part of the hunt, but that tracking down animals several days before intending to execute the hunt qualifies as ‘search for’.¹⁷⁰

The penalty for this offence differs depending on the species of animal in respect of which the offence is committed. If it is an animal specified in Schedule 2,¹⁷¹ other than an elephant or black or white rhinoceros, the offender shall be liable to a fine of not less than R4 000 and not more than R8 000 or, in default of payment of the fine, to imprisonment for a period of not less than one year and not more than two years. In the case of a previous conviction, the offender may be sentenced to imprisonment without the option of a fine.¹⁷²

If the animal is an elephant or rhinoceros, the fine is not less than R30 000 and not more than R100 000 or, in default of payment, imprisonment of not less than three years and not more than ten years. The option of a fine may be removed in the case of a previous conviction.¹⁷³ In addition, on first or subsequent conviction, such an offender is liable to a further fine not exceeding three times the commercial value of the animal in

¹⁶⁷ Section 21(1)(c).

¹⁶⁸ Section 1.

¹⁶⁹ 1954 (2) SA 317 (E).

¹⁷⁰ The case did not concern the National Parks Act, but the term, used in the applicable provincial ordinance, is the same as that used in the Act.

¹⁷¹ Schedule 2 is an extensive list of animals containing several mammals, a few fish and reptiles and several birds. It excludes species such as zebra, impala, blue wildebeest and baboon, which would appear to be those which are more numerous and not under significant threat.

¹⁷² Section 24(1)(a).

¹⁷³ Section 24(1)(b).

respect of which the offence was committed. This could amount to a significant sum: in 2001, the KwaZulu-Natal Nature Conservation Services game auction fetched an average price of just under R177 000 for the white rhinoceros and R550 000 for black rhinoceros.¹⁷⁴

Finally, if the animal is not on Schedule 2, the fine is not less than R1 000 and not more than R6 000. In default of payment, the imprisonment is for not less than three months and not more than eighteen months. If the offender has been convicted previously, then he or she will be liable to imprisonment without the option of a fine.¹⁷⁵ By way of illustration, in *S v Sibuyi*,¹⁷⁶ the accused was found guilty of hunting an impala and sentenced to a fine of R1 200 or nine months imprisonment.

9.4 Disturbing any animal

No person other than an officer or employee acting under the authority of the board may within a park disturb any animal. 'Disturb' with reference to an animal, means wilfully or negligently to injure, to tease, to alarm, to hinder, to interfere with, to throw an object at or to make aggressive.¹⁷⁷ Once again, the penalty for contravention of this provision depends on the animal that has been disturbed. Any person who disturbs any elephant, rhinoceros, lion, buffalo or baboon is liable to a fine of not less than R300 and not more than R1 000 or, in default, imprisonment of not less than one month and not more than three months. In case of previous conviction, the fine is not less than R1 000 and not more than R2 000 or, in default, not less than three months and not more than six months imprisonment.¹⁷⁸

In the case of an animal not specified in s 24(3), the maximum fine is R300 or, in default, imprisonment of no more than one month. Subsequent offenders are subject to a maximum fine of R1 000 or, in default, maximum prison term of three months.

¹⁷⁴ KZN NCS website: <http://www.rhino.org.za/auction2001.htm> (accessed 20 November 2001).

¹⁷⁵ Section 24(2).

¹⁷⁶ 1991 (2) SACR 163 (T).

¹⁷⁷ Section 1.

¹⁷⁸ Section 24(3).

9.5 Taking, damaging or destroying eggs, nests or honey

No person other than an officer or employee acting under the authority of the board may within a park take, damage or destroy any egg or nest of any bird, or take honey from a beehive.¹⁷⁹ The penalty for this offence is a maximum fine of R1 000 or, in default of payment of the fine, to imprisonment for a maximum of three months or, in the case of a previous conviction under the subsection in question, to a fine not exceeding R2 000 or imprisonment for a maximum of six months.¹⁸⁰

9.6 Causing a veld fire and damaging objects

No person other than an officer or employee acting under the authority of the board may wilfully or negligently cause a veld fire, or any damage to any object of geological, archaeological, historical, ethnological, oceanographic, educational or other scientific interest, within a park.¹⁸¹ A person convicted of causing a veld fire is liable to a fine of not less than R1 000 and not more than R6 000. In default of payment, the imprisonment is for not less than three months and not more than eighteen months. If the offender has been convicted previously, then he or she will be liable to imprisonment without the option of a fine.¹⁸² Any other contravention of the subsection will attract a penalty of a maximum fine of R1 000 or, in default of payment of the fine, imprisonment for a maximum of three months or, in the case of a previous conviction under the subsection in question, a fine not exceeding R2 000 or imprisonment for a maximum of six months.¹⁸³

¹⁷⁹ Section 21(1)(e).

¹⁸⁰ Section 24(8).

¹⁸¹ Section 21(1)(f).

¹⁸² Section 24(2).

¹⁸³ Section 24(8).

9.7 Introducing or permitting entry of animal into park

No person other than an officer or employee acting under the authority of the board may introduce any animal or permit any domestic animal to stray into or enter a park. The penalty for this offence is a maximum fine of R1 000 or, in default of payment of the fine, to imprisonment for a maximum of three months or, in the case of a previous conviction under the subsection in question, to a fine not exceeding R2 000 or imprisonment for a maximum of six months.¹⁸⁴

9.8 Possession of an animal in a park

No person other than an officer or employee acting under the authority of the board may within a park be in possession of any animal (other than an animal lawfully introduced into the park), whether alive or dead, or any part of an animal, or remove such animal or any part thereof from a park.¹⁸⁵ This subsection and section 21(1)(c), which prohibits hunting and killing of animals, are the two primary anti-poaching offences. The penalties for contravention of this section are the same as for contravention of s 21(1)(c) (described in 9.3 above) if the animal in question is a Schedule 2 animal or elephant or rhinoceros.¹⁸⁶ For any other animal, the penalty is a maximum fine of R1 000 or, in default of payment of the fine, to imprisonment for a maximum of three months or, in the case of a previous conviction under the subsection in question, to a fine not exceeding R2 000 or imprisonment for a maximum of six months.¹⁸⁷

9.9 Cutting, damaging, removing or destroying any tree or plant

No person other than an officer or employee acting under the authority of the board may cut, damage, remove or destroy any tree or any part thereof, dry or firewood, grass or

¹⁸⁴ Section 24(8).

¹⁸⁵ Section 21(1)(h).

¹⁸⁶ Section 24(1).

¹⁸⁷ Section 24(8).

other plant (including any marine plant) in a park.¹⁸⁸ There are specific penalties for contravention of this section, which, like the offences in respect of animals, differ for different categories of plants. If someone commits an offence in respect of a tree or plant on Schedule 3,¹⁸⁹ he or she will be liable to a minimum fine of R1 000 and maximum of R6 000 or, in default of payment, not less than three months and not more than eighteen months imprisonment. If there is a previous conviction for this offence, the offender may be sentenced to imprisonment without the option of a fine.¹⁹⁰

If the plant is not on the Schedule, then the penalty is a fine of not less than R300 and not more than R1 500 or, in default, imprisonment of not less than one month and not more than four months. Imprisonment without the option of a fine may be imposed on repeat offenders.¹⁹¹

9.10 Removal of seed

No person other than an officer or employee acting under the authority of the board may within a park remove seed from any tree or other plant without the permission of the board or any officer or employee authorised to grant such permission.¹⁹² The penalty for this offence is a maximum fine of R1 000 or, in default of payment of the fine, to imprisonment for a maximum of three months or, in the case of a previous conviction under the subsection in question, to a fine not exceeding R2 000 or imprisonment for a maximum of six months.¹⁹³

¹⁸⁸ Section 21(1)(i).

¹⁸⁹ Schedule 3 contains an extensive list of trees and plants.

¹⁹⁰ Section 24(5).

¹⁹¹ Section 24(6).

¹⁹² Section 21(1)(j).

¹⁹³ Section 24(8).

9.11 Feeding an animal

No person other than an officer or employee acting under the authority of the board may feed any animal in a park.¹⁹⁴ The penalty is as for the previous offence.

9.12 Forfeiture

Over and above any penalty discussed above, any weapon, explosive, trap or poison used in contravening any provision of the Act or which forms an element of the contravention shall, in addition to any other punishment, be declared forfeited to the State.¹⁹⁵ If a forfeited weapon is an ‘armament’ referred to in section 32(1) of the Arms and Ammunition Act 75 of 1969, it must be delivered to the South African Police Service to be disposed of.¹⁹⁶

Moreover, any animal (other than a domestic animal) or article in respect of which the provisions of section 21(1)(c) (prohibition of hunting and killing animals – see §9.3 above), 21(1)(e) (taking or damaging birds’ nests or eggs or honey – see §9.5 above) or 21(1)(h) (possession of an animal – see §9.8 above) has been contravened shall be declared forfeited to the State.¹⁹⁷

In addition, any vehicle¹⁹⁸ or vessel¹⁹⁹ used in connection with the contravention of sections 21(1)(c) or (h) may, if the contravention was wilful, be declared forfeited to the State unless it is proved that the person convicted is not the owner of such vehicle or

¹⁹⁴ Section 21(1)(k).

¹⁹⁵ Section 24(9)(a).

¹⁹⁶ Section 24(10)(a).

¹⁹⁷ Section 24(9)(a).

¹⁹⁸ Which is defined as any conveyance which can be sued for the transportation of persons or goods on land, whether such conveyance is self-propelled or not (s 1).

¹⁹⁹ Which is defined as any conveyance which can be used for the transportation of persons or goods on, in or over water, whether such conveyance is self-propelled or not (s 1).

vessel and that the owner thereof could not have prevented its use by the person convicted.²⁰⁰

There are several cases dealing with forfeiture in respect of conservation offences that are instructive as to how forfeiture is carried out. These cases do not deal with the forfeiture provisions under the National Parks Act, but rather with similar provisions in provincial legislation, but the overall principles (and, in many case, the wording of the legislation) are the same. In *S v Roos*,²⁰¹ the issue was whether a vehicle would be forfeited when the offender was not the 'owner' of the vehicle, which he had purchased under a hire-purchase agreement (the seller, therefore, being the official owner). The Court held that the vehicle did not 'belong to' the possessor for purposes of the forfeiture provision. The ordinance in question contained a provision to the effect that the vehicle could be forfeited if the offender was not the owner, unless it could be shown that the owner thereof could not have prevented its use by the person convicted. Clearly this was a case where this exclusion would apply.

In *S v Shiers*,²⁰² the question was whether a firearm that had not been fired could have been 'used' in commission of the offence. The Court held, correctly it is submitted, that the firing of the gun was not a prerequisite to its 'use' in the commission of the offence.

On the issue of forfeiture of a vehicle used in illegal hunting, the judgment in *R v Edy*²⁰³ is a questionable one. The Court here held that use of a motor vehicle in matters preparatory to the hunting (deriving access to the hunting area, for example) is not use in the act of hunting itself. In this case, the accused had been found in a motor vehicle containing hunting torches, one of which was connected to the car's battery, and with a recently-fired rifle and dead antelope in the boot. The judgment, therefore, is highly questionable on the facts. The wording of section 24(9)(b) of the National Parks Act, however, would cover even the situation where a vehicle was used merely to provide access to the national park for purposes of hunting, since it speaks of a vehicle used 'in connection with' the offence.

²⁰⁰ Section 24(9)(b).

²⁰¹ 1967 (4) SA 320 (T).

²⁰² 1971 (4) SA 244 (RAD).

²⁰³ 1957 (2) SA 429 (SR).

A final, though a very important, issue to consider is whether these forfeiture provisions are constitutional. As indicated in earlier discussion of forfeiture provisions,²⁰⁴ there have been no constitutional challenges on such provisions and the forfeiture of illegal articles (for example, drugs or unlicensed firearms) as well as the instrumentalities of crime (articles used in the commission of the offence) are usually regarded as justifiable inroads into a person's property rights. Where there may be a possible problem is that the forfeiture of instrumentalities, including a motor vehicle in some cases contemplated by the National Parks Act, might be considered to constitute excessive punishment. For example, somebody found guilty of contravening section 21(1)(e) as a result of negligently killing an animal by knocking it over while speeding in a park may be liable to have his or her vehicle forfeited. Although the Constitution forbids 'cruel' punishment, it is unclear whether excessive punishment would conflict with this right. The forfeiture clause with respect to vehicles is permissive rather than mandatory, so this would probably serve to restrict its application to appropriate circumstances. The forfeiture clause in respect of weapons and other articles or animals (other than vehicles) used in commission of an offence is mandatory, but is likely to be safe from constitutional challenge due to the public interest involved in ensuring that articles used in the commission of crime are removed from the offender.

9.13 Miscellaneous matters

A magistrate's court has jurisdiction to impose any punishment provided for in section 24 of the Act.²⁰⁵

Another provision of relevance to criminal prosecution is that, where a person is convicted of an offence for which a minimum sentence is provided, such minimum punishment shall not apply to a convicted person under the age of eighteen years.²⁰⁶

²⁰⁴ See § 1.2 (supra).

²⁰⁵ Section 25.

²⁰⁶ Section 24(7).

The Act contains some interesting provisions relating to powers of search and seizure. In addition to the regular powers of search and seizure in terms of the Criminal Procedure Act 51 of 1977,²⁰⁷ an officer or employee designated by the National parks Board may within a park or at any place within 10 kilometres from the boundary of a park, arrest without a warrant any person who is on reasonable grounds suspected of having committed an offence under this Act.²⁰⁸ Such an official may also, within a park or at any place within 10 kilometres of a park boundary, search without warrant any premises, place, vehicle, vessel, tent or receptacle of whatever nature if it is on reasonable grounds suspected that there is at or in such premises, place, vehicle, vessel, tent or receptacle any animal or article which may afford evidence of the commission of an offence under this Act, and may seize any such animal or article wherever found.²⁰⁹

It is unlikely that this search and seizure provision would present constitutional problems. Despite the fact that the section allows search without a warrant, the nature of the circumstances in which such a search would typically be carried out would be such that the delay in applying for a warrant would frustrate the enforcement efforts of the officials concerned. The section does explicitly require there to be ‘reasonable grounds’ for the suspicion of the presence of an animal or article which may afford evidence of the commission of an offence, which would be the requirements for granting of a warrant were application to be made for one.

One final issue that should be mentioned relates to splitting of charges. A person who kills an animal in a park (which is an offence in terms of section 21(1)(c)) and then has in his or her possession the carcass (an offence in terms of section 21(1)(h)) has, at least technically, committed two separate offences. It has been held, however, that charging an accused with both illegal hunting and possession of the carcass arising out of the same factual cause, amounts to improper splitting of charges.²¹⁰ Although this case involved legislation other than the National Parks Act, the offences were substantially the same and the overarching principle would certainly be applicable here.

²⁰⁷ Chapter 5.

²⁰⁸ Section 27(1).

²⁰⁹ Section 27(2).

²¹⁰ *S v Mawelele* 1990 (2) SA 8 (T).

9.14 Evaluation

The offences in the National Parks Act are, by and large, straightforward. The enforcement mechanisms used do not involve reverse-onus provisions and the only possible problematic provision, it is submitted, is that which deals with forfeiture of motor vehicles. The criminal sanctions provisions are the only enforcement mechanisms provided for in the Act.

10 Health Act 63 of 1977

The Health Act deals with a wide range of health issues, only some of which fall under the category of environmental law. The only offence under the Act that could be regarded as an environmental offence is contained in section 27. This section provides for a notice procedure requiring the recipient to take certain steps. Non-compliance is an offence. The relevant portion of the section reads:

(1) Where in the opinion of a local authority a condition has arisen within its district which is of such a nature as to be offensive or a danger to health unless immediately remedied and to which the provisions of the Atmospheric Pollution Prevention Act 45 of 1965 are not applicable, it may serve a written notice on the person responsible for such condition having arisen or the occupier or owner of the dwelling in which or premises on which such condition exists, calling upon him to remedy the condition within such period as may be specified in such notice.

(2) Any person failing to comply with any such notice shall be guilty of an offence.

The section allows the local authority, in the event of non-compliance by the offender, to take the necessary steps itself and to recover the costs of doing so from the person in question.²¹¹

The penalty, provided by section 57 for this offence is, for a first conviction, a maximum fine of five hundred rand or imprisonment for a maximum of six months or both. A second conviction carries a fine of not more than R1 000 or one year's imprisonment or both. In the case of a third or subsequent conviction, the maximum fine is R1 500 or two years' imprisonment or both. These penalties are somewhat on the low

²¹¹ Section 27(3).

side and are unlikely in themselves to pose a considerable deterrent. Coupled with liability for the remedial costs of the local authority, however, and it may be that the section does have adequate deterrent effect.

This type of provision is the ideal environmental law provision. The initial enforcement mechanism is the notice. The authority concerned requires the person to do something to remedy an undesirable state of affairs. If the notice is heeded, the objective of the legislation is served without much burden being suffered by the enforcing authority. Failure to comply with the notice is an offence and non-compliance would, in most cases, not be likely to raise difficult problems of proof. Since the Act also provides for the authority to take remedial measures upon default of the person receiving the notice, the environment is protected and/or harm mitigated. There is compliance with the polluter pays principle due to the defaulter being responsible for the authority's costs in carrying out the necessary activities.

This system, which uses criminal law as a back-up to the primary enforcement mechanism (the notice) is an efficient one. The notice would serve to put people on their guard and consequently issues of mens rea would not be likely to present problems in prosecutions for failure to comply with the notice.

This provision works along similar lines to the process envisaged in section 28 of the National Environmental Management Act 107 of 1998 (discussed in the following chapter), but operates in a far simpler manner. Another significant difference is that section 28 does not provide for criminal prosecution in event of non-compliance.

There are no reported cases dealing with section 27.

11 *Dumping at Sea Control Act 73 of 1980*

This Act provides, as the name suggests, for the control of dumping of substances in the sea. It puts into effect for South Africa the requirements of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972 (the so-called London Convention). The main offences under this Act are three types of dumping of substances at sea.

11.1 Dumping of substances at sea

According to section 2,

- (1) Any person who –
- (a) dumps any substance mentioned in Schedule 1;
 - (b)(i) dumps any substance mentioned in Schedule 2;
 - (ii) loads any such substance onto any vessel, aircraft, platform or other man-made structure at sea for dumping; or
 - (iii) deliberately disposes at sea of any vessel, aircraft, platform or other man-made structure, except under the authority of and in accordance with the provisions of a special permit under section 3,²¹² or
 - (c) (i) dumps any other substance; or
 - (ii) loads any such substance on to any vessel, aircraft, platform or other man-made structure at sea for dumping, except under the authority of and in accordance with the provisions of a general permit under section 3,

shall be guilty of an offence, unless the substance in question was dumped for the purpose of saving human life or of securing the safety of the vessel, aircraft, platform or other man-made structure at sea in question or any other vessel, aircraft, platform or other man-made structure at sea or of preventing damage to the vessel, aircraft, platform or other man-made structure at sea in question or to any other vessel, aircraft, platform or other man-made structure at sea, and such dumping was necessary for such purpose or was a reasonable step to take in the circumstances.

(2) The onus of proving any exception, exemption or qualification contemplated in subsection (1) shall be upon the accused.

(3) If any person who commits an offence referred to in subsection (1) is not the master or owner of the vessel, or the pilot or owner of the aircraft, in question, or person in charge of or the owner of the platform or other man-made structure in question, the master of such vessel or pilot of such aircraft or person so in charge and, if he is not the owner of such vessel, aircraft, platform or other man-made structure, also the owner thereof, shall in addition to the person who committed the said offence, be guilty of an offence, unless such master or pilot or person so in charge, and such owner, where he is not such master or pilot or person so in charge, proves that he did not permit or connive at such first-mentioned offence and that he took all reasonable measures, in addition to forbidding it, to prevent such offence being committed

The prohibitions in this section apply in respect of the ‘sea’, which is defined as the territorial waters of the Republic²¹³ and includes the sea between the high- and low-water

²¹² Section 2(1)(b).

marks.²¹⁴ The provisions of section 2 in respect of any South African vessel,²¹⁵ aircraft²¹⁶ or citizen, apply mutatis mutandis also on the high seas, including the fishing zone.²¹⁷ The Act also applies in respect of the Prince Edward Islands.

Section 2 provides for three separate offences: (1) dumping a Schedule 1 substance; (2) dumping or loading for dumping of Schedule 2 substances without a special permit; and (3) dumping or loading any other substance without a general permit.

Dumping a Schedule 1 substance

‘Dump’ in relation to any substance, means to deliberately dispose of at sea from any vessel, aircraft, platform or other man-made structure, by incinerating or depositing in the sea and includes the disposal of any vessel, aircraft, platform or other man-made structure at sea.²¹⁸ It does not include to dispose at sea of any substance incidental to or derived from the normal operations of any vessel, aircraft, platform or other man-made structure and its equipment, other than dispose of any substance from any vessel, aircraft, platform or other man-made structure operated for the purpose of disposing of such substance at sea. Nor does it include the lawful deposit at sea of any substance for a purpose other than the mere disposal thereof. Also excluded is the disposal at sea of wastes or other matter directly arising from or related to the exploration, exploitation and associated off-shore processing of sea-bed mineral resources.

The requirement that the disposal be ‘deliberate’ suggests that the mens rea requirement for this offence is intention. The prohibition relates to substances mentioned in Schedule 1, and is an absolute prohibition: these substances may not be dumped under any circumstances, save those set out in the exception. Schedule 1 substances, termed prohibited substances, are: organohalogen compounds; mercury and its compounds; cadmium and its compounds; persistent plastics and other persistent synthetic materials;

²¹³ As defined in s 2 of the Territorial Waters act 87 of 1963.

²¹⁴ Section 1.

²¹⁵ Any vessel registered in the Republic in terms of the Merchant Shipping Act 57 of 1951: s 2(8).

²¹⁶ Any aircraft registered in the Republic: s 2(8).

²¹⁷ Section 2(6). ‘Fishing zone’ is as defined in s 3 of the Territorial Waters Act 87 of 1963.

²¹⁸ Section 1.

high-level radio-active waste or other high-level radio-active matter prescribed by regulation with the concurrence of the Minister of Mineral and Energy Affairs; and substances in whatever form produced for biological and chemical warfare.

The penalty for this offence is a fine not exceeding R250 000 or imprisonment for a period not exceeding five years or both such fine and such imprisonment and in addition, if the offence was committed over a period of more than one day, a fine not exceeding R5 000 or imprisonment for a period not exceeding six months in respect of every day during which the offence continued.²¹⁹ The same penalty applies to any master, pilot, owner or person in charge mentioned in s 2(3) convicted in terms of s 2(1)(a) where such conviction is in pursuance of an offence by any other person.²²⁰:

Dumping or loading for dumping of Schedule 2 substances without a special permit

Schedule 2 substances, termed restricted substances, are: arsenic and its compounds; lead and its compounds; copper and its compounds; zinc and its compounds; organosilicon compounds; cyanides; fluorides; pesticides and their by-products (those not included in Schedule 1); beryllium and its compounds; chromium and its compounds; nickel and its compounds; vanadium and its compounds; containers, scrap metal and any substances or articles that by reason of their bulk may interfere with fishing or navigation; radio-active waste or other radio-active matter (such as are not in Schedule 1); and ammunition.

A special permit may be granted in terms of section 3, which provides that, after consultation with a Standing Committee consisting of persons appointed by the Minister of Industries for purposes of this section, the Secretary of Industries may on application and after taking into account the factors set out in Schedule 3, grant a special permit authorizing the dumping, on such conditions as the Secretary may think fit to attach to such permit, of any substance mentioned in Schedule 2; and/or the disposal at sea, on such conditions as the Secretary may think fit to attach to such permit, of any vessel,²²¹ aircraft,²²² platform or other man-made structure.²²³

²¹⁹ Section 6(1)(a).

²²⁰ Section 6(2)(a).

²²¹ Waterborne craft of any type whatsoever, whether self-propelled or not: s 1.

²²² Airborne craft of any type whatsoever, whether self-propelled or not: s 1.

The penalty for this offence is a fine not exceeding R100 000 or imprisonment for a period not exceeding two years or both such fine and such imprisonment and in addition, if the offence was committed over a period of more than one day, a fine not exceeding R2 000 or imprisonment for a period not exceeding two months in respect of every day during which the offence continued.²²⁴ The same penalty applies to any master, pilot, owner or person in charge mentioned in s 2(3) convicted in terms of s 2(1)(b) where such conviction is in pursuance of an offence by any other person.²²⁵

Dumping or loading any other substance without a general permit

‘Any other substance’ means any substance other than those mentioned in Schedules 1 and 2 and excluding any vessel, aircraft, platform or other man-made structure. Such substance may be disposed of at sea in terms of a general permit granted in the same manner as is a special permit. The general permit is also granted on such conditions as the Secretary may think fit to attach to it.

The penalty for this offence is a fine not exceeding R5 000 or imprisonment for a period not exceeding six months or both such fine and such imprisonment and in addition if the offence was committed over a period of more than one day, a fine not exceeding R500 or imprisonment for a period not exceeding 18 days in respect of every day during which the offence continued.²²⁶ The same penalty applies to any master, pilot, owner or person in charge mentioned in s 2(3) convicted in terms of s 2(1)(c) where such conviction is in pursuance of an offence by any other person.²²⁷

11.2 Contravention of regulations

The Minister may make regulations-

²²³ Section 3(1)(a).

²²⁴ Section 6(1)(b).

²²⁵ Section 6(2)(b).

²²⁶ Section 6(1)(c).

²²⁷ Section 6(2)(c).

- (a) prescribing the form of applications for permits and other documents which may be necessary for the carrying out of the provisions of this Act;
 - (b) prescribing the form of such permits and documents, the periods for which they shall be valid and, after consultation with the Minister of Finance, the fees or other charges which shall be paid in connection therewith and with the said applications;
 - (c) prescribing the manner in which water or any other substance used for the cleaning of any vessel or aircraft may be disposed of;
 - (d) prescribing the signals to be used or displayed with regard to any dumping under a special or general permit granted under section 3 (1) (a) (i) or (b);
 - (e) as to any matters which in terms of this Act are required or permitted to be prescribed by regulation,
- and, in general, as to all matters which he considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved.

It is an offence to contravene or fail to comply with the provisions of a regulation.²²⁸

There are regulations²²⁹ made in terms of section 8 of the Act that provide for the application process for permits. They also provide for a duty to report any dumping or disposal which has been made pursuant to any exception, exemption or qualification contemplated in section 2(1). There are also reporting requirements in respect of dumping and disposal that has been the subject of permits in terms of the Act. Any contravention of any provision of these regulations is an offence and subject to the penalties provided for in section 8(2) of the Act.

11.3 Procedural Aspects

If any person charged with having committed an offence under s 2(1), as applied by section 2(6), is found within the area of jurisdiction of any court in the Republic which

²²⁸ Section 8(2) by implication. This subsection prescribes a penalty not exceeding a fine of R5 000 or imprisonment for a period of six months.

²²⁹ GN R1135 GG 11348 of 17 June 1998.

would have had jurisdiction to try the offence if it had been committed within the said area, the court shall have jurisdiction to try the offence.²³⁰

Moreover, if any person is charged with having committed any offence under this Act on or in the sea, any court whose area of jurisdiction abuts on or includes any part of the sea may try the charge, and the offence shall, for all purposes incidental to or consequential upon the trying of the charge, be deemed to have been committed within the area of jurisdiction of the court so hearing it.²³¹ Also, in any prosecution for a contravention of this Act based on any act alleged to have been performed in a particular area, the act in question shall be deemed to have been performed in such area; and any information obtained by means of any instrument or chart used to determine any distance or depth, shall be deemed to be correct, unless the contrary is proved.²³²

11.4 Vicarious liability

Section 2(3) provides for vicarious liability of the owner and master/pilot/person in charge of the vessel, aircraft or platform as the case may be. Liability may be avoided if the person in question proves that he did not ‘permit or connive at’ the offence and that he or she ‘took all reasonable measures, in addition to forbidding [the conduct in question], to prevent the offence being committed’. Insofar as this section imposes a reverse onus on the accused, it would most likely fall foul of the Constitution, if the precedent in *S v Coetzee*²³³ were followed. The topic is discussed in further detail in Chapter 10.

11.5 Evaluation

This Act consists largely of the offences described above, which are the only enforcement mechanism provided for. The heavy penalties reflect the seriousness with which the

²³⁰ Section 2(7).

²³¹ Section 7(1).

²³² Section 7(2).

²³³ 1997 (3) SA 527 (CC).

various offences of dumping at sea, especially in respect of the Scheduled substances, are seen. Unfortunately, however, the Act is a very difficult one to enforce from a practical point of view, which is perhaps reflected by the apparent lack of prosecutions under this Act.

12 Marine Pollution (Control and Civil Liability) Act 6 of 1981

This Act used to be called the ‘Prevention and Combating of the Sea by Oil Act’ which gives a good indication of its purpose. The Act contains several offences, mainly of a technical/administrative nature. The offences worth examining for present purposes are as follows:

12.1 Discharge of oil

This offence is provided for in section 2 of the Act, which has been repealed.²³⁴ The repealing provision, however, has yet to be out into operation (despite having been Gazetted four years ago). Although the offence remains technically in force, the definition of ‘discharge’ in relation to oil has been replaced, making it unlikely that section 2(1) will be enforced again before its repeal comes into effect. For this reason, it will not be discussed here.

12.2 Failure to report discharge

²³⁴ By s 28 of the Shipping General Amendment Act 23 of 1997.

When any harmful substance²³⁵ has been discharged²³⁶ from a ship,²³⁷ tanker²³⁸ or offshore installation²³⁹ the master²⁴⁰ of such ship, tanker or offshore installation, or any member of the crew of such ship or tanker or of the staff employed in connection with such offshore installation, designated by such master, shall forthwith by the quickest means of communication available report the fact that such discharge has taken place to the principal officer²⁴¹ at the port in the Republic nearest to where such ship, tanker or offshore installation is.²⁴² In addition, if, while it is within the prohibited area,²⁴³ a ship

²³⁵ Defined as any substance which, if introduced into the sea, is likely to create a hazard to human health, harm living resources and marine life, damage amenities or interfere with other legitimate uses of the sea, and includes oil and any other substance subject to control by MARPOL 1973/78 (the convention contained in the Schedule to the Marine Pollution (Prevention of Pollution from Ships) Act of 1986), and mixtures of such substances and water or any other substance.

²³⁶ ‘Discharge’ means, in relation to a harmful substance, any release, howsoever caused, from a ship, a tanker or an offshore installation into a part of the sea which is a prohibited area, and includes any escape, disposal, spilling, leaking, pumping, emitting or emptying and ‘discharge’ when used as a verb has a corresponding meaning: s 1(1).

²³⁷ ‘Ship’ means any kind of vessel or other sea-borne object from which oil can be discharged, excluding a tanker, whether or not such vessel or object has been lost or abandoned, has stranded, is in distress, disabled or damaged, has been wrecked, has broken up or has sunk: s 1(1).

²³⁸ ‘Tanker’ is any seagoing vessel of any type whatsoever, actually carrying oil in bulk as cargo and in respect of which the provisions of the International Convention on Civil Liability for Oil Pollution Damage, 1969, are applicable: s 1(1).

²³⁹ An ‘offshore installation’ is a facility situated wholly or partly within a prohibited area and which is used for the transfer of harmful substances from a ship or tanker to a point on land or from a point on land to a ship or tanker or from a bunkering vessel to a ship or tanker, and includes any exploration or production platform situated within the prohibited area and used in prospecting for or the mining of natural oil: s 1(1).

²⁴⁰ ‘Master’ means, in relation to a ship or tanker, any person (other than a pilot) having charge or command of such ship or tanker and, in relation to an offshore installation, means the person in charge thereof.

²⁴¹ The officer in charge of the office of the Marine Division of the Department of Transport at any port: s 1(1).

²⁴² Section 3(1).

²⁴³ Defined as the internal waters, the territorial waters and the exclusive economic zone and, in relation to an offshore installation, includes the sea within the limits of the continental shelf: s 1(1).

or a tanker sustains any damage, whether to its hull, equipment or machinery, which causes, or creates the likelihood of, a discharge of any harmful substance from such ship or tanker, or having sustained such damage, enters the prohibited area in such damaged condition, the master of such ship or tanker, or any member of its crew designated by the master, shall forthwith by the quickest means of communication available report to the principal officer at the port in the Republic nearest to where such ship or tanker then is the fact that such damage was sustained, the nature and location on the ship or tanker of the damage, the position at sea where the damage was sustained, the name of the ship or tanker, its port of registry, its official number, its position, its course and, if in the Republic, its destination, the quantity and type of oil on board and, in the case of a tanker to which the provisions of section 13²⁴⁴ apply, the particulars contained in the certificate.²⁴⁵ For the purposes of this subsection damage to a ship or a tanker shall be deemed to have created the likelihood of a discharge of a harmful substance from such ship or tanker if it is of such a nature as to detrimentally affect, in any degree, the ship's or tanker's seaworthiness or efficient working.²⁴⁶

It is an offence for the master of a ship or a tanker to fail to comply with the above provisions or for the master of an offshore installation to fail to comply with the provisions of s 3(1).²⁴⁷ The penalty is a fine not exceeding R25 000 or imprisonment for a period not exceeding six months or both such fine and such imprisonment.²⁴⁸

12.3 Failure to comply with requirements of Authority

Section 4 deals with the powers of the South African Maritime Safety Authority to take steps to prevent marine pollution in cases of actual or likely discharge of hazardous substances. The section provides that

²⁴⁴ This section provides for compulsory insurance for tankers carrying more than 2 000 long tons of oil as cargo.

²⁴⁵ Section 3(2).

²⁴⁶ Section 3(3).

²⁴⁷ Section 3(4).

²⁴⁸ Section 30(2)(a).

(1) If any oil is being discharged or is in the opinion of the Authority likely to be discharged from a ship or a tanker the Authority may, with a view to preventing the pollution or further pollution of the sea by such oil, require the master or the owner of such ship or tanker or both such master and owner-

- (a) (i) to unload the oil from the ship or tanker or oil from a specified part of the ship or tanker;
 - (ii) to transfer oil from a specified part of the ship or tanker to another specified part of the ship or tanker;
 - (iii) to dispose of any oil so unloaded or transferred,
- in such manner and within such period as the Authority may direct if he deems fit to do so;
- (b) to move the ship or tanker or cause the ship or tanker to be moved to a place specified by the Authority;
 - (c) not to move the ship or tanker from a place specified by the Authority, except with the approval of the Authority and in accordance with the conditions subject to which such approval was granted;
 - (d) not to unload any cargo or oil, or any cargo or oil specified by the Authority, from the ship or tanker except with the approval of the Authority and in accordance with the conditions subject to which such approval was granted;
 - (e) to carry out such operations for the sinking or destruction of the ship or tanker, or any part thereof, or the destruction of the oil on the ship or tanker, or such quantity thereof, as the Authority may specify;
 - (f) to steer such course, while the ship or tanker is within the prohibited area, as the Authority may specify;
 - (g) to obtain the services of one or more suitable vessels to stand by such ship or tanker during a period determined by the Authority;
 - (h) to take such other steps in regard to the ship or tanker or its cargo or the oil therein or both the ship or tanker and its cargo or the oil therein as may be specified by the Authority, to prevent the discharge or further discharge of oil from the ship or tanker.

The provisions of sections (1)(a), (d), (g) and (h) shall *mutatis mutandis* apply in respect of hazardous substances discharged or, in the opinion of the Authority, likely to be discharged from an offshore installation.²⁴⁹

If, in the opinion of the Authority, the master and the owner of the ship or tanker in question are or would be incapable of complying with such a requirement or could not reasonably be expected to comply with such requirement, or the powers conferred upon the Authority in terms of s 4(1) are inadequate for the purpose there contemplated, the

²⁴⁹ Section 4(4).

Authority may cause any such steps to be taken as he has power to require to be taken in terms of the said subsection.²⁵⁰ Any reference to the power of the Authority to require steps to be taken in terms of this subsection, includes a reference to the power of the Authority in terms of that subsection to require that a specified step be not taken.²⁵¹

In addition, if any person performs salvage operations in connection with a ship or tanker, any requirement of the Authority in terms of s 4(1) in connection with such ship or tanker or its cargo or oil shall also be made known to such salvor, and any such requirement that a specified step be not taken shall thereafter, unless the Authority otherwise directs, also be binding upon such salvor and any such requirement that a specified act be performed shall, unless the Authority otherwise directs, also be construed as a requirement in terms of that subsection and binding upon such salvor that no steps be taken by such salvor which would obstruct or be likely to obstruct the performance of the specified act.²⁵²

It is an offence for any person wilfully to fail to comply with an order or requirement of the Authority in terms of s 4(1) and section 4 (2)(c).²⁵³ The penalty is a fine not exceeding R200 000 or imprisonment for a period not exceeding five years or both such fine and such imprisonment.²⁵⁴

12.4 Other offences

There are several other offences in terms of this Act, including the following:

- ❑ Failure to comply with an order by the Authority in connection with prevention or removal of marine pollution by harmful substances
- ❑ Failure to comply with an order to move a ship or tanker
- ❑ Tanker's leaving port without an insurance certificate
- ❑ Failure to produce such certificate

²⁵⁰ Section 4(2)(a).

²⁵¹ Section 4(2)(b).

²⁵² Section 4(2)(c).

²⁵³ Section 30(1)(b).

²⁵⁴ Section 30(2)(d).

- ❑ Failure to return cancelled certificate
- ❑ Rendering ship incapable of sailing
- ❑ Transferring oil within prohibited area
- ❑ Obstructing Authority in case of default by master or owner
- ❑ Operation of offshore installation without safety certificate
- ❑ Failure to comply with regulations

These are either peripheral to environmental issues or of a relatively technical nature (or both) and will not be discussed in further detail here.

12.5 Procedural Aspects

Jurisdiction of courts

No prosecution in respect of an offence under this Act shall be instituted except on the authority, which may be given in writing or otherwise, of the attorney-general having jurisdiction in the area of the court in question.²⁵⁵ Any offence under this Act shall, for purposes in relation to jurisdiction of a court to try the offence, be deemed to have been committed at any place where the accused happens to be.²⁵⁶

Summary enquiry procedure

The Act provides that if any person admits to the Authority that he has contravened any provision of this Act, or that he has failed to comply with any such provision with which it was his duty to comply; agrees to abide by the decision of the Authority; and deposits with the Authority such sum as that officer may require of him, but not exceeding the maximum fine which may be imposed upon a conviction for the contravention or failure in question, the Authority may, after such enquiry as he deems necessary, determine the matter summarily and may, without legal proceedings, order by way of penalty the whole or any part of the said deposit to be forfeited.²⁵⁷ There shall be a right of appeal to the

²⁵⁵ Section 20(3).

²⁵⁶ Section 20(4).

²⁵⁷ Section 30(3).

Minister, whose decision shall be final, from such a determination or order of the Authority whereby a penalty exceeding R2 000 is imposed, provided such right is exercised within a period of three months from the date of such determination or order. The imposition of a penalty under s 30(3) shall be deemed not to be a conviction of an offence, but no prosecution in respect of the offence in question may thereafter be instituted.²⁵⁸

12.6 Evaluation

This Act contains several offences but also has alternative enforcement measures that are worth commentary. First, there are several procedures provided for whereby the Maritime Safety Authority can take steps to prevent pollution of the sea by harmful substances, including ordering the master or owner of ships to take specified measures. Failure to comply with this primary enforcement measure is a criminal offence – so the criminal sanctions in this case work as back-up.

Where the criminal sanctions are utilised, the penalties provided for are substantial, reflecting the seriousness of the marine pollution problems (including oil pollution) that the Act is designed to address.

Finally, the summary enquiry procedure in section 30(3) is an interesting provision. This is designed to avoid costly and time-consuming court appearances and would serve the same deterrent effect as the criminal sanction, whilst still providing some safeguard to the offender who has the right of appeal. It is quite possible that the penalties meted out by the Authority could be more stringent than those imposed by a court, given the judiciary's propensity at times not to view environmental offences as serious. This is certainly a provision that could usefully be utilised in other legislation.

13 *Conservation of Agricultural Resources Act 43 of 1983*

²⁵⁸ Section 30(5).

This Act is concerned with the control over the utilisation of agricultural resources. It has particular focus on conservation of soil, water sources and vegetation. It also deals with combating of weeds and invader plants. The offences, other than those relating to administration of the Act and those that are not directly relating to conservation matters, are as follows:

13.1 Prohibition of the spreading of weeds

Section 5(1) provides that no person shall sell, agree to sell or offer, advertise, keep, exhibit, transmit, send, convey or deliver for sale, or exchange for anything or dispose of to any person in any manner for consideration, any weed or in any other manner whatsoever disperse or cause or permit the disposal of any weed from any place in the Republic to any place in the Republic. A ‘weed’ is any kind of plant which has under s 2(3) been declared a weed, and includes the seed of such plant and any vegetative part of such plant which reproduces itself asexually.²⁵⁹ The latest list of weeds includes plants such as Triffid Weed, Lantana, Bugweed and Mauritius Thorn.²⁶⁰ In addition, the executive officer²⁶¹ may issue an order on a person either (i) to take certain steps (including to return to the place of origin or to remove the weed) a weed from any seed, grain, hay or other agricultural product,²⁶² or (ii) to remove a weed that is adhering to an animal driven on a public road, conveyed in a vehicle or offered for sale at a livestock auction.²⁶³

Contravention of the general prohibition in subsection (1) or failure to comply with an order of the executive officer is an offence.²⁶⁴ The penalty is a maximum fine of R5 000 or two years imprisonment or both for a first conviction.²⁶⁵ A subsequent conviction (for

²⁵⁹ Section 1.

²⁶⁰ GN R 280 in GG 2166 of 30 March 2001, amending the original list in GN R 1048 of 25 May 1984.

²⁶¹ Appointed in terms of s 4.

²⁶² Section 5(2).

²⁶³ Section 5(3).

²⁶⁴ Section 5(6).

²⁶⁵ Section 23(1)(a).

the same offence or any other offence mentioned in s 23(1)(a)) attracts a maximum fine of R10 000 or imprisonment for not more than four years or both.²⁶⁶

²⁶⁶ Section 23(1)(b).

13.2 Failure to comply with control measures

Section 6 provides for the Minister to prescribe control measures in order to achieve the objects of the Act. These measures apply to specified land users.²⁶⁷ They may relate to issues like the utilisation and protection of vleis, marshes, water sponges, water courses and water sources, and utilisation and protection of vegetation. Control measures have been declared in respect of cultivation of virgin soil, cultivation on land with a slope, and protection against erosion amongst other matters.²⁶⁸ Any land user who refuses or fails to comply with any control measure which is binding on him or her shall be guilty of an offence. The penalty is as for the previous offence (see 13.1 above).

In *S v Buys*,²⁶⁹ the Natal Provincial Division held that negligence was sufficient fault for the offence of contravening a control measure.²⁷⁰

13.3 Failure to comply with directions

Section 7 provides for the executive officer by means of a direction to order a land user to comply with a particular control measure binding on the user or on the land specified in the direction, or if it is in the opinion of the executive officer essential in order to achieve

²⁶⁷ A 'land user' is defined in s 1 as the owner of land and includes –

- (a) any person who has a personal or real right in respect of any land in his capacity as fiduciary, fideicommissary, servitude holder, possessor. Lessee or occupier, irrespective of whether he resides thereon;
 - (b) any person who has the right to cut trees or wood on land or to remove trees, wood or other organic material from land; and
 - (c) in relation to land under the control of a local authority, that local authority,
- but not a person who carries on prospecting or mining activities.

²⁶⁸ GN R1048 in *GG* 9238 of 25 May 1984 as amended by GN R267 in *GG* 10029 of 6 December 1985 and GN R 280 in *GG* 2166 of 30 March 2001.

²⁶⁹ 1988 (3) SA 789 (N).

²⁷⁰ The case involved other issues relating to the regulations in terms of which the control measure was declared. The Court found on these in favour of the State and this was confirmed by the Appellate Division: *S v Buys* 1990 (1) SA 101 (A).

the objects of the Act, to perform or not to perform any other specified at on or with regard to the land in question.²⁷¹ A land user who fails to receive a direction served on him or her in the prescribed manner is guilty of an offence. The penalty for this offence is a maximum fine of R500 or imprisonment for a period of not more than three months or both.²⁷²

A second offence is the refusal or failure to comply with a direction binding on the land user in question. The penalty for this offence is as for the offences described in 13.1 and 13.2.

In *S v Claassen en 'n ander*,²⁷³ the Court was concerned with a direction issued under section 3(1) of the Soil Conservation Act,²⁷⁴ the precursor of the Conservation of Agricultural Resources Act. The accused in this case was arguing that he genuinely believed that the direction had been suspended because a request had been made to the Minister to reconsider the direction. The Court held that the contravention of the section in question required mens rea, which meant that the state was required to rebut the accused's defence beyond reasonable doubt.

13.4 Failure to comply with conditions for assistance in terms of a scheme

Section 8 of the Act provides for schemes which provide financial assistance to land users in order to carry out activities aimed at the objectives of the Act, like construction of soil conservation works and eradication of weeds. If a person, after his or her application for participation in a scheme has been approved, refuses or fails to comply with the provisions of the scheme, he or she shall be guilty of an offence.²⁷⁵ The penalty is a maximum fine of R500 or imprisonment for a period of not more than three months or both.²⁷⁶

²⁷¹ Section 7(1).

²⁷² Section 23(1)(c).

²⁷³ 1974 (2) SA 364 (O).

²⁷⁴ Act 76 of 1969.

²⁷⁵ Section 9(2)(a).

²⁷⁶ Section 23(1)(c).

Moreover, if a person refuses or fails to satisfy the conditions on which assistance has been rendered in terms of a scheme or are in terms of a scheme deemed to have been so rendered, is guilty of an offence. The penalty is as for the offences discussed in 13.1 and 13.2 above.

13.5 Failure to maintain soil conservation work

Where a soil conservation work has been established, land users on the land in question must maintain the work at their own expense.²⁷⁷ The executive officer may order a land user to do so if he becomes aware of any refusal or failure to do so.²⁷⁸ Failure or refusal to maintain a soil conservation work or to comply with the executive officer's order is an offence.²⁷⁹ The penalty is as for the offences described in 13.1 and 13.2 above.

13.6 Failure to comply with conditions of authorisation

Any person who refuses or fails to comply with the conditions on which any approval, authorization or consent has been granted in terms of this Act or a scheme shall be guilty of an offence.²⁸⁰ The penalty is a maximum fine of R500 or imprisonment for a period of not more than three months or both.²⁸¹

13.7 Failure to comply with regulations

Section 29, which empowers the Minister to make regulations dealing with various issues that are within the objectives of the Act, provides that any regulation may prescribe

²⁷⁷ Section 12(1).

²⁷⁸ Section 12(3).

²⁷⁹ Section 12(5).

²⁸⁰ Section 20(5).

²⁸¹ Section 23(1)(c).

penalties, not exceeding a fine of R500 or imprisonment for a period of three months or both, for any contravention of or failure to comply with its provisions.²⁸²

13.8 Presumptions and evidence

The Act provides for several presumptions in respect of any prosecution under the Act. First, it is presumed, unless the contrary is proved, that the applicable provisions of the Act apply to the land on or in respect of which the offence concerned has allegedly been committed.²⁸³ This is a mysterious provision in that it cannot be unduly onerous for the state to prove this fact. Should reliance on the provision lead to an accused's being convicted despite the presence of reasonable doubt as to whether he or she committed the offence, it would be unconstitutional. Since it is difficult to speculate as to how the provision might be invoked, it is not possible to declare with any more certainty how this presumption might fare in respect of the presumption of innocence.

There are also two presumptions relating to directions. The first presumes that a document purporting to be certified by the executive officer as a true copy of the original of a direction shall be admitted in evidence without any further proof or production of the original.²⁸⁴ This appears to be more in the nature of a 'deeming' provision than a presumption since there is no provision for rebuttal. This provision must be read in conjunction with s 24(c), which provides that it shall be presumed that the direction in question was either published in the *Gazette* or served by written notice on the individual in question, as the case may be and in accordance with the executive officer's endorsement on the copy. The accused may rebut this presumption. It would seem unnecessary for there to be a presumption that a direction was published in the *Gazette*, since this could easily be proved. In addition, it would be relatively easy to establish a system for serving directions that provides proof of such service (in the same way that summonses, for instance, are served). The presumption, then, seems to be questionable.

²⁸² Section 29(3).

²⁸³ Section 24(a).

²⁸⁴ Section 24(b).

The third presumption of interest here is one to the effect that it is presumed, unless the contrary is proved, that a soil conservation work which has been altered, removed or destroyed, was so altered, removed or destroyed without the executive officer having issued an order allowing such action; and by the person who was the land user in respect of the land concerned on the date on which the executive officer became aware of such alteration, removal or destruction.²⁸⁵ Whilst it would be almost impossible in many cases for the state to prove the identity of the person who altered, removed or destroyed a soil conservation work, this presumption could operate in such a way as to lead to conviction of an innocent land user unable to explain the fate of the soil conservation work on his or her land. The very difficult evidentiary hurdle for the state that would exist without this presumption could be obviated by dealing with the problem by means other than the criminal sanction. Why use criminal prosecution when it would be possible simply to issue a direction to the land user requiring him or her to take steps to put the soil conservation work back to its original state. The identity of the person responsible for damage, alteration or removal would not be important if this was the response used.

In summary, then, the presumptions in the Act²⁸⁶ are all problematic. They either serve questionable purposes since proof of the presumed fact is not apparently difficult at all or, alternatively, difficulties of proof could be avoided by using enforcement methods other than the criminal sanction.

13.9 Evaluation

Although the Conservation of Agricultural Resources Act does make use of several criminal offences, other modes of enforcement are used: primarily control measures, directions and schemes. Criminal sanctions are brought into play if persons fail to comply with these measures. Criminal law is thus used in a subsidiary role as far as these

²⁸⁵ Section 24(d).

²⁸⁶ There is a further presumption relating to damage, removal etc. of a beacon or mark. Since this offence has not been discussed here, the presumption is similarly excluded from discussion.

matters are concerned, but it is the primary mode of enforcement in respect of other issues – control of weeds, for example.

14 *Marine Pollution (Prevention of Pollution from Ships) Act 2 of 1986*

This Act is aimed at giving effect to the International Convention for the Prevention of Pollution from Ships, 1973 and provides for the protection of the sea from pollution by oil and other harmful substances discharged from ships. Although the Act itself contain an ‘offences and penalties’ provision, there are no offences explicitly provided for in the Act. Section 3A provides that any person who contravenes any provision of the Act or the Convention or who fails to comply with any provision thereof which it is his or her duty to comply, shall be guilty of an offence.²⁸⁷ The Convention itself contains no provisions that could be contravened by an individual, but there are extensive requirements in the Protocol (concerning reports on incidents involving harmful substances) and regulations to the Convention for the control of oil pollution; control of pollution by noxious liquid substances in bulk and prevention of pollution by harmful substances carried by sea in packaged form that contain numerous duties, most of a very technical nature that, if contravened by an individual, would amount to an offence in terms of section 3A.

14.1 Offences in regulations

The Prevention of Pollution by Garbage from Ships regulations²⁸⁸ curiously provide that any person guilty of failing to comply with the regulations is guilty of an offence and subject to a maximum fine of R20 000 or two years imprisonment or both, yet the regulations contain no substantive provisions that may be contravened! The Reception Facilities for Garbage from Ships regulations²⁸⁹ provide for the power of harbour

²⁸⁷ Section 3A(1)(a).

²⁸⁸ GN R1490 in GG 14000 of 29 May 1992.

²⁸⁹ GN R1491 in GG 14000 of 29 May 1992.

authorities or terminal operators to provide for or contract for reception facilities for garbage from ships. Regulation 4 makes provision for the Director-General of Transport to direct an authority to provide or arrange for the provision of such facilities, where such facilities are inadequate. Failure to comply with such a direction is an offence punishable by a fine not exceeding R20 000.²⁹⁰

14.2 Evaluation

This Act does not add much to the overall analysis. Of note is the summary enquiry procedure which is of almost identical nature to that provided for in the Marine Pollution (Control and Civil Liability) Act.²⁹¹

15 Marine Pollution (Intervention) 64 of 1987

This Act gives effect to the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties. The Act contains no offences.

16 Environment Conservation Act 73 of 1989

According to its long title, the Environment Conservation Act aims at providing for the effective protection and controlled utilization of the environment. It was the principal 'framework' environmental legislation in South Africa from its enactment until early 1999, when the National Environmental Management Act²⁹² came into force. The latter Act also repealed much of the Environment Conservation Act. This Act, however, contains several provisions dealing with aspects not addressed by other legislation that remain in force and for which offences are provided. These include waste management, certain types of protected areas and environmental impact assessment procedures, at least

²⁹⁰ Reg 6.

²⁹¹ Act 6 of 1981. See discussion in §12.5 above.

²⁹² Act 107 of 1998.

for the time being.²⁹³ The offences under the Environment Conservation Act are as follows:

16.1 Contravention of provision of direction relating to protected natural environment

Section 16 provides for the declaration of any areas to be a protected natural environment (PNE). This does not entail the state becoming the owner of land incorporated into the PNE. According to section 16(2), the competent authority²⁹⁴ may issue directions in respect of any land or water in a PNE in order to achieve the general policy and objects of the Act. Every owner of, and every holder of a real right in, land situated within a PNE in respect of which directions have been issued, and their successors in title, is subject to the provisions of the directions.²⁹⁵ Contravention of a provision of a direction or failure to comply with a direction is an offence.²⁹⁶ The penalty is a maximum fine of R8 000 or imprisonment for a period not exceeding two years or both.

16.2 Offences in respect of special nature reserves

The Minister may, in terms of section 18, declare any land to be a special nature reserve. No person shall gain admittance to a special nature reserve or perform any activity in or on a special nature reserve.²⁹⁷ The following may be exempted in writing from this prohibition: any scientist occupied with a specific project; any officer charged with specific duties or any other person desiring to view a special nature reserve on account of

²⁹³ The EIA procedures provided for in the Environment Conservation Act (ECA) are to be replaced by procedures declared in terms of the National Environmental Management Act (NEMA). The relevant provisions in the ECA have been repealed, but such repeal takes place only when regulations are made in terms of NEMA. This is discussed in more detail below.

²⁹⁴ This is defined as, in so far as a provision of the Act is applied within or with reference to a particular province, the competent authority to whom the administration of this Act has under s 235(8) of the Constitution of RSA been assigned in that province: s 1.

²⁹⁵ Section 16(3).

²⁹⁶ Section 29(2)(a).

²⁹⁷ Section 18(6).

its special nature or characteristics. Such exemption is granted subject to a process set out in section 18(7) and may be granted subject to conditions. Contravention of s 18(6) (by, for example, entering a special nature reserve while not exempted) or failure to comply with a condition of an exemption under s 18(7) is an offence.²⁹⁸ The penalty is as for the previous offence.

16.3 Establishing, providing or operating a disposal site without a permit

It is an offence for any person to establish, provide or operate any disposal site without a permit issued by the Minister of Water Affairs.²⁹⁹ The penalty is a fine not exceeding R100 000 or imprisonment not exceeding 10 years or both such fine and such imprisonment, and a fine not exceeding three times the value of any thing in respect of which the offence was committed. The same penalty applies for failure to comply with any condition of the permit. The elements of this offence which require explanation, are (i) disposal site and (ii) without a permit.

(i) disposal site

A disposal site is a site used for the accumulation of waste with the purpose of disposing or treatment of such waste.³⁰⁰ Waste, in terms of the Act, is any matter, whether gaseous, liquid or solid or any combination thereof, which is from time to time designated by the Minister by notice in the *Gazette* as an undesirable or superfluous by-product, emission, residue or remainder of any process or activity.³⁰¹ The Minister has designated the following as waste: an undesirable or superfluous by-product, emission, residue or remainder of any process or activity, any matter, gaseous, liquid or solid or any combination thereof, originating from any residential, commercial or industrial area, which -

(a) is discarded by any person; or

²⁹⁸ Section 29(2)(b).

²⁹⁹ Section 20(1) read with s 29(4).

³⁰⁰ Section 1.

³⁰¹ Ibid.

- (b) is accumulated and stored by any person with the purpose of eventually discarding it with or without prior treatment connected with the discarding thereof; or
- (c) is stored by any person with the purpose of recycling, re-using or extracting a usable product from such matter, excluding -
 - (i) water used for industrial purposes or any effluent produced by or resulting from such use which is discharged in compliance with the provisions of section 21(1) of the Water Act, 1956 or on the authority of an exemption granted under section 21(4) of the said Act;
 - (ii) any matter discharged into a septic tank or french drain sewerage system and any water or effluent contemplated by section 21(2) of the Water Act, 1956;
 - (iii) building rubble used for filling or levelling purposes;
 - (iv) any radio-active substance discarded in compliance with the provisions of the Nuclear Energy Act, 1982;
 - (v) any minerals, tailings, waste-rock or slimes produced by or resulting from activities at a mine or works as defined in section 1 of the Mines and Works Act, 1956; and
 - (vi) ash produced by or resulting from activities at an undertaking for the generation of electricity under the provisions of the Electricity Act, 1987.³⁰²

- (ii) without a permit

The requisite permit is issued by the Minister of Water Affairs. It may be issued subject to such conditions as the Minister may deem fit;³⁰³ the Minister may alter or cancel any permit or condition in a permit;³⁰⁴ and he may refuse to issue a permit,³⁰⁵ provided that he may exempt any person or category of persons from obtaining a permit, subject to such conditions as he may deem fit.

16.4 Failure to comply with Minister's directions

³⁰² GN 1986 in GG 12703 of 24 August 1990.

³⁰³ Section 20(1)(a).

³⁰⁴ Section 20(1)(b).

³⁰⁵ Section 20(1)(c).

The Minister of Water Affairs may from time to time by notice in the *Gazette* issue directions with regard to the control and management of disposal sites in general; the control and management of certain disposal sites or disposal sites handling particular types of waste; and the procedure to be followed before any disposal site may be withdrawn from use or utilized for another purpose.³⁰⁶ It is an offence to contravene any such direction.³⁰⁷ The penalty is as for the offence discussed above (16.3).

16.5 Unauthorised disposal of waste

It is an offence for any person to discard waste or dispose of it in any other manner, except at a disposal site for which a permit has been issued; or in a manner or by means of a facility or method and subject to such conditions as the Minister may prescribe.³⁰⁸ The penalty is the same as for the previous offence.

16.6 Littering

It is an offence for any person to discard, dump or leave any litter on any land or water surface, street, road or site in or on any place to which the public has access, except in a container or at a place which has been specially indicated, provided or set apart for such purpose.³⁰⁹ 'Litter' is defined as any object or matter discarded or left behind by the person in whose possession or control it was.³¹⁰ Note that the definition does not depend on the state of mind of the person who discards or leaves the object behind. The penalty is a fine not exceeding R2 000 or imprisonment for a period not exceeding three

³⁰⁶ Section 20(5).

³⁰⁷ Section 29(4).

³⁰⁸ Section 20(6).

³⁰⁹ Section 19(1) read with s 29(3).

³¹⁰ Section 1.

months.³¹¹ The penalty for a continuing offence and order for reparations as set out in ss 29(6) and (7) and described above (see 16.3) also apply.

16.7 Failure to provide containers

Every person or authority in control of or responsible for the maintenance of any place to which the public has access shall at all times ensure that containers or places are provided which will normally be adequate and suitable for the discarding of litter by the public.³¹² Failure to do so is an offence.³¹³ The penalty is the same as for littering.

16.8 Failure to remove litter

Every person or authority in control of or responsible for the maintenance of any place to which the public has access, shall within a reasonable time after any litter has been discarded, dumped or left behind at such place (with the inclusion of any pavement adjacent to, or land situated between, such a place and a street, road or site used by the public to get access to such place) remove such litter or cause it to be removed.³¹⁴ Failure to do so is an offence, for which the penalty is as for the previous offence.³¹⁵

16.9 Undertaking prohibited identified activities

Section 21 of the Act allows the Minister to identify those activities which in his opinion may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas. No person shall undertake an identified activity or cause such an activity to be undertaken without the written authorisation of the Minister or competent

³¹¹ Section 29(3) read with s 29(5).

³¹² Section 19(2).

³¹³ Section 29(3), read with s 29(5)..

³¹⁴ Section 19A, notwithstanding the provisions of s 19(2).

³¹⁵ Section 29(3) read with s 29(5).

authority.³¹⁶ Such authorisation will be granted only after consideration of reports concerning the impact of the proposed activity and of alternative proposed activities on the environment.³¹⁷ The organ concerned may at his or her discretion refuse or grant the authorisation on such conditions as he or she may deem necessary.³¹⁸ Failure to comply with any such condition may result in withdrawal of the authorisation by the organ in question.³¹⁹

Carrying on any activity prohibited under section 22(1) is an offence. The maximum penalty is a fine of R100 000 or imprisonment for a period of ten years or both and, in addition, to a fine not exceeding three times the commercial value of any thing in respect of which the offence was committed.³²⁰ The same applies in respect of failure to comply with a condition of the authorisation.

16.10 Undertaking prohibited activity in limited development area

Section 23 provides for a competent authority to declare a limited development area. No person shall undertake in a limited development area any development or activity prohibited by the competent authority or cause such development or activity to be undertaken unless he or she has on application been authorised to do so by the competent authority or by a local authority to whom such power has been delegated, on the conditions contained in such authorisation.³²¹ The penalty is as for the previous offence.

16.11 Failure to comply with direction relating to environmental harm

Section 31A provides that, if, in the opinion of the Minister or the competent authority, local authority or government institution concerned, any person performs any activity or

³¹⁶ Section 22(1).

³¹⁷ Section 22(2).

³¹⁸ Section 22(3).

³¹⁹ Section 22(4).

³²⁰ Section 29(4).

³²¹ Section 23(2).

fails to perform any activity as a result of which the environment is or may be seriously damaged, endangered or detrimentally affected, the Minister, competent authority, local authority or government institution, as the case may be, may in writing direct such person to cease such activity or to take such steps as the organ in question may deem fit, within a period specified in the direction, with a view to eliminating, reducing or preventing the damage, danger or detrimental effect.³²² In addition, the organ in question may direct such person to perform any activity or function at his or her expense with a view to rehabilitating any damage caused to the environment as a result of that person's activity or failure to act, to the satisfaction of the organ concerned.³²³

Failure to comply with such a direction is an offence,³²⁴ the penalty for which is a maximum fine of R2 000 or not more than three months imprisonment.³²⁵

16.12 Miscellaneous provisions

Section 29, the 'offences and penalties' section, contains several noteworthy provisions relating to criminal convictions. If any person convicted of an offence under the Act after conviction persists in the act or omission which constitutes the offence, he or she shall be guilty of a continuing offence and liable on conviction to a fine not exceeding R250 or to imprisonment for a period not exceeding 20 days or to both such fine and such imprisonment in respect of every day on which he or she so persists with such act or omission.³²⁶ Moreover, in the event of a conviction in terms of this Act the court may order that any damage to the environment resulting from the offence be repaired by the person so convicted, to the satisfaction of the Minister concerned.³²⁷ Failure to comply with such an order entitles the authority in question to take the necessary steps itself and

³²² Section 31A(1).

³²³ Section 31A(2).

³²⁴ Section 29(3).

³²⁵ Section 29(3) read with s 29(5).

³²⁶ Section 29(6).

³²⁷ Section 29(7).

to recover the costs from the defaulting party.³²⁸ These provisions are useful and correspond with practice in other countries. Orders of this type are discussed in more detail in Chapter 8.

The Act also provides that a magistrate's court is competent to impose any penalty provided for in the Act.³²⁹

Finally, the Environment Conservation Act also contains a forfeiture provision. A court convicting any person of an offence under the Act may declare any vehicle or other thing by means whereof the offence was committed or which was used in the commission of the offence, or the rights of such person to the vehicle or other thing, to be forfeited to the State.³³⁰ This does not affect the rights that any other person may have in respect of the vehicle or thing concerned, if it is proved that he or she did not know that the vehicle or thing was used or would be used for the purpose of or in connection with the commission of the offence concerned or that he or she could not prevent such use.³³¹ This is similar to the forfeiture clause that appears in the National Parks Act, discussed above,³³² and is a useful complement to the regular criminal sanction. The possible constitutional ramifications of forfeiture clauses are discussed above³³³ and in the light of this it is unlikely that this provision would be problematic.

16.13 Evaluation

The Environment Conservation Act makes use of several enforcement mechanisms in addition to criminal sanctions, including various types of authorisation and a direction procedure in section 31A. In addition, it contains provisions providing for augmented penalties in the case of continuing violations and for rehabilitation of damage caused by an offence. These are both desirable provisions in environmental legislation.

³²⁸ Section 29(8).

³²⁹ Section 29(9).

³³⁰ Section 30(1).

³³¹ Section 30(2).

³³² See §9.12 (*supra*).

³³³ At §6.5 (*supra*).

The Environment Conservation Act contains a good mix of criminal and non-criminal enforcement measures, and the criminal sanctions are meaningful – the maximum fines provided for are significant in the case of several offences. Unfortunately, though good on paper, the Environment Conservation Act has been poorly enforced. For example, there are apparently numerous examples of persons who have failed to comply with conditions imposed in their section 22 authorisations (authorisation to carry on identified activities) who have been allowed to do so with impunity.³³⁴ This undermines the law and is a situation that needs to be addressed if environmental law is to be taken seriously. It is all very well having good laws on paper, but inadequate enforcement is a widely perceived (and with ample justification, it would seem) problem that renders the laws merely paper laws.

17 Game Theft Act 105 of 1991

The Game Theft Act amends the common law position in respect of ownership of wild animals to protect owners of game. It is aimed at prevention of the theft and unlawful hunting, catching and taking into possession of game, and the offences reflect this.

17.1 Entering land with intent to steal game

Any person who enters another person's land with intent to steal game thereon or to disperse³³⁵ game from that land shall be guilty of an offence.³³⁶ This is essentially a trespass offence with the added requirement of 'intent to steal'. The latter requirement entails the offender intentionally effecting a contrectatio;³³⁷ intending to deprive the owner permanently of the property; knowing that the property is capable of being stolen;

³³⁴ Personal communication with several people involved in these processes.

³³⁵ This means to 'break up and scatter'.

³³⁶ Section 3(1)(a).

³³⁷ See JRL Milton *South African Criminal Law and Procedure: Vol III: Common Law Crimes* 3 ed (1996) at 590-598.

and that he or she is acting unlawfully in taking it.³³⁸ The penalty is, in the case of the court's being a district magistrates' court, a maximum fine of R8 000 or two years imprisonment in default of payment or both in the case of a first conviction. A subsequent conviction attracts a sentence of a maximum of three years imprisonment.³³⁹ In the case of a regional court, the maximum fine is R40 000 and not more than ten years imprisonment or both.³⁴⁰ A court may also order compensation upon conviction for the theft of game or malicious damage to property where the property is game.³⁴¹

17.2 Dispersing or luring away game

Any person who, without entering another person's land, intentionally disperses or lures away game from another person's land is guilty of an offence.³⁴²

17.3 Presumption

In a prosecution for an offence under this Act, if it is proved that the accused wrongfully and unlawfully entered another person's land upon which there is game or that he wrongfully and unlawfully dispersed or lured away game from another person's land, it shall be presumed that he had the intent to steal game or to disperse or lure away game from the land, as the case may be, unless the contrary is proved.³⁴³ It is possible that reliance on this presumption for the trespass offence may result in the conviction of an accused despite the presence of reasonable doubt. On the other hand, it would be very difficult in many cases for the state to prove intent to steal. Nevertheless, given the real possibility of people straying onto land containing game who are unable to rebut the presumption, there is a likelihood that this aspect of the presumption would run into

³³⁸ Milton *op cit* at 616.

³³⁹ Section 6(a).

³⁴⁰ Section 6(b).

³⁴¹ Section 7.

³⁴² Section 3(1)(b).

³⁴³ Section 3(2).

constitutional trouble. The way around the problem could be to reconsider the requirements of the offence. It is submitted that the presumption with respect to the second offence (dispensing or luring game) is safer from constitutional challenge but also less necessary. It is submitted that the requirement of intention is not really necessary for the offence and its omission would render the presumption unnecessary.

18 Minerals Act 50 of 1991

Although the Minerals Act is concerned with exploitation of natural resources, one of the objects of the Act is to regulate the orderly utilisation and rehabilitation of the surface of the land during and after mining operations. There are, therefore, several provisions in the Act that can be regarded as environmental law since they are concerned with the conservation of a natural resource. The offences related to these provisions are as follows:

18.1 Failure to carry out rehabilitation of surface of land

Section 38(1) requires the holder of a prospecting permit or mining authorisation to carry out the rehabilitation of the surface of the land in question in accordance with the applicable environmental management programme, if any; as an integral part of the prospecting or mining operations concerned; simultaneously with such operations, unless determined otherwise by the Director: Mineral Development; and to the satisfaction of the Director. Failure to do so is an offence,³⁴⁴ punishable by a fine (amount not specified) or imprisonment of not more than one year or both.³⁴⁵ In addition, such offender is subject to a further fine of not more than R1 000 or to further imprisonment for not more than five days per day for every day upon which he so contravened the provision concerned or failed to comply with it, up to a maximum of six months in total.

³⁴⁴ Section 60(1)(a)(i).

³⁴⁵ Section 61(1)(a).

18.2 Failure to submit environmental management programme

Every holder of a prospecting permit nor mining authorisation is required to submit to the Director: Mineral Development an environmental management programme in respect of the surface of the land in question for his or her approval. No such operations shall be commenced with before such approval is obtained.³⁴⁶ Failure to comply with this provision is an offence and the penalty is as for the previous offence.

18.3 Failure to comply with directives/conditions

In terms of section 41(1), the Director: Mineral Development may issue directives and determine conditions in relation to the use of the surface of land comprising the subject of any prospecting permit or mining authorisation in order to limit any damage to or the disturbance of the surface, vegetation, environment or water sources to the minimum which is necessary for any prospecting or mining operations or processing of any material.³⁴⁷ No person shall contravene or fail to comply with any such directive or condition.³⁴⁸ Such failure is an offence and the penalty is as for the offences described above.

³⁴⁶ Section 39(1). Section 39(4) provides for a temporary authorisation pending approval of the environmental management programme. The Director may also exempt a holder from one or more of the provisions of s 39(1): s 39(2).

³⁴⁷ Provided that such directives and conditions shall not be construed as placing the holder of any such prospecting permit or mining authorisation in a better position vis-à-vis the owner of such land in relation to the use of the surface thereof.

³⁴⁸ Section 41(2).

18.4 Offences under regulations

There is a set of general regulations which include provisions dealing with water pollution arising out of mining operations in terms of the Mines and Works Act.³⁴⁹ The Mines and Works Act has since been repealed by s 68(1) of the Minerals Act, but the latter provides, however, that any regulation made under the repealed Act which was in force immediately prior to the commencement of the Minerals Act shall, notwithstanding the repeal of the said Act, remain in force until amended or repealed under s 63.³⁵⁰

The offences provided for in the regulations are as follows:

(a) Failure to fence off polluted water

It is provided that water containing poisonous or injurious matter in suspension or solution must be effectually fenced off to prevent inadvertent access to it, and notice boards shall be put up in suitable places to warn persons from making use of such water.³⁵¹ It is an offence for any person to fail to comply with this regulation.³⁵² The penalty is a fine (no amount specified) or imprisonment for a period not exceeding six months or both a fine and such imprisonment.³⁵³

(b) Permitting polluted water to escape

It is an offence for any person to permit to escape water containing any injurious matter in suspension or solution without having been previously rendered innocuous.³⁵⁴ The penalty is as for the above offence.

³⁴⁹ The original regulations were published in GN R992 in GG 2741 of 26 June 1970. They have been amended several times: see PGW Henderson *Environmental Laws of South Africa* (1996) at 2-469 for full list of amending regulations. For particular relevance to this discussion, see regulations in GN R 537 in GG 6892 of 21 March 1980.

³⁵⁰ Section 68(2).

³⁵¹ Reg 5.9.1.

³⁵² Section 60(2) of the Minerals Act 50 of 1991.

³⁵³ Section 61(1).

³⁵⁴ Reg 5.9.2.

(c) Returning of impure effluent to water

It is provided that sand may be extracted from the channel of a stream or river as well as from a dam, pan or lake, provided that effluent produced from such operations shall not be returned to any stream, river, dam, pan or lake unless such effluent conforms to the purity standards laid down by the Department of Water Affairs.³⁵⁵ Failure to comply with this provision is an offence, and the penalty is as for the previous offence.

(d) Establishing dumps or slime dams on the bank of watercourses

It is an offence for any person to establish a sand dump or slimes dam on the bank of any stream, river, dam, pan or lake without the written permission of the Inspector of Mines, who shall obtain approval therefor from the Government Mining Engineer, and upon such conditions as the said Inspector may prescribe.³⁵⁶ The penalty is the same as in respect of the previous offence.

(e) Failure to prevent escape of oil

It is provided that during prospecting for or recovery of oil, all reasonable measures shall be taken, to the satisfaction of the Government Mining Engineer, to prevent the escape of oil to the surroundings, either on land or in the sea.³⁵⁷ Failure to comply with this regulation is an offence carrying the same penalty as the previous offence.

18.5 Evaluation

The offences under the Minerals Act that can be categorised as environmental crimes are somewhat unremarkable. One comment that could be made, however, is that the penalties provided for are mild, given the deep pockets of mining companies and the potential for serious environmental damage caused by failure to comply with these provisions.

³⁵⁵ Reg 5.14.1 (1980 amendment).

³⁵⁶ Reg 5.14.3 (1980 amendment).

³⁵⁷ Reg 5.15 (1980 amendment).

19 Occupational Health and Safety Act 85 of 1993

The purpose of this Act (OHSA) is primarily to provide for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery. It also provides for the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with the activities of persons at work. Most offences under the Act are not strictly environmental offences, but there are some, relating to health and safety of the general public, that will be discussed here.

19.1 Conducting activities which expose public to hazards to health or safety

Section 9(1) provides that an employer shall conduct his or her undertaking in such a manner as to ensure, as far as is reasonably practicable, that persons other than those in his or her employment who may be directly affected by his or her activities are not thereby exposed to hazards to their health or safety. The duty generally does not extend to employees since they are protected by means of various other provisions in the Act. The duty extends to any member of the public, although those most at risk would be visitors to the employer's premises or neighbours.

The section speaks of 'may be directly affected', meaning that it is not necessary to show actual damage or injury but that potential injury would suffice.³⁵⁸ The employer is also required to take 'reasonably practicable' steps, which is determined by balancing the following factors: the severity and scope of the risk; the state of knowledge concerning the risk; the ability to remove or mitigate; and the cost of such removal.³⁵⁹ The penalty for this offence is a maximum fine of R50 000 or imprisonment for not more than one year or both.³⁶⁰ This has been described as 'ludicrously small'.³⁶¹

³⁵⁸ MG Cowling 'Offences relating to health and safety' in JRL Milton & MG Cowling *South African Criminal Law and Procedure: Vol III: Statutory Offences* 2 ed (1997) at K5-10.

³⁵⁹ Cowling op cit at K5-7.

³⁶⁰ Section 38(1)(a).

³⁶¹ Cowling op cit at K5-46.

19.2 Doing anything threatening the health or safety of any person

Section 38(1)(p) makes it an offence for a person wilfully or recklessly to do anything at a workplace or in connection with the use of plant or machinery which threatens the health or safety of any person. The penalty is as for the previous offence.

19.3 Offences under regulations

The Minister of Labour has made regulations for hazardous chemical substances (HCS) in terms of section 43 of the Act.³⁶² These regulations require the following:

- ❑ Provision of information and training to employees exposed to HCS;
- ❑ Obedience of persons exposed to HCS to lawful instructions relating to various matters, for example cleaning up and disposal of HCS;
- ❑ Assessment of potential exposure;
- ❑ Air monitoring;
- ❑ Medical surveillance;
- ❑ Provision of respirator zone;
- ❑ Keeping of records;
- ❑ Control of exposure to HCS;
- ❑ Provision of personal protective equipment and facilities;
- ❑ Maintenance of control measures;
- ❑ Labelling, packaging, transportation and storage in accordance with SABS standards;
- ❑ Effective disposal of HCS.

The penalty for non-compliance with any of the regulations is an unspecified fine or imprisonment for not more than six months. In the case of a continuous offence, an additional fine may be levied of R200 per day on which the offence continues or additional imprisonment of one day for each day that the offence continues, with a

³⁶² GN R1179 in GG 16596 of 25 August 1995.

maximum of ninety days.³⁶³ This corresponds with the provision in the Act for penalties in regulations.³⁶⁴

19.4 Vicarious liability

Section 37 provides for vicarious liability as follows: whenever an employee does or omits to do any act which it would be an offence in terms of this Act for the employer of such employee to do or omit to do, then the employer him or herself shall be presumed to have done or omitted to do that act, and shall be liable to be convicted and sentenced in respect thereof. The presumption can be rebutted if it is proved that³⁶⁵ in doing or omitting to do the act the employee was acting without the connivance or permission of the employer; it was not under any condition or in any circumstance within the scope of the authority of the employee to do or omit to do an act, whether lawful or unlawful, of the character of the act or omission charged; and all reasonable steps were taken by the employer to prevent any act or omission of the kind in question. It shall not be accepted as sufficient proof of having taken all reasonable steps to prevent the act or omission that the employer issued instructions forbidding any act or omission of the type in question.³⁶⁶

In the light of the decision in *S v Coetzee*,³⁶⁷ this provision may well be problematic. A firm opinion on this matter will not be expressed here, however, since the question of vicarious liability will be dealt with in more detail in Chapter 10.

Evaluation

The above analysis indicates quite strongly that the criminal sanction is the primary mode of enforcement utilised in pre-1994 national legislation, strongly indicative of the 'command and control' regulatory approach. Some enactments do make use of devices

³⁶³ Reg 16.

³⁶⁴ Section 43(4).

³⁶⁵ The Act does not specify this, but presumably the onus of proving this is on the employer.

³⁶⁶ Section 37(1).

³⁶⁷ 1997 (3) SA 527 (CC), discussed in Chapter 3.

like directives/directions and the like, which is an effective and efficient manner of ensuring compliance with the goals of legislation. Penalties are, by and large, unimaginative, although there are several Acts which provide for fines for continuing offences and the Sea-Shore Act and Environment Conservation Act provide for compensation for damage. A number of Acts provide for forfeiture of objects used in the commission of the offence.

Not only are the sentencing options frequently not wide, but the maximum penalties provided for are often worryingly small, sometimes literally rendering the use of criminal sanctions a waste of money (the Atmospheric Pollution Prevention Act is a case in point).

Another interesting feature is the summary enquiry procedure provided for in some of the marine pollution statutes. Why this process is not used in more legislation is somewhat of a mystery, although there is no record of the procedure having been used as yet.

Bearing these observations in mind, attention will now be given to the post-1994 national environmental legislation in order to ascertain if similar trends can be found there, or whether, in particular, more innovative use has been made of enforcement machinery other than the criminal sanction.

Chapter 5

An examination of environmental crimes and their enforcement in South Africa:

Part Two – Post-1994 National Legislation

1994 saw the onset of a new legal and Constitutional regime in South Africa, with the first democratic government elected by the whole population and the adoption of a justiciable Bill of Rights in a new Constitution. The impact of this Constitution on criminal enforcement of law has been discussed in Chapter 3. With the new government, new policy priorities have been adopted and several new environmental enactments have been promulgated since 1994. The main impetus in certain instances has been primarily environmental, but a common theme in much of the legislation has been the furtherance of socio-economic rights of the people and increased equity in access to natural resources, particularly in marine resources, forests and water.

Given the presence of the Bill of Rights, one would expect that compliance and enforcement measures in the new legislation would be less reliant on presumptions and reverse-onus provisions. In addition, given worldwide trends away from the ‘command and control’ regulatory paradigm, one might also expect that more innovative enforcement and compliance instruments would be included in this legislation.

These expectations will be assessed by examining the legislation, and in particular the enforcement and compliance provisions, in more detail below.

Analysis of the legislation

1 Development Facilitation Act 67 of 1995

This Act is aimed at the provision of extraordinary measures for reconstruction and development and contains principles relating to land development. There are some

provisions in the Act dealing with environmental factors that have to be taken into account in the development planning process. There are no offences under this Act that could be regarded as environmental offences.¹

2 Water Services Act 108 of 1997

This Act is concerned with the provision for the rights of access to basic water supply and basic sanitation. The Act essentially provides a framework for the supply of water services, providing for bodies or institutions like water services providers, water services authorities and others. It is not, by and large, directly concerned with environmental matters, but there are some features of the Act that could be said to constitute environmental law. The relevant offences in the Act for present purposes are:

2.1 Wasteful use of water

According to section 82(1), no person may continue the wasteful use of water after being called upon to stop by the Minister,² a Province or any water services authority.³ Water services authorities are required to make by-laws which provide for, inter alia, the prevention of wasteful use of water,⁴ but the Act does not otherwise provide for the wasteful use of water. The power of the Minister or Province to call upon persons to stop the wasteful use of water is not expressly provided for in the Act. Section 82(1), then, appears to be a ‘stand-alone’ provision – it is not providing for an offence arising out of failure to comply with another provision in the Act.

There is no specific penalty provided in the Act – section 82(2) provides that any person who contravenes s 82(1) is guilty of an offence and liable, on conviction, to a fine or to imprisonment or to both such fine and imprisonment.

¹ In fact, the only offences relate to the functioning of development tribunals (s 21).

² Minister of Water Affairs and Forestry.

³ A water services authority is a municipality, including a district or rural council as defined in the Local Government Transition Act 209 of 1993, responsible for ensuring access to water services (s 1).

⁴ Section 21(1)(g).

2.2 Prohibited use of water and disposal of effluent

No person may intentionally use water or dispose of effluent in contravention of section 6 or 7.⁵ Section 6 provides that no person may use water services from a source other than a water services provider⁶ nominated by the water services authority having jurisdiction in the area in question, without the approval of that water services authority. Section 7 provides that no person may obtain water for industrial use from any source other than the distribution system of a water services provider nominated by the water services authority having jurisdiction in the area in question, without the approval of that water services authority.⁷ In addition, no person may dispose of industrial effluent in any manner other than that approved by the water services provider nominated by the water services authority having jurisdiction in the area in question.⁸ The penalty is as for the previous offence.

2.3 Vicarious liability

According to s 82(3), whenever an act or omission by any employee or agent constitutes an offence in terms of this Act, and takes place with the express or implied permission of any employer, the employer shall, in addition to the employee or agent, be liable to conviction for that offence; or if it would constitute an offence by the employer in terms of the Act, that employee or agent shall in addition to that employer be liable to conviction for that offence. This provision may be problematic. The concept of vicarious liability is discussed in Chapter 10.

⁵ Section 82(1)(c).

⁶ A water services provider is any person who provides water services to consumers or to another water services institution, but does not include a water services intermediary (s 1).

⁷ Section 7(1).

⁸ Section 7(2).

2.4 Evaluation

The Water Services Act is concerned mainly with the provision of services and the establishment of an institutional framework to this end. Consequently, the enforcement and compliance aspects of the Act are of a somewhat peripheral nature. Other than a questionable vicarious liability clause, there is nothing remarkable about the criminal provisions in this Act.

3 *Marine Living Resources Act 8 of 1998*

The long title of this Act sets out its objectives as to provide for the conservation of the marine ecosystem, the long-term sustainable utilisation of marine living resources and the orderly access to exploitation, utilisation and protection of certain marine living resources; and for these purposes to provide for the exercise of control over marine living resources in a fair and equitable manner to the benefit of all the citizens of South Africa. To this end, this Act regulates sea fisheries in South Africa and largely replaces the Sea Fishery Act 12 of 1988 which was the previous legislation dealing with this matter. The operation of the Act will become apparent from consideration of the offences provided for in the Act, which relate to most issues covered in the Act. The offences are:

3.1 Fishing without permit (see also s 18)

Section 58(1)(a) provides that any person who undertakes fishing or related activities in contravention of a provision of section 13 is guilty of an offence and liable on conviction to a fine not exceeding two million rand, or to imprisonment for a period not exceeding five years. Section 13 provides that no person shall exercise any right granted in terms of section 18⁹ or perform any other activity in terms of this Act unless a permit has been issued by the Minister to such person to exercise that right or perform that activity. Section 13(3) provides that the holder of a permit shall at all times have that permit

⁹ Section 18 deals with the procedure for the granting of rights.

available for inspection at the location where the right or activity in respect of which the permit has been issued, is exercised. Read together, then, sections 58(1) and 13 prohibit fishing or related activities without a permit. The elements of this offence are (i) fishing or related activities and (ii) without a permit.

(i) fishing or related activities

‘Fishing’ is defined in s 1 as—

- (a) searching for, catching, taking or harvesting fish or an attempt to any such activity;
 - (b) engaging in any other activity which can reasonably be expected to result in the locating, catching, taking or harvesting of fish;
 - (c) placing, searching for or recovering any fish aggregating device¹⁰ or associated gear, including radio beacons;
 - (d) any operation in support or in preparation of any activity described in this definition;
- or
- (e) the use of an aircraft¹¹ in relation to any activity described in this definition.

‘Related activities’ is also defined in s 1, as including —

- (a) storing, buying, selling, transshipping, processing or transporting of fish or any fish product taken from South African waters up to the time it is first landed or in the course of high seas fishing;
- (b) on-shore storing, buying, selling or processing of fish or any fish product from the time it is first landed;
- (c) refuelling or supplying fishing vessels, selling or supplying fishing equipment or performing any other act in support of fishing;
- (d) exporting and importing fish or any fish product; or

¹⁰ This is an artificially made or partially artificially made floating, submerged or semi-submerged device, whether anchored or not, intended to aggregate fish, including any natural floating object on which a device has been placed to facilitate its location (s 1). ‘Aggregate’ means ‘collect together’ (*The Concise Oxford English Dictionary of Current English* 7th ed (1982)).

¹¹ This means any craft capable of self-sustained movement through the atmosphere and includes a hovercraft (s 1).

(e) engaging in the business of providing agency, consultancy or other similar services for and in relation to fishing or a related activity.

(ii) permit

The different types of permit that are provided for are as follows:

- ❑ Subsistence fishing permit;¹²
- ❑ Recreational fishing permit;¹³
- ❑ Commercial fishing permit;¹⁴
- ❑ Local fishing vessel licence;¹⁵
- ❑ Foreign fishing vessel licence;¹⁶
- ❑ High seas fishing licence.¹⁷

3.2 Fishing in contravention of conditions of authorisation

It is an offence for any person to undertake fishing or related activities in contravention of the conditions of any right of access, other right, licence or permit granted or issued in terms of Part 1, 2 or 3 of Chapter 3,¹⁸ or an authorisation to undertake fishing or related activities in terms of Part 6 or 7 of Chapter 3, but excluding section 39(5).¹⁹ The various Parts of Chapter 3 referred to in this offence provide as follows:

Part 1 Fisheries Planning

Part 2 Local Fishing

Part 3 Commercial Fishing

Part 6 Foreign Fishing

¹² Referred to in section 19.

¹³ Referred to in section 20.

¹⁴ This is not provided for expressly – but section 21 provides for commercial fishing rights. Read with section 13, there must be a commercial fishing permit.

¹⁵ Section 23.

¹⁶ Section 39.

¹⁷ Section 41.

¹⁸ Section 58(1)(a)(ii).

¹⁹ Section 58(1)(a)(iii).

Part 7 High Seas Fishing.

The penalty is as for the previous offence.

3.3 Contravention of an international management or conservation measure

Any person who contravenes a provision of an international conservation and management measure inside or outside South African waters by means of a vessel registered in the Republic shall be guilty of an offence and liable on conviction to a fine not exceeding three million rand.²⁰ The Act defines ‘international conservation and management measures’ as measures to conserve or manage one or more species of marine living resources contained in international conventions, treaties or agreements, or that are adopted or applied in accordance with the relevant rules of international law as reflected in the United Nations Convention on the Law of the Sea, whether by global, regional or subregional fishery organisations and which measures are binding on the Republic in terms of international law.²¹ This clearly envisages a number of measures provided for by a number of international instruments, which raises the possibility that this prohibition may not be sufficiently precise to satisfy the principle of legality. It would have been better, it is submitted, had the Act expressly listed (perhaps in a Schedule) the provisions of which contravention is regarded as an offence by this section.

3.4 Contravention of provisions of high seas fishing licence/permit

Any person who contravenes the conditions imposed in a high seas fishing permit or high seas fishing vessel licence, shall be guilty of an offence and liable on conviction to a fine not exceeding three million rand.²²

²⁰ Section 58(2)(a). This subsection also prohibits failure to comply with any provision of Part 7 of Chapter 3. This Part deals with high seas fishing. The contraventions that are contemplated in this Part are also prohibited elsewhere – the prohibition of fishing without a permit (discussed above) and contravention of section 41 (see below).

²¹ Section 1.

²² Section 58(2)(b).

3.5 Fishing without foreign fishing vessel licence

Section 39(1) prohibits any foreign fishing vessel from being used for fishing or related activities in South African waters unless a foreign fishing vessel licence has been issued to such vessel. If a fishing vessel is used in contravention of this prohibition or of any condition of a foreign fishing vessel licence, the master, owner and charterer of that fishing vessel shall each be guilty of an offence,²³ and liable on conviction to a fine not exceeding five million rand.²⁴

Some of the elements of the offence have been described above (the meaning of ‘fishing’ and the permit requirement). The offence also envisages the involvement of a ‘foreign fishing vessel’ and fishing in ‘South African waters’. Determining the meaning of ‘foreign fishing vessel’ requires perusal of four definitions in the Act (s 1). A foreign fishing vessel means any fishing vessel other than a local fishing vessel. A ‘local fishing vessel’ means any fishing vessel registered in the Republic which is—

- (a) wholly owned and controlled by one or more South African persons;
- (b) wholly owned by the State;
- (c) wholly owned and controlled by any body corporate, society or other association of persons incorporated or established under the laws of the Republic and in which the majority of the shares and the voting rights are held and controlled by South African persons; or
- (d) wholly owned by a body corporate designated as an authorised body corporate by the Minister.

A ‘fishing vessel’ means any vessel, boat, ship or other craft which is used for, equipped to be used for or of a type that is normally used for fishing or related activities, and includes all gear, equipment, stores, cargo and fuel on board the vessel; and ‘vessel’ includes any canoe, lighter, floating platform, decked boat, carrier vessel, vessel equipped with an inboard or outboard motor or any other craft, whether a surface craft or submarine.

²³ Section 39(5).

²⁴ Section 50(3).

‘South African waters’ means the seashore, internal waters, territorial waters, the exclusive economic zone, and in relation to the sedentary species as defined in Article 77 of the United Nations Convention on the Law of the Sea,²⁵ the continental shelf as defined in section 7 of the Maritime Zones Act²⁶ and such waters include tidal lagoons and tidal rivers in which a rise and fall of the water level takes place as a result of the tides.

The persons who may be liable for this offence are defined in s 1 as follows: ‘Master’ means, in relation to a vessel, aircraft or other craft, the person having lawful command or charge, or for the time being in charge, of the vessel, aircraft or other craft, as the case may be, including a person who has principal responsibility for fishing on board, but does not include a pilot aboard a fishing vessel solely for the purpose of providing navigational assistance. ‘Owner’ means any person exercising or discharging or claiming the right or accepting the obligation to exercise or discharge any of the powers or duties of an owner whether on his or her own behalf or on behalf of another, including a person who is the owner jointly with one or more other persons and the manager, director, secretary, or other similar officer or any person purporting to act in such a capacity, of any body corporate or company which is an owner. ‘Charterer’ is not defined in the Act, but a dictionary definition is the person who hires the ship.²⁷

The heavy penalty provided for contravention of this provision reflects the serious problem of foreign fishing in South African waters and the seriousness with which the state views such occurrences.

²⁵ ‘Sedentary species’ is defined in the Act (s 1) as organisms which, at the harvestable stage, either are immobile on or under the seabed, or are unable to move except in constant physical contact with the seabed or the subsoil. This accords with the Convention’s definition in Article 77(4).

²⁶ Act 15 of 1994. This Act defines the continental shelf with reference to the Convention on the law of the Sea. The Convention’s definition of continental shelf is very long and complicated and it is not necessary to reproduce it here: for the definition, see

http://www.globelaw.com/LawSea/ls82_2.htm#article_76_definition_of_the_continental_shelf

(accessed 28 November 2001).

²⁷ *The Concise Oxford English Dictionary of Current English* 7th ed (1982).

3.6 Possession of prohibited gear

No person shall use, possess or have control of—

- (a) any net or trap, the mesh size of which does not conform to the prescribed minimum mesh size;
- (b) any gear which does not conform to the standards that may be prescribed for that type of gear; or
- (c) any gear which is prohibited in terms of the Act.²⁸

‘Net’ means a fabric of rope, cord, twine or other material knotted or woven into meshes by which fish can be taken. A ‘trap’ is an enclosure, not being a net, that may be used to take fish. ‘Gear’ means, in relation to fishing, any equipment, implement or other object that can be used in fishing, including any net, rope, line, float, trap, hook, winch, aircraft, boat or craft carried on board a vessel, aircraft or other craft.²⁹ The Minister may make regulations, inter alia, prescribing fisheries management and conservation measures, including mesh sizes, gear standards, minimum species sizes, closed seasons, closed areas, prohibited methods of fishing or gear and schemes for limiting entry into all or any specified fisheries.³⁰ Chapter 4 of general regulations made under the Act in 1998 deals in detail with prohibited gear and nets and mesh sizes.³¹

The penalty is as for the previous offence and, once again, reflects the seriousness with which the authorities view the use of prohibited gear. Bearing in mind that the fine of five million rand is a maximum, not every use of prohibited gear will attract such a penalty, but the use of some types of gear (driftnets, for example) is a serious environmental problem.³²

²⁸ Section 45.

²⁹ Section 1.

³⁰ Section 77(2)(e).

³¹ GN R1111 in *GG* 19205 of 2 September 1998 as amended by GN R27 in *GG* 20796 of 14 January 2000.

³² See below.

3.7 Driftnet fishing

Except on the authority of a permit issued by the Minister—

- (a) no vessel shall be used for or to assist in any driftnet fishing activities;
- (b) no person shall engage or assist in any driftnet fishing activities; and
- (c) no person on board a local fishing vessel or a foreign fishing vessel in respect of which a foreign fishing vessel licence has been issued, shall be in possession of a driftnet or part thereof.³³

A 'driftnet' is a gillnet or other net or a combination of nets, the purpose of which is to enmesh, entrap or entangle fish by drifting on the surface of or in the water, irrespective of whether it is used or intended to be used while attached to any point of land or the seabed or to any vessel.

The penalty is as for the previous offence and its seriousness can be explained by the serious environmental problem posed by these nets.³⁴ It is a problem that requires severe deterrent penalties to curb.

3.8 Fishing within a radius of one nautical mile of a fish aggregating device

No person shall fish within a radius of one nautical mile from a designated fish aggregating device without the permission of the Minister and unless in accordance with the conditions that he or she may determine.³⁵ The Minister may by notice in the *Gazette* declare any fish aggregating device to be a designated fish aggregating device for the purposes of this section.³⁶ The penalty for this offence is as for the previous offence.

³³ Section 47.

³⁴ In December 1991 the United Nations General Assembly passed U.N. Resolution 46-215, calling for a global moratorium on all high-seas driftnet fishing in the world's oceans and enclosed seas. For the problems of driftnet fishing, see, for example, <http://www.earthtrust.org/dnw.html> (accessed 28 November 2001).

³⁵ Section 48(4).

³⁶ Section 48(3)(a).

3.9 Stowage of gear

Gear on board any foreign fishing vessel for which a foreign fishing vessel licence has not been issued shall be stowed in the prescribed manner while the vessel is within South African waters.³⁷ In addition, if a foreign fishing vessel is licensed to fish by means of a particular type of gear in any specific area of the South African waters, it is required to stow any other gear on board the vessel in the prescribed manner while the vessel is within that area; and must stow all gear on board the vessel in the prescribed manner while the vessel is within any other area of the South African waters where it is not licensed to fish.³⁸ The Minister has the power to make regulations regulating the navigation of foreign fishing vessels through South African waters, having due regard to the provisions of the United Nations Convention on the Law of the Sea; and the manner in which gear is to be stowed aboard such vessels.³⁹ There are as yet no regulations prescribing how gear is to be stowed.

The penalty is as for the previous offence.

3.10 Contravention of any other provision of this Act

Section 58 makes it an offence to carry out a number of specified offences, but it also provides that contravention of ‘any other provision of this Act’ (that is, other than those specified already in section 58) is an offence carrying a maximum fine of two million rand or five years imprisonment.⁴⁰ The offences that are not specified in section 58 are (or could be):

³⁷ Section 49(1).

³⁸ Section 49(2).

³⁹ Section 77(2)(k).

⁴⁰ Section 58(1)(b).

3.10.1 Contravention of emergency measures

Section 16 empowers the Minister to take certain emergency measures where fish are endangered, including suspension of fishing. The Act does not indicate that failure to comply with the emergency measures is an offence, but this could be included in the measures when published.

3.10.2 Offences in marine protected area

Section 43 empowers the Minister to declare an area to be a marine protected area. No person shall in any marine protected area, without permission⁴¹—

- (a) fish or attempt to fish;
- (b) take or destroy any fauna and flora other than fish;
- (c) dredge, extract sand or gravel, discharge or deposit waste or any other polluting matter, or in any way disturb, alter or destroy the natural environment;
- (d) construct or erect any building or other structure on or over any land or water within such a marine protected area; or
- (e) carry on any activity which may adversely impact on the ecosystems of that area.⁴²

The Act does not explicitly make any of these acts an offence, but it would be nonsensical for them not to be offences.

3.10.3 Use of prohibited fishing methods

In terms of section 44, no person shall -

- (a) use, permit to be used, or attempt to use any explosive, fire-arm, poison or other noxious substance for the purpose of killing, stunning, disabling or catching fish, or of in any way rendering fish to be caught more easily;

⁴¹ In terms of s 43(3).

⁴² Section 43(2).

- (b) carry or have in his or her possession or control any explosive, fire-arm, poison or other noxious substance for any of the purposes referred to in paragraph (a); or
- (c) engage in a fishing or related activity by a method or in a manner prohibited by the Minister by notice in the *Gazette*.⁴³

In addition, no person shall land, sell, receive or possess any fish taken by any means in contravention of this Act.⁴⁴

Once again, no explicit provision in the Act declares contravention of this section to be an offence.

3.10.4 Interference with gear

No person shall—

- (a) remove, haul, empty, cast adrift or otherwise interfere with any fishing net, line, pot, trap, gear, tackle, or other equipment belonging to any other person without the consent of that person;
- (b) place any object in the water, or promote or undertake any activity in a manner so as to obstruct a fishing operation being carried out by another person;
- (c) destroy, damage, displace or move or alter the position of any fishing net, line, pot, trap, gear, tackle or other fishing equipment, or any buoy, float or other marker attached to it; or
- (d) remove fish from any fishing net, line, pot, trap, gear, tackle or other fishing equipment belonging to any other person without the consent of that person.⁴⁵

This prohibition is not explicitly made an offence in terms of the Act.

⁴³ Section 44(1).

⁴⁴ Section 44(2).

⁴⁵ Section 46.

3.10.5 Destruction of evidence

No person who, being on board any vessel being pursued, about to be boarded or notified that it will be boarded by a fishery control officer shall throw overboard or destroy any fish, fish product, gear, explosive, fire-arm, poison, noxious substance, chart, log book, document or other thing to avoid the seizure thereof or the detection of any contravention of this Act.⁴⁶ This prohibition is also applicable to vehicles, aircraft, fish processing plants and other premises.⁴⁷

The Act does not explicitly make this an offence.

3.11 Contravention of regulations

The general regulations⁴⁸ made under the Act contain a number of prohibitions. These range from prohibitions from fishing in closed seasons⁴⁹ to offences relating to gear and nets and mesh sizes.⁵⁰ The regulations provide that contravention or failure to comply with any of the regulations is an offence and that the penalty is a fine (unspecified amount) or imprisonment for not more than two years.⁵¹

3.12 Enforcement powers of fishery control officers

The Act gives fishery control officers extensive powers in respect of enforcement. They have extensive powers of search and seizure, both with and without the necessity of a warrant. The provisions relating to search and seizure would appear to be in compliance with the requirements of the Constitution, as they require reasonable grounds or

⁴⁶ Section 60(1).

⁴⁷ Section 60(2).

⁴⁸ GN R1111 in *GG* 19205 of 2 September 1998, as amended by GN R27 in *GG* 20796 of 14 January 2000.

⁴⁹ Reg 9.

⁵⁰ Chapter 4.

⁵¹ Reg 96. See also s 58(4) in the Act.

reasonable suspicion on the part of the officer that an offence has been or is being committed, and indicate that the officer may only act where the circumstances are such that the delay in requesting a warrant would defeat the object of the exercise.⁵²

A fishery control officer also has similar powers beyond South African waters in the case of hot pursuit.⁵³

3.13 Forfeiture

If any person is convicted of an offence in terms of this Act, the court may, in addition to any other penalty, order that any fishing vessel, together with its gear, equipment, any fish caught unlawfully or the proceeds of sale of such fish or any perishables, and any vehicle or aircraft used or involved in the commission of that offence be forfeited to the State.⁵⁴ Provided that the forfeiture is confined to the instrumentalities of the offence or the fruits of illegal activities (fish caught without a permit, for example) there would appear to be no problem with this provision and it is, indeed, a desirable provision in the circumstances.⁵⁵

3.14 Jurisdiction of courts

Section 70, which speaks for itself, reads as follows:

- (1) Any act or omission in contravention of any of the provisions of this Act which is committed—
 - (a) by any person within South African waters;
 - (b) outside South African waters by any citizen of the Republic or any person ordinarily resident in the Republic; or
 - (c) by any person on board any local fishing vessel;
- shall be dealt with and judicial proceedings taken as if such act or omission had taken place in the territory of the Republic.

⁵² Section 51.

⁵³ Section 52. The notion of 'hot pursuit' is regulated by Art 111 of the UNCLOS.

⁵⁴ Section 68.

⁵⁵ See discussion in previous Chapter, at §§2.3 and 6.5.

(2) Any offence in terms of this Act shall, for purposes in relation to jurisdiction of a court to try the offence, be deemed to have been committed within the area of jurisdiction of the court in which the prosecution is instituted.

(3) Notwithstanding anything to the contrary in any other Act, a magistrate's court shall have jurisdiction to impose any penalty prescribed by this Act.

This is an important provision, given that many offences in terms of this Act would be committed in the ocean, thus presenting possible jurisdiction problems for criminal procedural rules that are designed to deal with offences carried out on land.

3.15 Evidentiary matters

There are several provisions dealing with evidence and providing that furnishing of such evidence constitutes prima facie proof of the facts therein. This places the onus of disproving the evidence onto the accused, which constitutes an infringement of the accused's rights. Whether or not the provision in question can be saved by the limitations clause is then the issue that has to be resolved. This is difficult to evaluate outside of a particular context in which the issue may be raised, but tentative opinions are expressed below:

3.15.1 Documentary evidence

Chapter 71 empowers the Minister to issue a certificate stating certain specified facts (for example, that a particular location or area of water was on a specified date within South African waters, or within an area of South African waters subject to specified conditions). Such certificate is prima facie evidence of the facts averred therein,⁵⁶ but the person issuing the certificate may be required to give oral evidence.⁵⁷ The list of matters for which such certificate may be made⁵⁸ do not seem to be such that it would be overly

⁵⁶ Section 72(1).

⁵⁷ Section 72(2).

⁵⁸ That –

- (a) a specified vessel was or was not a local fishing vessel or a foreign fishing vessel on a specified date;
- (b) a specified vessel or person was or was not on a specified date the holder of any specified licence, permit, authorisation or certificate of registration;

onerous for the accused to disprove them. Nor, on the other hand, does it appear that it would be onerous for the State to prove these acts either. It would seem, then, that the rationale of the provision is efficiency and whether that would satisfy the limitations clause is debatable.

3.15.2 Certificate as to location of vessel

A certificate given by a fishery control officer or observer shall be prima facie evidence in any proceedings in terms of this Act, of the place or area in which a vessel has been at a particular date and time or during a particular period of time.⁵⁹ The section specifies a comprehensive list of information that must be supplied by the officer in question, which indicates that the information certified here is akin to technical evidence of the type contemplated by s 212(4) of the Criminal Procedure Act, the constitutionality of which was discussed above and was found to be unproblematic.⁶⁰ It is important that the accused be given the option of cross-examining the deponent of the document in question, and this is not explicitly provided for by section 73. It is provided that s 71 applies, with the necessary changes, to this certificate but it is s 72 that provides for oral evidence to be given. This is a potential problem, unless the right to cross-examine is implied in s 73.

-
- (c) an appended document is a true copy of the licence, authorisation or certificate of registration for a specified vessel or person and that specified conditions were those of a licence, permit, authorisation or certificate of registration issued in respect of a specified vessel or person;
 - (d) a particular location or area of water was on a specified date within South African waters, or within an area of South African waters subject to specified conditions;
 - (e) an appended chart shows the boundaries on a specified date of South African waters, internal waters, territorial waters, the exclusive economic zone or any area within such waters or zones which is subject to specified conditions;
 - (f) a call sign, name or number is that of a particular vessel or has been allotted under any system of naming or numbering of vessels to a particular vessel; or
 - (g) a particular position or catch report was given in respect of a specified vessel.

⁵⁹ Section 73.

⁶⁰ See above, Chapter 3 §4.3.

3.15.3 Designated machines

Section 74 provides for proof of readings given by machines or instruments that have been designated by the Minister, provided that the person making the readings is trained to do so and that the machine in question has been checked for correct working order a reasonable time before and after the readings made for the case in point. This is unlikely to be problematic, and, indeed, is a sensible section for the reasons given above in relation to s 212(4) of the Criminal Procedure Act.

3.15.4 Photographic evidence

There is a similar provision for photographic evidence with respect to photographs that have the date, time and location superimposed onto the photograph at the time the photograph is taken.⁶¹ Once again, the considerations discussed above would apply.

3.15.5 Observation devices⁶²

Section 76 provides for designated observation devices and the prima facie proof of information produced by such devices. The evaluation of the designated machines provision would apply with equal relevance here.

3.16 Revocation of permit

Where activities have to be carried out in terms of some sort of authorisation - a permit, for example – one of the most effective incentives for that person to comply with the permit conditions is that the permit can be revoked if he or she fails to comply with those conditions. This is provided for in the Act: section 28 provides that if a holder of any right, licence or permit in terms of this Act, inter alia, contravenes or fails to comply with a condition imposed in the right, licence or permit; contravenes or fails to comply with a provision of this Act; or is convicted of an offence in terms of this Act, the Director-

⁶¹ Section 75.

⁶² Section 1 defines as any device or machine placed on a fishing vessel in terms of this Act as a condition of its licence which transmits, whether in conjunction with other machines elsewhere or not, information or data concerning the position and fishing activities of the vessel.

General may request the holder to show cause in writing, within a period of 21 days from the date of the notice, why the right, licence or permit should not be revoked, suspended, cancelled, altered or reduced, as the case may be.

3.17 Evaluation

It is clear from analysis of this Act that the primary modes of enforcement are permit and criminal sanctions. Carrying out of activities without a permit or in contravention of the permit conditions is an offence and, in addition, grounds for the cancellation of the permit. The Act does not provide for alternative methods of enforcement, however, which might in certain circumstances be much more efficient than criminal prosecution.

As far as criminal prosecution is concerned, the Act facilitates this for the State by providing for several facts to be presumed given in specified circumstances, most of which are unlikely to present constitutional problems given the nature of the evidence and the ability of the accused to rebut such evidence.

Another noteworthy aspect of the Marine Living Resources Act is that the maximum penalties provided for are significantly large, indicating the seriousness with which offences under the Act are seen. The penalties provided for in this Act are much larger than any penalty provided for in pre-1994 legislation.

4 *National Water Act 36 of 1998*

The long title of this Act provides that the major objective of the Act is to provide for fundamental reform of the law relating to water resources. This Act provides for a movement away from the inequitable, riparian rights-based approach to water access to a more equitable approach which sees the state as the trustee of water in the Republic. Other noteworthy features of the Act are the provision for devolved catchment management of water resources and recognition of the water needs of the environment.

The Act provides for a number of offences. Those which are not merely administrative or not aimed directly at environmental conservation are as follows:

4.1 Use of water otherwise than as permitted

No person may use water otherwise than as permitted under this Act.⁶³ What at first glance appears to be a straightforward prohibition becomes considerably more complex when the concept of ‘water use’ is examined.

According to section 21, water use includes -

- (a) taking water from a water resource;
- (b) storing water;
- (c) impeding or diverting the flow of water in a watercourse;
- (d) engaging in a stream flow reduction activity contemplated in section 36;⁶⁴
- (e) engaging in a controlled activity identified as such in section 37(1) or declared under section 38(1);
- (f) discharging waste or water containing waste into a water resource through a pipe, canal, sewer, sea outfall or other conduit;
- (g) disposing of waste in a manner which may detrimentally impact on a water resource;
- (h) disposing in any manner of water which contains waste from, or which has been heated in, any industrial or power generation process;
- (i) altering the bed, banks, course or characteristics of a watercourse;
- (j) removing, discharging or disposing of water found underground if it is necessary for the efficient continuation of an activity or for the safety of people; and
- (k) using water for recreational purposes.

Two important terms used in this section are ‘watercourse’ and ‘water resource’. A ‘watercourse’ is a river or spring; a natural channel in which water flows regularly or intermittently; a wetland, lake or dam into which, or from which, water flows; and any collection of water which the Minister may, by notice in the *Gazette*, declare to be a watercourse, and a reference to a watercourse includes, where relevant, its bed and banks.⁶⁵ A ‘water resource’ includes a watercourse, surface water, estuary or aquifer.⁶⁶

⁶³ Section 151(1)(a).

⁶⁴ A stream flow reduction activity is use of land for afforestation which has been or is being established for commercial purposes; and any other activity so declared by the Minister: s 36(1).

⁶⁵ Section 1.

⁶⁶ Ibid. An ‘estuary’ is a partially or fully enclosed body of water which is open to the sea permanently or periodically; and within which the sea water can be diluted, to an extent that is measurable, with fresh water

Section 22 provides for permissible water use. Any water use requires a licence unless it falls into one of the following categories:

- ❑ It is permissible under schedule 1;
- ❑ It is permissible as a continuation of an existing lawful use;
- ❑ It is permissible under general authorisation issued under s 39; or
- ❑ The licence requirement has been dispensed with by the responsible authority.⁶⁷

Schedule 1 contains a list of water uses that do not require a licence under s 22. They are as follows:

- ❑ The taking of water for reasonable domestic use in that person's household, directly from any water resource to which that person has lawful access;
- ❑ The taking of water for use on land owned or occupied by that person, for -
 - reasonable domestic use;
 - small gardening not for commercial purposes; and
 - the watering of animals (excluding feedlots) which graze on that land within the grazing capacity of that land, from any water resource which is situated on or forms a boundary of that land, if the use is not excessive in relation to the capacity of the water resource and the needs of other users;
- ❑ The storing and use of run-off water from a roof;
- ❑ In emergency situations, the taking of water from any water resource for human consumption or firefighting;
- ❑ For recreational purposes -
 - use the water or the water surface of a water resource to which that person has lawful access; or
 - portage any boat or canoe on any land adjacent to a watercourse in order to continue boating on that watercourse; and
- ❑ Discharge -

drained from land (ibid). An 'aquifer' is a geological formation which has structures or textures that hold water or permit appreciable water movement through them (ibid).

⁶⁷ 'Responsible authority' is defined in s 1 as, in relation to a specific power or duty in respect of water uses, if that power or duty has been assigned by the Minister to a catchment management agency, that catchment management agency; or if that power or duty has not been so assigned, the Minister.

- waste or water containing waste; or
 - run-off water, including stormwater from any residential, recreational, commercial or industrial site,
- into a canal, sea outfall or other conduit controlled by another person authorised to undertake the purification, treatment or disposal of waste or water containing waste, subject to the approval of the person controlling the canal, sea outfall or other conduit.

Other permissible water use without a licence is an existing lawful water use. This is as the name suggests and is essentially a water use which took place within two years immediately before the date of commencement of the Act, and which is lawful in terms of legislation in force immediately before the commencement of the new Act.⁶⁸ An existing lawful water use is not necessarily indefinite in its duration, and such users may be required to apply for a licence in terms of the Act.

The third form of permissible unlicensed water use is water use under a general authorisation. A general authorization is made under s 39, which provides that a responsible authority may, subject to Schedule 1, by notice in the *Gazette* (a) generally; (b) in relation to a specific water resource; or (c) within an area specified in the notice, authorise all or any category of persons to use water, subject to any regulation and any conditions imposed under the Act. A general authorization, then, is akin to a 'blanket licence', which is granted without the need for those benefiting to apply. General authorizations have been issued and the offences under these authorizations are discussed below.⁶⁹

It is beyond the scope of this work to consider the notion of water use in detail, but let us consider an example to illustrate the possible conceptual difficulties that arise with respect to water use. One of the types of water use included in s 21 is disposing in any manner of water which contains waste from, or which has been heated in, any industrial or power generation process. According to Schedule 1, however, discharge of water containing waste is a permissible use if such discharge is made into canal, sea outfall or

⁶⁸ Section 32. See also ss 33-35.

⁶⁹ (Infra) at 173-5.

other conduit controlled by another person authorised to undertake the purification, treatment or disposal of waste or water containing waste, subject to the approval of the person controlling the canal, sea outfall or other conduit. This scenario would cover most industrial wastewater emissions, which are discharged into municipal sewers. Such discharge would typically be regulated by municipal by-laws which would set standards for the quality of the wastewater that can be discharged into the sewers. The upshot of this is that persons discharging wastewater under such circumstances would not require a licence under the National Water Act but would require the permission of the person in charge of the sewer system.

On the other hand, those persons who discharge waste or wastewater directly into a water resource by means of a pipe or conduit or similar manner, would require a licence to do this, which would typically set out the standards with which the effluent would be required to comply. A licence would *not* be required, however, where the discharge fell within the ambit of a general authorisation under s 39. The general authorisation dealing with discharge of waste⁷⁰ requires compliance with certain effluent standards.

Returning to the offence of water use otherwise as permitted, then, this essentially amounts to water use without a licence, where such licence is necessary. Failure to comply with the conditions or standards of an unlicensed water use (under a general authorisation, for example) is a separate offence discussed immediately below.

The penalty for this offence, and for all offences under the Act, is, on the first conviction, a fine or imprisonment for a period not exceeding five years, or both a fine and such imprisonment and, in the case of a second or subsequent conviction, a fine or imprisonment for a period not exceeding ten years or both.⁷¹

⁷⁰ Discussed below, 173-4.

⁷¹ Section 151(2).

4.2 Failure to comply with condition attached to permitted water use

No person may fail to comply with any condition attached to a permitted water use under the Act.⁷² Section 29 provides that a responsible authority may attach conditions to every general authorisation or licence. The section contains a comprehensive list of conditions which can be imposed for different licences and authorizations. For example, a permit relating to return flow and discharge or disposal of waste may specify a water resource to which it must be returned or other manner in which it must be disposed of; specifying permissible levels for some or all of its chemical and physical components; specifying treatment to which it must be subjected, before it is discharged; and specifying the volume which may be returned.⁷³

The penalty for this offence is the same as for the previous offence.

4.3 Failure to comply with directive

No person may fail to comply with a directive issued under section 19, 20, 53 or 118. The latter (s 118) deals with dams that are regarded as safety risks. This is not directly relevant to the current enquiry. The others are all important provisions for environmental law. The penalty for this offence is as for the previous offence.

Section 19 deals with the prevention and remedying of effects of pollution. It places a duty on the owner of land, a person in control of land or a person who occupies or uses the land on which any activity or process is or was performed or undertaken; or any other situation exists, which causes, has caused or is likely to cause pollution of a water resource, to take all reasonable measures to prevent any such pollution from occurring, continuing or recurring. Such measures may include measures to -

- ❑ cease, modify or control any act or process causing the pollution;
- ❑ comply with any prescribed waste standard or management practice;
- ❑ contain or prevent the movement of pollutants;

⁷² Section 151(1)(c).

⁷³ Section 29(1)(c).

- ❑ eliminate any source of the pollution;
- ❑ remedy the effects of the pollution; and
- ❑ remedy the effects of any disturbance to the bed and banks of a watercourse.⁷⁴

A catchment management agency may direct any person who fails to take the required measures commence taking specific measures before a given date; diligently continue with those measures; and complete them before a given date.⁷⁵ Failure to to comply, or comply inadequately with this directive allows the catchment management agency to take the measures it considers necessary to remedy the situation,⁷⁶ and to recover all costs incurred as a result of it acting jointly and severally from the persons listed in the section.⁷⁷

Failure to comply with a s 19 directive, them is not only an offence but also lays the offender open to liability for the costs incurred in remedying the situation that was the subject of the directive. This is an important provision in that it provides for an effective alternative to the criminal sanction that is less onerous to use than criminal prosecution. A person who is carrying on an activity that is polluting water may be prosecuted under the Act,⁷⁸ but it may in certain circumstances be more effective for the responsible authority to issue a directive under s 19, requiring the person to stop the polluting activity

⁷⁴ Section 19(2).

⁷⁵ Section 19(3).

⁷⁶ Section 19(4).

⁷⁷ Section 19(5). These persons are –

- (a) Any person who is or was responsible for, or who directly or indirectly contributed to, the pollution or the potential pollution;
- (b) the owner of the land at the time when the pollution or the potential for pollution occurred, or that owner's successor-in-title;
- (c) the person in control of the land or any person who has a right to use the land at the time when -
 - (i) the activity or the process is or was performed or undertaken; or
 - (ii) the situation came about; or
- (d) any person who negligently failed to prevent -
 - (i) the activity or the process being performed or undertaken; or
 - (ii) the situation from coming about.

⁷⁸ See below.

and to clean up any pollution that has already occurred, than to resort to prosecution. Of course, the two courses of action are not mutually exclusive. A person to whom a directive has been issued is not exempt from prosecution under the Act.

Section 20 deals with emergency incidents. An ‘incident’ includes any incident or accident in which a substance pollutes or has the potential to pollute a water resource; or has, or is likely to have, a detrimental effect on a water resource.⁷⁹ ‘Emergency’ is not defined. This section sets out steps for the responsible person to take in the case of an emergency incident, including notification of specified officials and clean-up measures. The ‘responsible person’ includes any person who is responsible for the incident; owns the substance involved in the incident; or was in control of the substance involved in the incident at the time of the incident.⁸⁰ The catchment management agency may direct the responsible person to take measures to deal with the incident. Failure to comply with the directive is an offence and it also allows the catchment management agency to take measures to remedy the situation, and to claim costs from every responsible person jointly and severally.

Section 53 provides that a responsible authority may, by notice in writing to a person who contravenes any provision of Chapter 4 (which regulates water use); a requirement set or directive given by the responsible authority under this Chapter; or a condition which applies to any authority to use water, direct that person, or the owner of the property in relation to which the contravention occurs, to take any action specified in the notice to rectify the contravention, within the time (being not less than two working days) specified in the notice or any other longer time allowed by the responsible authority. If the action is not taken within the time specified in the notice, or any longer time allowed, the responsible authority may carry out any works and take any other action necessary to rectify the contravention and recover its reasonable costs from the person on whom the notice was served; or apply to a competent court for appropriate relief.⁸¹ Failure to comply with such a directive is an offence. The observations made above about the

⁷⁹ Section 20(1).

⁸⁰ Section 20(2).

⁸¹ Section 53(2).

benefits of using a directive process rather than criminal prosecutions apply with equal relevance to this provision.

4.4 Tampering or interfering with waterwork

No person may unlawfully and intentionally or negligently tamper or interfere with any waterwork or any seal or measuring device attached to a waterwork.⁸² A waterwork is defined as including any borehole, structure, earthwork or equipment installed or used for or in connection with water use.⁸³ The penalty is the same as for the previous offence.

4.5 Refusal to perform duty

No person may intentionally refuse to perform a duty, or obstruct any other person in the exercise of any power or performance of any of that person's duties in terms of this Act.⁸⁴ The penalty is the same as for the previous offence.

4.6 Pollution of water resource

No person may unlawfully and intentionally or negligently commit any act or omission which pollutes or is likely to pollute a water resource.⁸⁵ 'Pollution' means the direct or indirect alteration of the physical, chemical or biological properties of a water resource so as to make it -

- ❑ less fit for any beneficial purpose for which it may reasonably be expected to be used; or
- ❑ harmful or potentially harmful -
 - to the welfare, health or safety of human beings;
 - to any aquatic or non-aquatic organisms;

⁸² Section 151(1)(e).

⁸³ Section 1.

⁸⁴ Section 151(1)(h).

⁸⁵ Section 151(1)(i).

- to the resource quality; or
- to property.⁸⁶

This is a widely-phrased prohibition, if the definition of pollution is taken into account. First, it does not have to be an act that in fact pollutes but merely one which is likely to pollute. Second, whether an act is polluting can be determined either by reference to whether the act has rendered the water less fit for its expected use, which would require proof of the water quality before the incident, or whether it is harmful or potentially harmful. The mens rea is also made explicit in this prohibition, clearly excluding strict liability but providing for a minimum of negligence.

The penalty is the same as for the previous offence.

4.7 Detrimentially affecting water resource

No person may unlawfully and intentionally or negligently commit any act or omission which detrimentally affects or is likely to affect a water resource.⁸⁷ If the pollution prohibition is not wide enough, this prohibition is a very broad back-up. In this case, it is not necessary to prove 'pollution' in the sense that is defined but merely detrimental effect, which is not defined in the Act and could be very widely construed. Once again, fault is specified as including negligence. The penalty is as above.

4.8 Failure to comply with temporary restriction

Schedule 3 of the Act sets out the powers and duties of catchment management agencies on assignment or delegation. In terms of item 6 in Schedule 3, if a catchment management agency on reasonable grounds believes that a water shortage exists or is about to occur within an area it may, despite anything to the contrary in any authorisation, by notice in the *Gazette* or by written notice to each of the water users in the area who are likely to be affected -

⁸⁶ Section 1.

⁸⁷ Section 151(1)(j).

- ❑ limit or prohibit the use of water;
- ❑ require any person to release stored water under that person's control;
- ❑ prohibit the use of any waterwork; and
- ❑ require specified water conservation measures to be taken.

Failure to comply with a temporary restriction on the use of water in terms of item 6 of Schedule 3 is an offence⁸⁸ attracting the same penalty as the other offences described here.

4.9 Offences under regulations

Various sections in the Act empower the Minister to make regulations dealing with various issues. For example, section 26 deals with regulations relating to water use. Section 69 regulates the making of regulations and provides that any regulation made under the Act may provide that a contravention of or failure to comply with a regulation is an offence and that any person found guilty of the offence is liable to a fine or to imprisonment for a period not exceeding 5 years.⁸⁹

Several sets of regulations have been made under the Act. We will consider one here. General authorizations under section 39 were made in 1999.⁹⁰ Chapter 3 of these regulations deal with the discharge of waste or water containing waste into a water resource through a pipe, canal, sewer or other conduit; and disposing in any manner of water which contains waste from, or which has been heated in, any industrial or power generation process. This general authorization essentially allows a water user to discharge up to 2000 m³ of water per day into a water resource⁹¹ provided that the discharge complies with limit values (standards) set out in the regulations; and does not

⁸⁸ Section 151(1)(l).

⁸⁹ Section 69(2).

⁹⁰ GN 1191 in GG 20526 of 8 October 1999.

⁹¹ The regulations distinguish between two sets of water resources – those which are listed and those which are not. Different limit values apply to listed water resources – special limit values. General limit values apply to the other water resources.

alter the natural ambient water temperature of the receiving water resource by more than 3 degrees Celcius; and that it is not a complex industrial wastewater.⁹²⁹³ The limit values contain standards for indicators such as faecal coliforms, chemical oxygen demand, heavy metals, pH, phosphorus and so on. The regulations require the user to carry out monitoring of the discharges according to specified criteria and to keep records of the discharges. Such records are to be made available to the responsible authority on request.⁹⁴ Contravention of anything in the general authorisation is an offence and subject to the penalty provided for in s 151(2).⁹⁵

Prosecution of a person who has failed to comply with the general authorisation by exceeding one or more of the limit values requires scientific proof of this fact. The Act does not provide for any presumptions relating to proof of scientific evidence, although s 212(4) of the Criminal Procedure Act would apply. Despite the presumption contained in s 212(4), however, it would be more difficult to prove contravention of the general authorisation than to use the general pollution prohibition in s 151. This difficulty may be ameliorated by requiring the user to keep his or her own records, but whether these can be used as evidence against the user is debatable. The question of self-incrimination in this type of situation is discussed in Chapter 10.

In practice, possibly the best way to deal with infractions of the general authorisation, where they are not too serious, would be to use a s 53 directive ordering the offender to comply with the regulations. This directive would be issued after the user's records indicated a contravention. The question of self-incrimination would not be problematic in this situation. Once the responsible authority was aware of a contravention, it could

⁹² This is wastewater arising from industrial activities and premises, that contains-

- a) a complex mixture of substances that are difficult or impractical to chemically characterise and quantify,
- or
- b) one or more substances, for which a Wastewater Limit Value has not been specified, and which may be harmful or potentially harmful to human health, or to the water resource (identification of complex industrial wastewater will be provided by the Department upon written request).

⁹³ Reg 3.7.1(a).

⁹⁴ Reg 3.9.

⁹⁵ Reg 3.12.

itself monitor the user's discharges for a period in order to establish compliance. Criminal prosecution could ensue if the user subsequently failed to comply with the standards. The authority would have its own records that could be used as evidence without the problem of self-incrimination.

4.10 Miscellaneous provisions

The Act also provides for an enquiry to be made into loss suffered by a person or damage caused to a water resource as a result of an offence under this Act. This occurs upon conviction and in the same proceedings.⁹⁶ Once the Court has done this, it may order payment of damages or the costs of remediation of damage, or order that the remedial measures be taken.⁹⁷ This measure is a complementary measure to the criminal sanction, not an alternative, since it applies only upon conviction. It is a useful measure in environmental legislation since it is aimed at the remediation of environmental damage. A criminal conviction in itself does not directly benefit the environment or address the harm done to the environment, yet such a measure does and, for this reason, is welcome. Such a measure existed in the 1954 Water Act, the 1998 Act's precursor, as well.⁹⁸

The Act also contains a vicarious liability provision. Section 154 provides

Whenever an act or omission by an employee or agent -

(a) constitutes an offence in terms of this Act, and takes place with the express or implied permission of the employer or principal, as the case may be, the employer or principal, as the case may be, is, in addition to the employee or agent, liable to conviction for that offence; or

(b) would constitute an offence by the employer or principal, as the case may be, in terms of this Act, that employee or agent will in addition to that employer or principal be liable to conviction for that offence.

Subsection (a) provides for vicarious liability and may be problematic as far as the presumption of innocence is concerned. This issue is discussed in further detail in Chapter 10. Subsection (b) may be referred to as a reverse vicarious liability provision and this type of provision is also discussed later. There is a similar provision in the

⁹⁶ Section 152.

⁹⁷ Section 153.

⁹⁸ Section 171 of Act 54 of 1956.

National Environmental Management Act that is discussed in detail below. In short, it would seem that this provision is of questionable usefulness.

A further provision relevant to enforcement of the Act is section 155, which provides that a High Court may, on application by the Minister or the water management institution concerned, grant an interdict or any other appropriate order against any person who has contravened any provision of this Act, including an order to discontinue any activity constituting the contravention and to remedy the adverse effects of the contravention. This is a useful alternative to the criminal sanction and in many cases potentially very effective indeed. If a person is carrying out an activity that is harmful to the environment, interdicting him or her from continuing from the activity will serve to put a stop to that activity, which is directly in the interests of environmental conservation. There is also nothing in the section to prevent this measure being used in addition to criminal prosecution. In other spheres, the interdict has been used as a very effective alternative to the criminal sanction – particularly in respect of contraventions of the Atmospheric Pollution Prevention Act.⁹⁹

4.11 Evaluation

The National Water Act is less reliant on the criminal sanction than other legislation studied thus far in this work. Although the criminal sanction is still an important enforcement tool, this Act makes use of permits and other authorizations and a variety of directives as a primary mode of compliance. Moreover, the Act explicitly provides for the power of the authority concerned to apply for an interdict requiring cessation of an activity that is a contravention of the Act.

As far as the criminal sanction is concerned, the Act makes use of both primary and subsidiary criminal sanctions.¹⁰⁰ The former is one where the environmentally harmful activity is outlawed directly (for example, pollution of a watercourse is an offence). A subsidiary or secondary sanction is one which is used in circumstances where the primary

⁹⁹ See discussion above at 73.

¹⁰⁰ See RF Fuggle & MA Rabie *Environmental Management in South Africa* (1992) at 130.

enforcement mechanism is administrative (a licence, for example) and the criminal sanction is invoked only where the administrative control fails. An example would be carrying out an activity without the required licence. Generally speaking, it is easier to prove an offence of acting without a licence than an offence defined in terms of environmental harm. Moreover, use of a subsidiary sanction often allows less reactive enforcement – the harm need not have materialized before the criminal enforcement kicks in.

The maximum penalty provided for is stringent enough to reflect the seriousness of contravention of the Act. Moreover, the provision relating to compensation is exactly the sort of provision that environmental legislation should contain in order to complement the criminal sanction. The one aspect of the National Water Act that may be problematic, however, is the vicarious liability provision.

5 National Forests Act 84 of 1998

The National Forests Act is aimed in part at the conservation of natural forests and woodlands, but also at the regulation of commercial forestry. As is the case with several post-1994 enactments, the Act also has an important socio-economic focus in that it provides for more equitable distribution of the economic, social and environmental benefits of forests than was the case in the past.

There are several important terms used in the Act that it would be useful to define at this point, as they are referred to in several of the offences discussed below. ‘Forest’ is defined in s 1 as including a natural forest, a woodland and a plantation; the forest produce in it; and the ecosystems which it makes up. A ‘natural forest’ is defined in s 1 as a group of indigenous¹⁰¹ trees whose crowns are largely contiguous, or which has been declared to be one by the Minister.¹⁰² A ‘woodland’ is a group of indigenous trees which are not a natural forest, but whose crowns cover more than five per cent of the area

¹⁰¹ Indigenous to South Africa (s 1).

¹⁰² The Minister may declare to be a natural forest a group of indigenous trees whose crowns are not largely contiguous; or where there is doubt as to whether or not their crowns are largely contiguous (s 7(2)).

bounded by the trees forming the perimeter of the group.¹⁰³ A ‘plantation’ is a group of trees cultivated for exploitation of the wood, bark, leaves or essential oils in the trees.¹⁰⁴

A ‘state forest’

(a) means

- i. State land, other than trust forests, acquired or reserved for forestry in terms of this Act or any previous forest legislation, unless it has been released under section 50 (3);
- ii. (State land, other than trust forests, designated as demarcated State forest or a similar designation in terms of any previous forest legislation, unless it was withdrawn from demarcation and is no longer used for forestry; and
- iii. trust forests; and

(b) includes--

- i. State plantations, State sawmills and State timber preservation plants;
- ii. land controlled and managed by the Department for research purposes or as a tree nursery;
- iii. areas protected in terms of sections 8 (1) (a) and (b) and 9;
- iv. an area of State land which has been set aside in terms of previous forest legislation for the prevention of soil erosion or sand drift;
- v. an area referred to in paragraph (a) or paragraph (b) (i) to (iv), the ownership or control of which is transferred to a person or organ of State contemplated in section 53 (2) (g) (i);

A ‘tree’ is any tree seedling, sapling, transplant or coppice shoot of any age and any root, branch or other part of it.¹⁰⁵ Finally, ‘forest produce’ means anything which appears or grows in a forest, including any living organism, and any product of it, in a forest; and inanimate objects of mineral, historical, anthropological or cultural value.¹⁰⁶

The Act contains an innovative penalty system, providing for five different categories of offences. Each category attracts a particular penalty. The offences (other than those relating to enforcement¹⁰⁷) are as follows:

¹⁰³ Section 1.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Section 64.

5.1 Failure to take steps relating to sustainable forest management

Section 4 empowers the Minister to determine and publish standards for sustainable forest management and indicate where breach of such standards is an offence. Where such a breach occurs, a forest officer may inform an owner who is in breach of that standard by written notice of the nature of the breach; the steps that the owner must take to remedy the breach; and the period within which this must be done.¹⁰⁸ Failure to take such steps is a fifth category offence.¹⁰⁹ A ‘forest officer’ is a person so designated under s 65, and is the official responsible for much of the enforcement duties in the Act. An ‘owner’, for purposes of this section, is a registered owner or, where the registered owner¹¹⁰ has transferred control of the forest management unit¹¹¹ in question to another person or organ of State, whether by way of assignment, delegation, contract or otherwise, that person or organ of State.¹¹²

5.2 Cutting, damaging etc indigenous tree

In terms of s 7(1), no person may cut, disturb, damage or destroy any indigenous, living tree in, or remove or receive any such tree from, a natural forest except in terms of a licence,¹¹³ or an exemption determined by the Minister. This is the provision that gives natural forests their protection under this Act. Contravention of this provision is a second

¹⁰⁸ Section 4(8).

¹⁰⁹ Section 61. A fifth category offence is one for which imprisonment may not be imposed, but there is a maximum fine of R50 000 (s 58(6)).

¹¹⁰ Registered in the Deeds Registry as owner.

¹¹¹ This is defined in s1as an area of land on all or on part of which there is forest and which is managed as an integrated unit.

¹¹² Section 4(1).

¹¹³ Issued under s 7(4) or s 23.

category offence.¹¹⁴ None of the terms ‘cut’, ‘disturb’, ‘damage’ or ‘destroy’ are defined in the Act, so they must bear their dictionary meanings.

5.3 Cutting, damaging etc forest produce in protected area

In terms of section 8, the Minister may declare¹¹⁵ a State forest or a part of it; purchase or expropriate land and declare it; or at the request or with the consent of the registered owner of land outside a State forest, declare it, as a specially protected area in one of three categories. The categories are forest nature reserve; forest wilderness area; or any other type of protected area which is recognised in international law or practice.¹¹⁶ No person may cut, disturb, damage or destroy any forest produce in, or remove or receive any forest produce from, a protected area, except in terms of rules made for the management of the area;¹¹⁷ in the course of the management of the protected area by the responsible organ of State or person; in terms of a right of servitude; in terms of the authority of a licence or exemption; or in the case of a protected area on land outside a State forest, with the consent of the registered owner or by reason of another right which allows the person concerned to do so, subject to the prohibition in section 7 (1).¹¹⁸ Any person who contravenes the prohibition on the cutting, disturbance, damage or destruction of forest produce in or the removal or receipt of forest produce from a protected area referred to in section 10 (1) is guilty of a second category offence.¹¹⁹ The penalty is as for the previous offence.

¹¹⁴ Section 62(1). A person who is guilty of a second category offence may be sentenced on a first conviction for that offence to a fine or imprisonment for a period of up to two years, or to both a fine and such imprisonment.

¹¹⁵ The Minister may declare such an area only if he or she is of the opinion that it is not already adequately protected in terms of other legislation.

¹¹⁶ Section 8(1).

¹¹⁷ In terms of s 11(2)(b).

¹¹⁸ Section 10(1).

¹¹⁹ Section 62(2)(a).

It should be noted that a forest may be both a natural forest and a protected area in terms of the Act. Although there is some overlap between s 10 and s 7, the latter would prevail in the case of a natural forest which is also a protected area. The effect of this, for example, would be that the right of servitude which allows cutting forest produce in terms of s 10 would not qualify as an exemption from the prohibition in s 7.

5.4 Contravention of protected area rules

The Minister is required by s 11(2)(b) to make rules for the management of the protected area so as to achieve the purpose for which the area has been protected, unless there are already suitable rules in place. Contravention of such rules is a third category offence.¹²⁰

5.5 Prohibited activities in respect of protected tree

The Minister may declare a particular tree; a particular group of trees; a particular woodland; or trees belonging to a particular species, to be a protected tree, group of trees, woodland or species.¹²¹ No person may cut, disturb, damage, destroy or remove any protected tree; or collect, remove, transport, export, purchase, sell, donate or in any other manner acquire or dispose of any protected tree, except under a licence granted by the Minister.¹²² The Minister is required to publish an appropriate warning of this prohibition and the consequences of non-compliance annually in the *Gazette* and in two newspapers circulating nationally.¹²³ This is a first category offence,¹²⁴ the most serious of the offences provided for in the Act.

¹²⁰ Section 62(2)(b). A person who is guilty of a third category offence may be sentenced on a first conviction for that offence to a fine or imprisonment for a period of up to one year, or to both a fine and such imprisonment (s 58(3)).

¹²¹ Section 12(1). The Minister may make such a declaration only if he or she is of the opinion that the tree, group of trees, woodland or species is not already adequately protected in terms of other legislation (s 12(2)).

¹²² Section 15(1).

¹²³ Section 15(3)(b).

5.6 Prohibited activities in controlled forest areas

If the Minister is of the opinion that urgent steps are required to prevent the deforestation or further deforestation of; or rehabilitate a natural forest or a woodland protected under section 12 (1) which is threatened with deforestation, or is being or has been deforested, he or she may declare it a controlled forest area.¹²⁵ The Minister may, in respect of such area, stop any persons wishing to exercise a right of access¹²⁶ from entering the area; prohibit any person from removing forest produce from the area; prohibit any other activity which may cause deforestation or prevent rehabilitation; suspend licences issued under this Act in respect of the area; require the owner to take specified steps to prevent deforestation or rehabilitate the natural forest or woodland; and require the owner to submit and comply with a sustainable forest management plan for the area.¹²⁷ Any person who contravenes a prohibition or any other provision in a notice declaring a controlled forest area under section 17 (3) and (4) is guilty of a second category offence.¹²⁸

5.7 Prohibited entry into forest

Any person who without authority, enters or is in an area of a forest which is not designated for access for recreation, education, culture or spiritual fulfilment, is guilty of a fourth category offence.¹²⁹ Access to state forests is permitted by s 19. This access

¹²⁴ Section 62(2)(c). A person who is guilty of a first category offence may be sentenced to a fine or imprisonment for a period of up to three years, or to both a fine and such imprisonment (s 58(1)).

¹²⁵ Section 17(2).

¹²⁶ Referred to in s 19.

¹²⁷ Section 17(4). Such provisions are to be published in terms of s 17(3).

¹²⁸ Section 62(3).

¹²⁹ Section 63(1)(a). A person who is guilty of a fourth category offence may be sentenced on a first conviction for that offence to a fine or community service for a period of up to six months or to both a fine and such service (s 58(4)).

may be restricted in terms of s 20. Access to forests other than state forests is regulated by s 21.

5.8 Contravention of rules relating to access to forests

Any person who contravenes a rule made by an owner in terms of section 20 (3) or a registered owner in terms of section 21 (2), is guilty of a fourth category offence.¹³⁰ These sections both deal with rules relating to access to forests. The former relate to state forests and the latter forests other than state forests. These rules may contain matters like restrictions on permitted modes of transport and restrictions on fires.

5.9 Making marks or signs

Any person who without authority makes a mark or sign on a rock, building, tree or other vegetation in a forest, is guilty of a third category offence.¹³¹ It is noteworthy that this prohibition does not apply only to state forests but to all forests. This would cover the frequent trend of carving or spraypainting initials or other marks on things like rocks and trees in areas to which the public has access. Although in many cases this is probably physically harmless, it is aesthetically displeasing.

5.10 Littering in a forest

Any person who dumps or scatters litter in a forest, is guilty of a fourth category offence.¹³² 'Litter' is not defined, and nor are 'dump' or 'scatter'. It may have been better for the Act to distinguish between deliberate dumping of litter (or waste) and

¹³⁰ Section 63(1)(b).

¹³¹ Section 63(1)(e). A person who is guilty of a third category offence may be sentenced on a first conviction for that offence to a fine or imprisonment for a period of up to one year, or to both a fine and such imprisonment (s 58(3)).

¹³² Section 63(1)(f). See above (§5.7) for penalty.

littering in the ordinary sense of the word. Dumping is a much more serious offence and ought to attract a more serious penalty than a fourth category offence.

5.11 Cutting, damaging seven-week ferns

Any person who, without a licence or other authority cuts, disturbs, damages, destroys, removes or receives seven-week ferns (*Rumohra adiantiforme*) from any forest, is guilty of a first category offence.¹³³ This is the most serious category of offence provided for in the Act. According to the Department of Forestry,¹³⁴ the rationale behind the offence is to protect the seven-week fern because it is endangered, but curiously it does not appear on the CITES Appendices of endangered species, nor in South African nature conservation legislation. It may be that the plant is under pressure from collectors, since it is used in the florist industry, and this is the reason behind its protection. Why it warrants the most serious offence status, however, is not clear. Note once again that this offence applies to any forest, not just state forests nor protected areas.

5.12 Killing fauna in a forest

Any person who kills any animal, bird, insect or fish, is guilty of a second category offence if it is in a protected area and a third category offence if it is in any other area.¹³⁵ It is interesting that this prohibition does not stipulate a mens rea requirement, which raises the possibility that negligent killing of any fauna could be an offence.

¹³³ Section 63(2)(a). A person who is guilty of a first category offence may be sentenced to a fine or imprisonment for a period of up to three years, or to both a fine and such imprisonment (s 58(1)).

¹³⁴ Regional Office (KwaZulu-Natal), personal communication.

¹³⁵ Section 63(2)(b). A person who is guilty of a second category offence may be sentenced on a first conviction for that offence to a fine or imprisonment for a period of up to two years, or to both a fine and such imprisonment. The penalty for a third category offence is set out above (§5.9).

5.13 Removal of forest produce

Any person who, without the permission of the registered owner, removes any forest produce other than trees referred to in section 62 (1), from a forest other than a State forest, is guilty of a third category offence.¹³⁶ The exclusion of trees referred to in s 62(1) is not because those trees can be removed, but because there is a heavier penalty for removing them.¹³⁷ Also, the reason why the offence applies only to forests other than state forests is probably because the offences discussed below apply to state forests.

5.14 Licence contraventions

Any person who carries on an activity in a State forest for which a licence is required without such a licence is guilty of a third category offence, if the State forest is a protected area; and a fourth category offence, if the State forest is not a protected area.¹³⁸ Any person who contravenes a condition in a licence, exemption or other authorisation in terms of this Act in any protected area is guilty of a second category offence; and in any other forest is guilty of a third category offence.¹³⁹

Section 23 provides that the Minister *may* in a state forest, license any of a list of specified activities, including the felling of trees and removal of timber; and the cutting, disturbance, damage or destruction of any other forest produce. Section 23(2) prohibits anyone from engaging in any activity in a state forest for which a licence is required without such a licence, save in specified circumstances where he or she would be exempted.¹⁴⁰ The Act does not, however, specify that a person *must* have a licence to

¹³⁶ Section 63(3). For penalty see previous note.

¹³⁷ See above, §5.2.

¹³⁸ Section 63(4). For penalties, see n133 (supra) for third category offence and n129 (supra) for fourth category offence.

¹³⁹ Section 63(5). For penalties, see n133 (supra).

¹⁴⁰ Where he or she is exempted under section 24 (6); he or she is acting in the scope of his or her employment or mandate as an officer, employee or agent of the Department; he or she has a right to engage in the activity in terms of the Interim Protection of Informal Land Rights Act 31 of 1996.

carry on any of the activities listed in s 23(1) or, alternatively, that the activities are prohibited *without* a licence. Since the principle of legality cannot allow a prohibition to be implied, this is a loophole in the Act which potentially renders the offence in s 63(4) of no effect. This could be remedied quite easily by amending s 23(1) to read ‘No person may in a state forest - (list the activities) without a licence issued by the Minister.

5.15 Miscellaneous Provisions

As indicated above, s 58 deals with sentencing by creating different categories of offences carrying different penalties. The section contains the following additional provisions relating to sentencing. First, a person who is guilty of a second, third or fourth category offence may be sentenced on a second conviction for that offence as if he or she has committed a first, second or third category offence, respectively.¹⁴¹ It is not uncommon for legislation to provide for more serious penalties for repeat offences, and the National Forests Act does so in a novel way by using the sentencing categories.

Second, a court which sentences any person to community service for an offence in terms of this Act must impose a form of community service which benefits the environment if it is possible for the offender to serve such a sentence in the circumstances.¹⁴² The circumstances in which community service may be imposed are relatively few in the Act, but this provision makes sense in the context of the overall aim of environmental law.

The third provision relating to sentencing that is worth mentioning is the power of the court that sentences any person for any offence in terms of this Act, to suspend or revoke a licence granted to the offender under section 7 or 23. For reasons given earlier, the suspension of a licence is an important deterrent measure at the disposal of the enforcement authorities and this is therefore an important provision.

As is the case in other environmental legislation, the National Forests Act also contains a provision providing for compensatory orders in criminal proceedings. Section

¹⁴¹ Section 58(5).

¹⁴² Section 58(7)(a).

59 provides that a court which convicts a person of an offence in terms of the Act, may order the return of any forest produce or protected tree which has unlawfully been removed, cut or damaged, to the person entitled to it if it is feasible to do so; and, in addition to or instead of such return, the person convicted to pay damages to any person who suffered a loss as a result of the offence. This takes place during the criminal trial and an order under this section is executed in the same manner as a judgment of that court in a civil case.¹⁴³ The benefits of this kind of provision have already been discussed above and are equally applicable in respect of this section.

Also, in order to aid compliance, the Act provides for payment of rewards for informants: A court which imposes a fine for an offence in terms of this Act, may order that a sum of not more than one-fourth of the fine, be paid to any person¹⁴⁴ whose evidence led to the conviction or who helped bring the offender to justice.¹⁴⁵

Finally, the Act contains powers of search,¹⁴⁶ seizure¹⁴⁷ and arrest¹⁴⁸ for forest officers. These are the standard type of provisions dealing with these matters and do not present any obvious problems. Such empowering of officials who are well-versed in the forests legislation is preferable to relying, for example, on the South African Police Services, who not only are struggling to keep apace with enforcement of the common law, but who are also not necessarily familiar with the prohibitions contained in the Act.

5.16 Evaluation

Although the Act contains an innovative system of penalties, making explicit the difference in seriousness of various offences, in other ways the Act conforms to the traditional ‘command and control’ enforcement paradigm. Contraventions of the Act are intended to be dealt with primarily by means of the criminal sanction. Whereas other

¹⁴³ Section 59(3).

¹⁴⁴ Other than an officer in the service of the State.

¹⁴⁵ Section 60.

¹⁴⁶ Section 67.

¹⁴⁷ Section 68.

¹⁴⁸ Section 69.

more recent enactments have made use of directive mechanisms whereby officials may order persons to cease certain activities, or to take steps to remedy damage, such mechanisms are absent in the National Forests Act. Many of the offences provided for in the Act, given the penalties provided for their contravention, are relatively minor and these could surely be dealt with administratively rather than by resort to the cumbersome procedure of criminal prosecution.

6 National Veld and Forest Fire Act 101 of 1998

This Act deals with veld and forest fires, matters like the burning of firebreaks, establishment of fire protection associations and various other fire safety measures. Although the Act does take into account environmental considerations, none of the offences provided for are concerned directly with environmental conservation and therefore are not relevant to the current enquiry.

7 National Environmental Management Act 107 of 1998

The National Environmental Management Act (NEMA) is probably the most important environmental legislation in South Africa. It is aimed primarily at co-operative environmental governance but contains several important provisions relating to environmental offences, although there are no offences created by the Act itself.¹⁴⁹ Chapter 7 of the Act deals with enforcement, compliance and protection and it is part 2 of this Chapter that contains the relevant provisions to be analysed here.

7.1 Private prosecutions

Section 33 of NEMA provides:

(1) Any person may—

¹⁴⁹ There is provision in the Act for regulations to be made which provide for offences and penalties: section 44(3).

- (a) in the public interest; or
- (b) in the interest of the protection of the environment,

institute and conduct a prosecution in respect of any breach or threatened breach of any duty, other than a public duty resting on an organ of state, in any national or provincial legislation or municipal bylaw, or any regulation, licence, permission or authorization issued in terms of such legislation, where that duty is concerned with the protection of the environment and the breach of that duty is an offence.

(2) The provisions of sections 9 to 17 of the Criminal Procedure Act, 1977 (Act 51 of 1977) applicable to a prosecution instituted and conducted under section 8 of that Act must apply to a prosecution instituted and conducted under subsection (1): Provided that if—

- (a) the person prosecuting privately does so through a person entitled to practice as an advocate or an attorney in the Republic;
- (b) the person prosecuting privately has given written notice to the appropriate public prosecutor that he or she intends to do so; and
- (c) the public prosecutor has not, within 28 days of receipt of such notice, stated in writing that he or she intends to prosecute the alleged offence,
 - (i) the person prosecuting privately shall not be required to produce a certificate issued by the Attorney-General stating that he or she has refused to prosecute the accused; and
 - (ii) the person prosecuting privately shall not be required to provide security for such action.

(3) The court may order a person convicted upon a private prosecution brought under subsection (1) to pay the costs and expenses of the prosecution, including the costs of any appeal against such conviction or any sentence.

(4) The accused may be granted an order for costs against the person prosecuting privately, if the charge against the accused is dismissed or the accused is acquitted or a decision in favour of the accused is given on appeal and the court finds either:

- (a) that the person instituting and conducting the private prosecution did not act out of a concern for the public interest or the protection of the environment; or
- (b) that such prosecution was unfounded, trivial or vexatious.

(5) When a private prosecution is instituted in accordance with the provisions of this Act, the Attorney-General is barred from prosecuting except with the leave of the court concerned.

This is a provision which is in keeping with the tenor of the Act to facilitate public participation in environmental decision-making and enforcement. Section 32, for example, provides for liberal standing for persons wishing to enforce provisions of any law relating to protection of the environment or use of natural resources. It is most likely that members of the public would use section 32 in order to pursue civil remedies (for example, applications for interdicts) than resort to a private prosecution. Where section

33 may well have significant utility, however, is in allowing enforcement agencies (the Department of Water Affairs and Forestry, for example) to utilise lawyers hired by the agency concerned to prosecute contraventions of environmental laws rather than handing the matter over to the Director of Public Prosecutions for prosecution as is the case at present. The possibilities in this regard are discussed in more detail in Chapter 13.

7.2 Provisions relating to criminal proceedings

Section 34 provides as follows:

(1) Whenever any person is convicted of an offence under any provision listed in Schedule 3 and it appears that such person has by that offence caused loss or damage to any organ of state or other person, including the cost incurred or likely to be incurred by an organ of state in rehabilitating the environment or preventing damage to the environment, the court may in the same proceedings at the written request of the Minister or other organ of state or other person concerned, and in the presence of the convicted person, inquire summarily and without pleadings into the amount of the loss or damage so caused.

(2) Upon proof of such amount, the court may give judgement therefor in favour of the organ of state or other person concerned against the convicted person, and such judgement shall be of the same force and effect and be executable in the same manner as if it had been given in a civil action duly instituted before a competent court.

(3) Whenever any person is convicted of an offence under any provision listed in Schedule 3 the court convicting such person may summarily enquire into and assess the monetary value of any advantage gained or likely to be gained by such person in consequence of that offence, and, in addition to any other punishment imposed in respect of that offence, the court may order the award of damages or compensation or a fine equal to the amount so assessed.

(4) Whenever any person is convicted of an offence under any provision listed in Schedule 3 the court convicting such person may, upon application by the public prosecutor or another organ of state, order such person to pay the reasonable costs incurred by the public prosecutor and the organ of state concerned in the investigation and prosecution of the offence.

(5) Whenever any manager, agent or employee does or omits to do an act which it had been his or her task to do or to refrain from doing on behalf of the employer and which would be an offence under any provision listed in Schedule 3 for the employer to do or omit to do, and the act or omission of the manager, agent or employee occurred because the employer failed to take all reasonable steps to prevent the act or omission in question, then the employer shall be guilty of the said offence and, save that no penalty other than a fine may be imposed if a conviction is based on

this sub-section, liable on conviction to the penalty specified in the relevant law, including an order under subsections (2), (3) and (4), and proof of such act or omission by a manager, agent or employee shall constitute *prima facie* evidence that the employer is guilty under this subsection.

(6) Whenever any manager, agent or employee does or omits to do an act which it had been his or her task to do or to refrain from doing on behalf of the employer and which would be an offence under any provision listed in Schedule 3 for the employer to do or omit to do, he or she shall be liable to be convicted and sentenced in respect thereof as if he or she were the employer.

(7) Any person who is or was a director of a firm at the time of the commission by that firm of an offence under any provision listed in Schedule 3 shall himself or herself be guilty of the said offence and liable on conviction to the penalty specified in the relevant law, including an order under subsection (2), (3) and (4), if the offence in question resulted from the failure of the director to take all reasonable steps that were necessary under the circumstances to prevent the commission of the offence: Provided that proof of the said offence by the firm shall constitute *prima facie* evidence that the director is guilty under this subsection.

(8) Any such manager, agent, employee or director may be so convicted and sentenced in addition to the employer or firm.

(9) In subsection (7) and (8)—

(a) “firm” shall mean a body incorporated by or in terms of any law as well as a partnership; and

(b) “director” shall mean a member of the board, executive committee, or other managing body of a corporate body and, in the case of a close corporation, a member of that close corporation or in the case of a partnership, a member of that partnership.

(10) (a) The Minister may amend Part (a) of Schedule 3 by regulation.

(b) An MEC may amend Part (b) of Schedule 3 in respect of the province of his or her jurisdiction by regulation.

Each subsection will be examined in turn.

Subsections (1) and (2)

These subsections operate in tandem. They are applicable to those offences listed in Schedule 3 of the Act. This Schedule is reproduced below, together with reference to where the relevant offence is discussed in this thesis.

Schedule 3: Part (a): National Legislation

No. and year of law	Short title	Relevant provisions	Reference in this work
Act No. 36 of 1947	Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act	Section 18(1)(l) insofar as it relates to contraventions of sections 7 and 7bis	64
Act No. 71 of 1962	Animal Protection Act	Sections 2(1) and 2A	n/a ¹⁵⁰
Act No. 45 of 1965	Atmospheric Pollution Prevention Act	Section 9	71
Act No. 15 of 1973	Hazardous Substances Act	Section 19(1)(a) and (b) insofar as it relates to contraventions of sections 3 and 3A	81-3
Act No. 57 of 1976	National Parks Act	Section 24(1)(b)	94
Act No. 63 of 1976 (sic – should be 1970)	Mountain Catchment Areas Act	Section 14 insofar as it relates to contraventions of section 3	80
Act No. 63 of 1977	Health	Section 27	103
Act No. 73 of 1980	Dumping at Sea Control Act	Sections 2(1)(a) and 2(1)(b)	105-8
Act No. 6 of 1981	Marine Pollution (Control and Civil Liability) Act	Section 2(1)	111
Act No. 43 of 1983	Conservation of Agricultural Resources Act	Sections 6 and 7	119-20
Act No. 2 of 1986	Marine Pollution (Prevention of Pollution from Ships)	Section 3A	124
Act No. 73 of 1989	Environment Conservation Act	Section 29(2)(a) and (4)	126-131

¹⁵⁰ Not discussed in this work because it was felt that it was not environmental legislation since it deals with domestic animals and animals in captivity – in other words, not natural resources.

Act No. 18 of 1998	Marine Living Resources Act	Section 58(1) in so far as it relates to contraventions of sections 43(2), 45, and 47, and section 58(2) insofar as it relates to contraventions of international conservation and management measures	150-6
Act No. 36 of 1998	National Water Act	Section 151(i) and (j)	171-2

Schedule 3: Part (b): Provincial Legislation

No. and year of law	Short title	Relevant provisions	
Ordinance No. 8 of 1969 Section	Orange Free State Conservation Ordinance	Section 40(1)(a) insofar as it relates to contraventions of sections 2(3), 14(2), 15(a), 16(a) and 33	n/a
Ordinance No. 9 of 1969	Orange Free State Townships Ord.	Section 40(1)(a)(ii)	n/a
Ordinance No. 15 of 1974	Natal Nature Conservation Ord.	Section 55 insofar as it relates to section 37(1), to section 49 in respect of specially protected game and to section 51 in respect of specially protected game, section 109 insofar as it relates to section 101, to section 102 and to section 104, section 154 insofar as it relates to section 152; section 185 insofar as it relates to section 183, and section 208 insofar as it relates to section 194 and to section 200	214-239

Ordinance No. 19 of 1974	Cape Nature and Environmental Conservation Ord.	Section 86(1) insofar as it relates to contraventions of sections 26, 41(1)(b)(ii) and (c)-(e), 52(a), 57(a), 58(b) and 62(1)	239
Ordinance No. 12 of 1983	Transvaal Nature Conservation Ord.	Sections 16A, 42, 84, 96 and 98	243
Ordinance No. 15 of 1985	Cape Land Use Planning Ord.	Section 46(1) insofar as it relates to sections 23(1) and 39(2)	n/a
Ordinance No. 15 of 1986	Transvaal Town Planning and Townships Ord.	Sections 42, 93 and 115	n/a
Act No. 5 of 1998	KwaZulu Natal Planning and Development Act	Section 48	251
Act No. 29 of 1992	KwaZulu Nature Conservation Act	Section 67 insofar as it relates to sections 59(1), 59(2), 60(1) and 62(1); section 86 insofar as it relates to sections 76, 77 and 82; and section 110 insofar as it relates to section 109	n/a

Section 34(1) allows a criminal court to enquire into the amount of any loss suffered by a victim as a result of the commission of the offence in question, without the necessity of a separate civil trial, and to give judgment in the amount proved in favour of the victim. This is not a novel provision – it has been used, for example, in the National Water Act (s 152) and previous Acts (the Water Act 54 of 1956 in s 171). This provision is a useful time-saving tool that recognizes the civil consequences of environmental criminal acts. At the time of writing, there was no record of the section's having been used in any prosecution.

Subsection (3)

Subsection (3) allows the Court to award damages or compensation or require payment of a fine in the amount of the advantage gained by the offender as a result of his or her contravention. Again, this is not a novel provision. It has been used, for example, in the Sea Fishery Act.¹⁵¹

Subsection (4)

Section 34(4) allows the Court to award costs incurred in the mounting and execution of the prosecution. Although this is not a practice that has been used in South Africa before, it has been common practice in other countries like the United Kingdom and New Zealand.¹⁵² It is submitted that this is a good provision as it encourages an offender who knows that he or she has committed the offence to plead guilty rather than waste the Court's time in attempting to avoid conviction on a technicality. If an offender knows that there is a chance that he or she will have to pay for expert evidence and the time of the prosecutor, there will be a good incentive for such offender to expedite proceedings and avoid unnecessary costs. This will also encourage offenders to co-operate with enforcement personnel before any prosecution is brought.

The question may be raised whether it is not an infringement of a person's right to a fair trial to be required to pay the costs of such trial. This is discussed in full in Chapter 13 below.

Subsection (5)

This subsection provides for vicarious liability. It is discussed in detail in Chapter 10.

Subsection (6)

This section envisages a situation where it would be an offence for an employer to commit an act which he or she entrusts to an employee, manager or agent. If the latter fails to act (or refrain from acting, as the case may be) then the latter will be liable to be

¹⁵¹ Act 12 of 1988 s 47(2)(a).

¹⁵² See Chapter 13 (infra), §2.

convicted and sentenced as if he or she was the employer. In evaluating this section, the first question to ask is whether it is necessary. Are there any acts or omissions that would impose criminal liability on the employer but not (absent this subsection) on the employee, manager or agent who in fact carried out the act (or failed to do it, as the case may be)? Nothing obviously springs to mind from the list of Schedule 3 offences. A second observation is that the subsection speaks of ‘an act which it had been [the manager, employee or agent’s] task to do or to refrain from doing on behalf of the employer’. This does not require a specific instruction on the part of the employer to act in a particular way. If an employee does something contrary to his or her conditions of employment, but that had never been explicitly explained to him or her, that would conceivably fall within the purview of this subsection. Given the Constitutional Court’s rejection of servants’ liability in terms of s 332(5) of the Criminal Procedure Act in *S v Coetzee*,¹⁵³ it is unlikely that this section would pass the constitutional test. In any event, it would seem to be a pointless provision.

Subsection (7)

This subsection is also a vicarious liability provision and is discussed in Chapter 10.

Subsection (8)

This subsection, it is submitted, is not clear at all. The subsection reads ‘any such manager, agent, employee or director may be so convicted and sentenced in addition to the employer or firm’. The previous subsection refers only to directors, so the reference in subsection (8) to ‘manager, agent, employee’ lacks a reference point. Notwithstanding the lack of clarity, the objective of the subsection seems to be a sound one – that corporate officers ought to be liable for offences in addition to the corporation. This issue is discussed in more detail in Chapter 11.

¹⁵³ 1997 (1) SACR 379 (CC).

Overall, the vicarious liability and other provisions in section 34(5)-(8) inclusive are possibly problematic and ought to be reconsidered. This issue will be discussed in further detail in Chapter 10.

7.3 Further comment

Section 28 of NEMA places significant responsibilities on persons who are carrying out activities harmful to the environment to take steps to keep such harm to a minimum and even to remediate harm already caused. The Act provides for a competent authority to issue a directive requiring the person in question to carry out specified steps in order to meet these objectives. Failure to comply with such directive may result in the competent authority taking steps itself to ameliorate the problem and then to recover the costs of doing so from the defaulting party or other persons specified in the Act. The Act does not, however, provide that failure to comply with the directive is an offence. This, it is submitted, is a serious omission as the criminal sanction should be available in such circumstances as a reinforcement for the primary instrument of civil liability.

8 *National Heritage Resources Act 25 of 1999*

This Act is the successor to, and repeals, the National Monuments Act 28 of 1969. It is concerned with the management of heritage resources in the Republic. A ‘heritage resource’ is any place or object of cultural significance. ‘Cultural significance’ means aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance.¹⁵⁴ The focus of the National Heritage Resources Act is consequently somewhat wide, but there is environmental significance to the Act, particularly its regulation of protected areas. For the purposes of the current analysis, offences which relate to matters that are not directly connected with environmental conservation will not be discussed. This would exclude, for example, offences relating to archaeological issues and conservation of movable objects, but will include offences

¹⁵⁴ Section 1.

relating to conservation of buildings, even though there is some debate as to whether the latter topic is really environmental law.¹⁵⁵

8.1 Destroying etc heritage site

No person may destroy, damage, deface, excavate, alter, remove from its original position, subdivide or change the planning status of any heritage site without a permit issued by the heritage resources authority responsible for the protection of such site.¹⁵⁶ A 'heritage site' is a place declared to be a national heritage site by the South African Heritage Resources Agency (SAHRA) or a place declared to be a provincial heritage site by a provincial heritage resources authority.¹⁵⁷ The penalty is a fine or imprisonment for a period not exceeding five years or both.¹⁵⁸

8.2 Damage etc to any part of a protected area

No person may damage, disfigure, alter, subdivide or in any other way develop any part of a protected area unless, at least 60 days prior to the initiation of such changes, he or she has consulted the heritage resources authority which designated such area in accordance with a procedure prescribed by that authority.¹⁵⁹ Protected areas may be designated either by SAHRA or a provincial agency.¹⁶⁰ The penalty is a fine or imprisonment for not more than two years or both.¹⁶¹

¹⁵⁵ See Michael Kidd *Environmental Law: A South African Guide* (1997) at 5-7.

¹⁵⁶ Section 27(18).

¹⁵⁷ Section 1.

¹⁵⁸ Section 51(1)(a) read with item 1 of the Schedule.

¹⁵⁹ Section 28(3).

¹⁶⁰ (1) SAHRA may, with the consent of the owner of an area, by notice in the *Gazette* designate as a protected area—

(a) such area of land surrounding a national heritage site as is reasonably necessary to ensure the protection and reasonable enjoyment of such site, or to protect the view of and from such site; or

(b) such area of land surrounding any wreck as is reasonably necessary to ensure its protection; or

(c) such area of land covered by a mine dump.

8.3 Damage etc to provisionally protected place or object

No person may damage, deface, excavate, alter, remove from its original position, subdivide or change the planning status of a provisionally protected place or object without a permit issued by a heritage resources authority or local authority responsible for the provisional protection.¹⁶² The Act allows the relevant authority to provisionally protect for a maximum period of two years any protected area; heritage resource, the conservation of which it considers to be threatened and which threat it believes can be alleviated by negotiation and consultation; or heritage resource, the protection of which the relevant authority wishes to investigate in terms of this Act.¹⁶³ The penalty for this offence is as for the offence discussed in §8.1.

8.4 Alteration of structure older than 60 years

No person may alter or demolish any structure or part of a structure which is older than 60 years without a permit issued by the relevant provincial heritage resources authority.¹⁶⁴ A ‘structure’ is any building, works, device or other facility made by people and which is fixed to land, and includes any fixtures, fittings and equipment associated therewith.¹⁶⁵ ‘Alter’ means any action affecting the structure, appearance or physical properties of a place or object, whether by way of structural or other works, by painting,

(2) A provincial heritage resources authority may, with the consent of the owner of an area, by notice in the *Provincial Gazette* designate as a protected area—

- (a) such area of land surrounding a provincial heritage site as is reasonably necessary to ensure the protection and reasonable enjoyment of such site, or to protect the view of and from such site; or
- (b) such area of land surrounding any archaeological or palaeontological site or meteorite as is reasonably necessary to ensure its protection.

¹⁶¹ Section 51(1)(c) read with item 3 of the Schedule.

¹⁶² Section 29(10).

¹⁶³ Section 29(1).

¹⁶⁴ Section 34(1).

¹⁶⁵ Section 1.

plastering or other decoration or any other means.¹⁶⁶ ‘Demolish’ is not defined. The penalty is the same as for the offence discussed in §8.2.

8.5 Compensatory order

Section 51(8) provides:

When any person has been convicted of any contravention of this Act which has resulted in damage to or alteration of a protected heritage resource the court may—

- (a) order such person to put right the result of the act of which he or she was found guilty, in the manner so specified and within such period as may be so specified, and upon failure of such person to comply with the terms of such order, order such person to pay to the heritage resources authority responsible for the protection of such resource a sum equivalent to the cost of making good; or
- (b) when it is of the opinion that such person is not in a position to make good damage done to a heritage resource by virtue of the offender not being the owner or occupier of a heritage resource or for any other reason, or when it is advised by the heritage resources authority responsible for the protection of such resource that it is unrealistic or undesirable to require that the results of the act be made good, order such person to pay to the heritage resources authority a sum equivalent to the cost of making good.

Failure to comply with such an order is an offence, the penalty for which is a fine or imprisonment for not more than six months or both.¹⁶⁷ This order is similar to provisions found in other legislation and comes into effect only on conviction of an offender.

8.6 Miscellaneous provisions

In terms of s 51(3), the Minister or the MEC, as the case may be, may make regulations in terms of which the magistrate of the district concerned may levy admission of guilt fines up to a maximum amount of R10 000 for infringement of the terms of this Act for which such heritage resources authority is responsible; and serve a notice upon a person who is contravening a specified provision of this Act or has not complied with the terms

¹⁶⁶ Ibid.

¹⁶⁷ Section 51(1)(e) read with item 5 in the Schedule.

of a permit issued by such authority, imposing a daily fine of R50 for the duration of the contravention, subject to a maximum period of 365 days.

Another provision, which is relatively common in environmental legislation, is to the effect that a magistrate's court shall, notwithstanding the provisions of any other law, be competent to impose any penalty under this Act.¹⁶⁸

Also, in addition to other penalties, if the owner of a place has been convicted of an offence in terms of the Act involving the destruction of, or damage to, the place, the Minister on the advice of SAHRA or the MEC on the advice of a provincial heritage resources authority, may serve on the owner an order that no development of such place may be undertaken, except making good the damage and maintaining the cultural value of the place, for a period not exceeding 10 years specified in the order.¹⁶⁹

Section 51(13) provides that, in any case involving vandalism, and whenever else a court deems it appropriate, community service involving conservation of heritage resources may be substituted for, or instituted in addition to, a fine or imprisonment.

Finally, the Act also provides for forfeiture orders: Where a court convicts a person of an offence in terms of this Act, it may order the forfeiture to the relevant heritage authority, of a vehicle, craft, equipment or any other thing used or otherwise involved in the committing of the offence.¹⁷⁰ Since the forfeiture order is limited to the instrumentalities of the offence, it is not likely to be constitutionally problematic.

8.7 Alternatives to criminal sanctions

There is a plethora of criminal offences provided for in the Act, only a handful of which have been considered here. In addition to the criminal enforcement, however, the Act provides for alternatives. First, section 43 provides for the Minister to make regulations

¹⁶⁸ Section 51(7).

¹⁶⁹ Section 51(9). The affected individual is given a chance to make submissions on whether the order should be made and its duration (s 51(10)). Such an order attaches to the land and is binding on any person who becomes an owner of the place while the order remains in force (s 51(11)). Such an order may be reconsidered (s 51(12)).

¹⁷⁰ Section 51(14).

providing for financial incentives for the conservation of heritage resources. MECs and local authorities may also do so. In addition, section 45(1) provides

When the heritage resources authority responsible for the protection of a heritage site considers that such site—

(a) has been allowed to fall into disrepair for the purpose of—

(i) effecting or enabling its destruction or demolition;

(ii) enabling the development of the designated land; or

(iii) enabling the development of any land adjoining the designated land; or

(b) is neglected to such an extent that it will lose its potential for conservation,

the heritage resources authority may serve on the owner an order to repair or maintain such site, to the satisfaction of the heritage resources authority, within a reasonable period of time as specified in the order: Provided that the heritage resources authority must specify only such work as, in its opinion, is necessary to prevent any further deterioration in the condition of the place.

Default by the owner allows the authority to take the necessary steps and to recover costs from the owner.¹⁷¹ Contravention of such a notice is not, however, an offence.

8.8 Evaluation

There is nothing remarkable about the criminal provisions in the National Heritage Resources Act. What is noteworthy is that there are, at least on paper, alternative compliance mechanisms to the criminal sanction in the form of incentives and reparation or maintenance orders. Penalties provided for differ according to the seriousness of the offence, and a system similar to that in the National Forests Act is used. Some of the maximum penalties are quite stringent, making use of the criminal provisions worthwhile.

9 *Nuclear Energy Act 46 of 1999*

This is the third in a series of Acts regulating nuclear energy since 1982. It establishes the South African Nuclear Energy Corporation (SANEC) Ltd and its powers and functions; provides for the implementation of the Safeguards Agreement of the Nuclear Non-Proliferation Treaty; and regulates nuclear activities and the possession and acquisition of nuclear material. Most of the offences under the Act are administrative or

¹⁷¹ Section 45(2).

relate to obstruction of officials. Those that have direct environmental significance are as follows:

9.1 Failing to discharge duty under s 33

A person is guilty of an offence upon failing to discharge any duty or obligation imposed on the person by or in terms of section 33(3).¹⁷² Section 33 is concerned with the responsibilities of the Minister of Mineral and Energy Affairs towards implementing the Safeguards Agreement. To this end the Minister is given several powers, including the power to issue instructions on matters like the keeping of records and the physical protection of nuclear material. Subsection (3) places responsibilities on ‘any person in possession of, using, handling or processing nuclear material’ to carry out certain specified duties, including the implementation and maintenance of the prescribed physical protective measures in respect of nuclear material; and the immediate notification of the Minister in the event of loss of nuclear material. The penalty for failure to discharge any of the duties imposed by s 33(3) (the remainder of which are largely administrative in nature) is a fine or imprisonment for not longer than five years.¹⁷³

‘Nuclear material’ is defined as source material and special nuclear material. The Minister may declare any substance containing uranium or thorium with concentration and mass limits higher than those specified in the notice, to be source material.¹⁷⁴ He or she may also declare any of the substances specified in s 2(c)¹⁷⁵ with concentration and

¹⁷² Section 56(1)(a).

¹⁷³ Section 56(2)(a).

¹⁷⁴ Section 2(b).

¹⁷⁵ The substances specified in the subsection are -

- (i) plutonium-239;
- (ii) uranium-233;
- (iii) uranium enriched in its 235 or 233 isotope;
- (iv) transuranium elements; or

mass levels higher than those specified in the notice, to be special nuclear material for the purposes of this Act.¹⁷⁶

9.2 Performing restricted act without authorisation

A person is guilty of an offence upon performing or carrying out any restricted act or activity without an authorisation required in terms of section 34 or 35 (as the case may be), or in contravention of the relevant authorisation or any condition imposed in respect thereof under section 34 or 35 (as the case may be).¹⁷⁷ A ‘restricted act’ is any of the acts or activities mentioned in paragraphs (c) to (u) of section 34(1); and section 35(1). These are as follows:

- ❑ The acquisition, use or disposal of¹⁷⁸ any source material;¹⁷⁹
- ❑ The import of any source material into the Republic;
- ❑ The processing,¹⁸⁰ enriching¹⁸¹ or reprocessing¹⁸² of any source material;
- ❑ The acquisition of any special nuclear material;
- ❑ The import of any special nuclear material into the Republic;

(v) any composition of any of the materials referred to in subparagraphs (i), (ii), (iii) and (iv), or any composition of those materials and any other substance or substances.

¹⁷⁶ Section 2(c).

¹⁷⁷ Section 56(1)(d).

¹⁷⁸ ‘Disposed of’ used in the context of safeguards means sell, exchange, donate, distribute, lend or in any other manner transfer and ‘disposal of’ has a corresponding meaning. All the definitions given in the footnotes dealing with ss 34 and 35 are from s 1.

¹⁷⁹ All of the activities in this list are listed in s 34(1) unless otherwise indicated.

¹⁸⁰ ‘Process’, when used as a verb in relation to source material, special nuclear material and restricted material, means to extract or recover such a material or to concentrate, refine or convert it in any manner without enriching it, and ‘processing’ has a corresponding meaning;

¹⁸¹ ‘Enrich’ means to increase the ratio of an isotopic constituent of an element to the remaining isotopic constituents of that element relative to the naturally occurring ratio, and ‘enrichment’ has a corresponding meaning.

¹⁸² ‘Reprocess’ means to extract or separate, from source material or special nuclear material that has been subjected to radiation, the constituents that have undergone transmutations as a result of the radiation, or the constituents that have not undergone those transmutations and are re-usable.

- ❑ The use or disposal of any special nuclear material;
- ❑ The processing, enriching or reprocessing of any special nuclear material;
- ❑ The acquisition of any restricted material;¹⁸³
- ❑ The import of any restricted material into the Republic;
- ❑ The use or disposal of any restricted material;
- ❑ The production of nuclear energy;
- ❑ The manufacture of or otherwise to produce or acquire, or dispose of, uranium hexafluoride (UF₆);
- ❑ The import of uranium hexafluoride (UF₆) into the Republic;
- ❑ The manufacture, or acquisition, or disposal of, nuclear fuel;¹⁸⁴
- ❑ The importation of nuclear fuel into the Republic;
- ❑ The manufacture of or otherwise to produce, import, acquire use or dispose of nuclear-related equipment and material;¹⁸⁵
- ❑ The disposal of, storage or reprocessing of any radioactive waste¹⁸⁶ or irradiated fuel (when the latter is external to the spent fuel pool);
- ❑ The transport of any of the abovementioned materials;
- ❑ The disposal of any technology related to any of the abovementioned materials or equipment.

¹⁸³ ‘Restricted material’ means beryllium and zirconium and any other substance declared under section 2(a) to be restricted material.

¹⁸⁴ ‘Nuclear fuel’ means any material capable of undergoing a nuclear fission or nuclear fusion process on its own or in combination with some other material and which is produced in a nuclear fuel assembly or other configuration.

¹⁸⁵ ‘Nuclear-related equipment and material’ means equipment and material declared under section 2(f) to be nuclear-related equipment and material. The Minister may declare any equipment and material specially designed or prepared for the processing, use or production of nuclear material, to be nuclear-related equipment and material (s 2(f)).

¹⁸⁶ ‘Radioactive waste’ means any radioactive material destined to be disposed of as waste material; “radioactive material” means any substance consisting of, or containing, any radioactive nuclide, whether natural or artificial.

Section 35(1) provides that no person may export any source material, special nuclear material or restricted material or any nuclear-related equipment and material from the Republic except with the written authorisation of the Minister.

The prohibition amounts essentially to a number of interrelated offences, all of which are regarded as serious when one takes into account that the penalty for contravention of this section is a fine of maximum term of imprisonment of ten years.¹⁸⁷

9.3 Possession of restricted matter

A person is guilty of an offence upon being in possession of restricted matter in contravention of section 34(1)(a) or (b).¹⁸⁸ ‘Restricted matter’ means (in terms of s 1) any or all of the following, namely—

- (a) source material;
- (b) special nuclear material;
- (c) restricted material;
- (d) uranium hexafluoride (UF₆);
- (e) nuclear fuel; and
- (f) nuclear-related equipment and material.

Section 34(1)(a) provides that, except with the written authorisation of the Minister, no person, institution, organisation or body may be in possession of any source material, except where—

- (i) the possession has resulted from prospecting, reclamation or mining operations lawfully undertaken by the person, institution, organisation or body; or
- (ii) the possession is on behalf of anyone who had acquired possession of the source material in the manner mentioned in subparagraph (i); or
- (iii) the person, institution, organisation or body has lawfully acquired the source material in any other manner.

¹⁸⁷ Section 56(2)(c).

¹⁸⁸ Section 56(1)(e).

Section 34(1)(b) prohibits any person from being in possession of any restricted matter except source material, save with Ministerial authorisation. The penalty for this offence is a fine or imprisonment for not more than three years.¹⁸⁹

9.4 Evaluation

There are no additional enforcement provisions other than the offences and penalties provided for in section 56. The Act is not concerned primarily with regulating behaviour – it is more of an empowering Act as far as the SANEC is concerned. Where there are prohibitions, however, the nature of the serious damage or harm that can be caused by nuclear or radioactive material dictates the imposition of heavy potential penalties for contravention of the Act and perhaps explains why the only enforcement mechanism provided for is the criminal sanction.

10 National Nuclear Energy Regulator Act 47 of 1999

As its name suggests the Act provides for a National Nuclear Regulator which is designed to regulate nuclear activities. The Act also provides for safety standards and regulatory practices for protection of persons, property and the environment from nuclear damage. The offences of an environmental nature under this Act are:

10.1 Activities of unlicensed nuclear installation

No person may site, construct, operate, decontaminate or decommission a nuclear installation, except under the authority of a nuclear installation licence.¹⁹⁰ A ‘nuclear installation’ is defined as –

- (a) a facility, installation, plant or structure designed or adapted for or which may involve the carrying out of any process, other than the mining and processing of ore, within the nuclear fuel cycle involving radioactive material, including, but not limited to—

¹⁸⁹ Section 56(2)(b).

¹⁹⁰ Section 20(1).

- (i) a uranium or thorium refinement or conversion facility;
 - (ii) a uranium enrichment facility;
 - (iii) a nuclear fuel fabrication facility;
 - (iv) a nuclear reactor, including a nuclear fission reactor or any other facility intended to create nuclear fusion;
 - (v) a spent nuclear fuel reprocessing facility;
 - (vi) a spent nuclear fuel storage facility;
 - (vii) an enriched uranium processing and storage facility; and
 - (viii) a facility specifically designed to handle, treat, condition, temporarily store or permanently dispose of any radioactive material which is intended to be disposed of as waste material; or
- (b) any facility, installation, plant or structure declared to be a nuclear installation in terms of section 2(3).¹⁹¹

The required licence may be granted in terms of s 21. Contravention of this prohibition is an offence,¹⁹² punishable by a fine or imprisonment for no longer than ten years.¹⁹³ Since this activity is hardly likely to be something that a person could do overnight, it may have been useful for the Act to contain an alternative to the criminal sanction like a directive procedure allowing the Minister or other specified authority to order cessation of the activities on pain of a criminal prosecution.

10.2 Operation of vessel using nuclear power

No vessel which is propelled by nuclear power or which has on board any radioactive material capable of causing nuclear damage may anchor or sojourn in the territorial waters of the Republic; or enter any port of the Republic, except under the authority of a nuclear vessel licence.¹⁹⁴ Such licence is also provided for in s 21. ‘Vessel’ is not defined in the Act, but ‘radioactive material’ means any substance consisting of, or containing, any radioactive nuclide, whether natural or artificial, including, but not limited to, radioactive waste and spent nuclear fuel;¹⁹⁵ and ‘nuclear damage’ means any

¹⁹¹ Section 1.

¹⁹² Section 52(1)(a).

¹⁹³ Section 52(3)(a).

¹⁹⁴ Section 20(2).

¹⁹⁵ Section 1.

injury to or the death or any sickness or disease of a person; or other damage, including any damage to or any loss of use of property or damage to the environment, which arises out of, or results from, or is attributable to, the ionizing radiation associated with a nuclear installation, nuclear vessel or action.¹⁹⁶ Contravention of the prohibition is an offence,¹⁹⁷ and the penalty is the same as for the offence discussed above.

10.3 Failure to comply with conditions of authorisation

Both a nuclear installation licence and nuclear vessel licence required by s 20 may have conditions attached if they are granted.¹⁹⁸ Failure to comply with a condition is an offence.¹⁹⁹ The penalty is the same as for the above two offences.

10.4 Unspecified offences

The Act also provides that any person who contravenes or fails to comply with any provision of this Act or any condition, notice, order, instruction, directive, prohibition, authorisation, permission, exemption, certificate or document determined, given, issued, promulgated or granted in terms of this Act is, if any such contravention or failure is not declared an offence in terms of s 52(1), is guilty of an offence.²⁰⁰ The penalty is the same as for the other offences discussed here.

It appears that the only possible offence under this subsection with environmental relevance would be failure to comply with prescribed duties regarding nuclear accidents or incidents in terms of s 37. Essentially, s 37 requires the holder of the relevant nuclear authorization to report to the Regulator if there is a nuclear accident or nuclear incident in connection with a nuclear installation, nuclear vessel or nuclear action. ‘Action’ means the use, possession, production, storage, enrichment, processing, reprocessing, conveying

¹⁹⁶ Ibid.

¹⁹⁷ Section 52(1)(b).

¹⁹⁸ See s 23. Section 24 deals with special conditions for nuclear vessel licences.

¹⁹⁹ Section 52(1)(a) and (b).

²⁰⁰ Section 52(2).

or disposal of, or causing to be conveyed, radioactive material; any action, the performance of which may result in persons accumulating a radiation dose resulting from exposure to ionizing radiation; or any other action involving radioactive material.²⁰¹ A ‘nuclear accident’ is any occurrence or succession of occurrences having the same origin which results in the release of radioactive material, or a radiation dose, which exceeds the safety standards contemplated in section 36; and is capable of causing nuclear damage.²⁰² A ‘nuclear incident’ is any unintended event at a nuclear installation which causes off-site public exposure of the order of at least one tenth of the prescribed limits; or the spread of radioactive contamination on a site or exposure of a worker above the prescribed limits or a significant failure in safety provisions, other than a nuclear accident.²⁰³ Section 37 does not specify that failure to comply with these duties is an offence. Read with s 52(2), however, it is likely that a person failing to comply with the duty would be liable for criminal prosecution.

10.5 Alternative enforcement mechanisms

The Act provides in s 30 for strict (civil) liability of the holder of a nuclear installation licence for nuclear damage²⁰⁴ caused by or resulting from the nuclear installation in question arising during that person’s period of responsibility. The importance of this provision is that it provides advance warning to a person wishing to become involved in an activity that holds significant potential danger for the environment and for people, that he or she will not avoid liability for damage on the basis of absence of fault. If this requires extraordinary safety measures on the part of the licence holder, then so be it. There was a similar provision in this Act’s precursor and it is a welcome provision. What is interesting, though, is that it is unique among enactments regulating hazardous activities and it (or similar provisions) may well be useful in other regulated areas (hazardous substances, for example).

²⁰¹ Section 1.

²⁰² Ibid.

²⁰³ Section 1.

²⁰⁴ Defined above, §10.2.

10.6 Evaluation

The only noteworthy aspect of the criminal provisions in this Act is the fact that the maximum penalty is significant. This is hardly surprising given the nature of the regulated activity, however. As indicated in the previous paragraph, the imposition of strict civil liability for any damage arising from activities regulated by the Act is an interesting and worthwhile provision.

11 *World Heritage Convention Act 49 of 1999*

This Act deals with the incorporation of the World Heritage Convention into South African law and issues like the establishment of World Heritage Sites in South Africa. The Act is primarily of an empowering nature and applies more to organs of state than the general public. For this reason, there are no offences provided for under this Act.

Evaluation

One would expect that the legislation enacted post-1994 would be less inclined to use devices that might be in conflict with the Constitution. Also, given modern trends in enforcement of regulatory offences, one would be excused for expecting that increased reliance would be placed on non-criminal modes of enforcement. While one might be largely correct on the first score, there are some vicarious liability provisions in various Acts that might give cause for constitutional concern. This issue will be canvassed fully in Chapter 10.

As far as alternatives to the criminal sanction are concerned, less use is made of these than one might expect. Although several Acts contain provisions for officials to make use of powers enabling directives to be given to offenders to remedy the situation or take other necessary steps, the criminal sanction still appears to be the primary mode of enforcement. There are currently no provisions in South African environmental law at the national level that empower officials to levy administrative penalties, for example. The potential for use of alternative measures is discussed in Chapter 8.

A final observation concerns penalties. Criticism has often been levelled at South African environmental law to the effect that the penalties provided for are so low as to make the use of criminal sanctions a pointless exercise.²⁰⁵ Certainly this is the case in respect of several pre-1994 environmental statutes. If one considers the penalties provided for offences in Acts considered in this Chapter, however, the penalties provided for are, in most if not all cases, relatively serious. In most cases heavy maximum terms of imprisonment are imposed. Another recent trend has been for legislation not to specify the amount of the fine, leaving that to the discretion of the Court. Such discretion will probably be influenced by the maximum term of imprisonment provided for, which is not subject to the effects of inflation. In short, then, the criticism of inadequate penalties does not hold much water when it comes to more recent environmental legislation.

On paper, then, other than a reluctance to provide for alternative enforcement measures, there is not much wrong with recent environmental legislation from the point of view of enforcement. It would appear, though, that the paper potential of environmental law is not yet being given effect to in reality. There may be several reasons for this, and these will be considered in more detail further on in this work. Enforcement is vital if environmental law is to be taken seriously and whatever can be done to facilitate and make more effective the enforcement of environmental law should be seriously considered.

²⁰⁵ RF Fuggle & MA Rabie *Environmental Management in South Africa* (1992) at 130; Cheryl Loots 'Making environmental law effective' (1994) 1 *SAJELP* 17 at 18.

Chapter 6

An examination of environmental crimes and their enforcement in South Africa:

Part Three – Provincial and Local Legislation

Not all environmental legislation is found at national level and, in fact, many important environmental enactments are either provincial or local. In terms of the Constitution,¹ various environmental matters are of concurrent national and provincial legislative competence: environment, nature conservation, pollution control and soil conservation, for example. Air pollution and noise pollution are examples of matters of local responsibility in terms of the Constitution. Provincial legislatures have not been particularly busy since 1994 and there are not many new provincial environmental Acts to examine.

However, nature conservation was a matter regulated at provincial level before the new Constitutional era and there are several provincial nature conservation ordinances that are still applicable today. It is these ordinances which constitute the most important nature conservation legislation in South Africa and, for this reason, their enforcement provisions should be carefully evaluated.

In this Chapter, not all enactments will be examined in the same detail as was the case with the national legislation in the previous two chapters. Since the four² nature conservation ordinances are relatively similar in substance, detailed examination will be made of only one of these, the Natal Nature Conservation Ordinance,³ and, where there are significant provisions in the other ordinances that are different from the Natal provisions, these will also be examined.

¹ Schedules 4 and 5.

² One for each of the four previous provinces: Transvaal, Natal, Cape and Orange Free State.

³ 15 of 1974.

There are three post-1994 provincial environmental Acts⁴ dealing with substantive environmental law and these will all be examined in some detail as well.

1 Pre-1994 Provincial Legislation

1.1 The Natal Nature Conservation Ordinance 15 of 1974

This Ordinance is comprehensive in its scope, regulating issues relating to hunting, and all types of wild fauna ranging through mammals, reptiles, birds, amphibians, invertebrates and fish (freshwater and marine), as well as indigenous plants. Since important protected areas in the province of KwaZulu-Natal are not subject to the National Parks Act, the ordinance applies to these areas as well as to areas that are not protected, and where most of the infringements of the legislation probably take place.

The ordinance sets out penalties in each of its chapters and does not always specify explicitly that activities are offences. There are numerous prohibitions and offences in the ordinance, and for this reason not all of the offences will be discussed in any detail. Analysis will be reserved for noteworthy or controversial provisions. As far as the latter are concerned, there are several presumptions in the ordinance that are very unlikely to pass constitutional muster. The analysis will be carried out by examining the following categories of offences:

- ❑ Offences in relation to parks;
- ❑ Offences in relation to game;
- ❑ Offences in relation to private reserves;
- ❑ Offences in relation to mammals;
- ❑ Offences in relation to professional hunting;
- ❑ Offences in relation to amphibians, invertebrates and reptiles;

⁴ KwaZulu-Natal Planning and Development Act 5 of 1998; Mpumalanga Nature Conservation Act 10 of 1998; and the Western Cape Planning and Development Act 7 of 1999. There have been several amendment Acts that have few substantive provisions relevant to this analysis and the KwaZulu-Natal Nature Conservation Management Act 9 of 1997, which deals with institutional arrangements and does not regulate public behaviour.

- ❑ Offences in relation to wild birds;
- ❑ Offences in relation to freshwater fish;
- ❑ Offences in relation to marine fish;
- ❑ Offences in relation to indigenous plants.

1.1.1 Offences in relation to parks

Section 15 deals with the restriction of access into parks and the prohibition of certain acts within parks.⁵ A ‘park’ is defined with reference to a repealed section of the ordinance, but they are essentially protected areas initially managed by the Natal Parks Board and now managed by the KwaZulu-Natal Nature Conservation Services (hereafter referred to as the NCS). As far as prohibitions are concerned, first, it is unlawful for any person other than an employee of the NCS to enter or reside in any park without authorisation.⁶ This is similar to the prohibition in the National Parks Act.

Then s 15 lists a number of prohibitions, relating to bringing weapons or hunting implements into parks, and the hunting, capturing etc of fauna and gathering etc of flora within parks. For example, s 15(1)(c) provides that it is not lawful for any person within a park to kill, injure, capture or disturb any animal or to take or destroy any egg, larva or nest thereof; provided that any dangerous animal, or noxious insect may be killed in defence of human life or to prevent the infliction of personal injury. Penalties for these offences are provided for in s 23. The heaviest penalties are provided for the offence of killing animals and this depends on the type of animal killed.

The ordinance differentiates between different categories of ‘game’, which means any of the mammals or birds, alive or dead, mentioned in Schedule 1, 2, 3 or 4 and shall include any meat, fat or blood thereof, whether fresh, preserved, processed or manufactured in any manner, and also any tooth, tusk, bone, head, horn, shell, claw, hoof, hide, skin, hair, egg, feather, or other durable portion or any such mammal or bird,

⁵ Some of the offences also apply to ‘game reserves’ and ‘nature reserves’. These terms are also both defined in terms of a deleted section.

⁶ The penalty is a maximum fine of R100 or imprisonment for one month: s 23(5).

whether preserved, processed, manufactured or not, but shall not include any trophy.⁷ The four schedules represent the categories of 'ordinary game'; 'protected game'; 'specially protected game' and 'open game' respectively. Examples of ordinary game are the impala and Egyptian goose. Protected game includes zebra, hippopotamus and Whitebacked Duck. Specially protected game is a relatively short list containing the elephant, both species of rhinoceros, the big cats and some others. Finally, open game consists of only two animals, the springbok and the blesbok.

Any person who wilfully or negligently kills, injures or captures any specially protected game within a park or game reserve or nature reserve is guilty of an offence and liable to a fine not exceeding ten thousand rand or imprisonment for not more than two years or both.⁸ If the contravention relates to either species of rhinoceros or elephant, the maximum penalty is R100 000 fine or ten years imprisonment or both.⁹ This is a very heavy penalty indeed but it reflects the seriousness with which poaching of these animals is viewed, given these animals' vulnerable¹⁰ status in the wild.

The same activity with respect to ordinary or protected game is also an offence and the penalty is a maximum of five thousand rand fine or imprisonment for one year or both.¹¹ This is still a relatively serious penalty and certainly not what could be described as insignificant. Other offences relating to parks, other than wilfully or negligently causing a veld fire, which carries the same penalty as killing protected game, carry a maximum fine of five hundred rand or six months' imprisonment.¹²

1.1.2 Offences in relation to game

The offences in relation to game are essentially hunting offences. This ordinance has a very complex system of hunting permits and licences which are utilised in conjunction

⁷ Section 1.

⁸ Section 23(1).

⁹ Ibid.

¹⁰ This term is used here in its ordinary sense and not to reflect the IUCN Red Book categorisation.

¹¹ Section 23(2).

¹² Section 23(4).

with open and closed hunting seasons. No person may hunt during a closed season save in specified circumstances,¹³ and no person may hunt ordinary or protected game without the necessary permit.¹⁴ The hunting, capture and keeping in captivity of specially protected game is prohibited unless in terms of a specially-granted permit.¹⁵ No person may capture or keep in captivity ordinary or protected game without a permit.¹⁶

This Chapter also prohibits the following:

- ❑ Trespassing on land during hunting;¹⁷
- ❑ Use of unlicensed persons to hunt;¹⁸
- ❑ Hunting or capturing game in or from public roads;¹⁹
- ❑ Conveyance of firearms on roads traversing area in which game is present;²⁰
- ❑ Possession of snares;²¹
- ❑ Hunting contrary to prohibited methods or at prohibited times;²²
- ❑ Sale and purchase of game;²³ and
- ❑ Exportation of game.²⁴

This Chapter contains a presumption to the effect that whenever any person is or has been in possession of or deals or has dealt in or handles or has handled any game and there exists at any time a reasonable suspicion that such game was hunted or acquired

¹³ Section 31(2).

¹⁴ Section 33(1)(a). Open game may be hunted with the prior permission of the landowner: s 33(1)(b).

¹⁵ Section 37.

¹⁶ Section 38.

¹⁷ Section 42.

¹⁸ Section 44.

¹⁹ Section 45.

²⁰ Section 46.

²¹ Section 47. A 'snare' is a noose of string or of wire or of any other material which can be used for capturing any animal (s 1).

²² Section 48. Hunting with artificial light or with a crossbow or between half-an-hour of sunset on any day and half-an-hour before sunrise the following day are some of the prohibitions listed here.

²³ Section 50.

²⁴ Section 51. 'Export' is not defined.

unlawfully he shall be guilty of an offence unless he proves the contrary.²⁵ If that is not enough, whenever any game is upon any vehicle or at any camping place, every person who is in any way associated with such vehicle or who is at or in any way associated with such camping place shall be deemed to be in possession of such game for the purposes of s 39(1).²⁶

This presumption, which casts a reverse onus on the accused to explain his or her possession, dealing or handling of the game, certainly infringes the presumption of innocence in the Constitution and its operation could lead to a person's conviction despite the presence of reasonable doubt. It is doubtful that this presumption would meet the requirements of the limitations clause, primarily because there are other ways of addressing the issue. It would appear that the presumption assists enforcement officials in cases (probably the vast majority) where there is no direct evidence of the actual killing of the animal. Possession is presumed to be hunting. If the legislation made it an offence for any person to *possess* game, without a licence or reasonable explanation for that possession, this would address the problem without having to resort to a reverse onus provision.

There are three further presumptions. First, any person who is in possession of any game shall be deemed to have hunted or captured such game in contravention of the Chapter, unless it is proved that he was in lawful possession of the same.²⁷ Second, if any person is found removing game from any trap or snare it shall be presumed until the contrary is proved that he hunted or captured such game in contravention of the prohibition on using snares.²⁸ Finally, any person who is found conveying game between half-an-hour after sunset on any day and half-an-hour before sunrise on the following day shall be deemed to have contravened the prohibition on night hunting unless in any prosecution the contrary is proved.²⁹

²⁵ Section 39(1). None of the verbs in this provision are defined in the Act.

²⁶ Section 39(2).

²⁷ Section 57(1).

²⁸ Section 57(2).

²⁹ Section 57(3).

All three of these presumptions cast a reverse onus on the accused and could lead to the conviction of innocent persons. It is unlikely that any of these will be regarded as acceptable by the Courts. The first presumption overlaps with the one discussed immediately above. As indicated above, if possession of game was made an offence, the presumption would be unnecessary. As for the second presumption, surely the evidence of a person removing an animal from a snare would in itself be very strong evidence for the accused to counter in a prosecution for using a snare? If not, the offence could be redrafted to include within the definition of using a snare the removal of a captured dead animal therefrom. By specifying that the animal must be dead, the offence would exclude from its ambit good Samaritans who remove living animals from snares. The hunters would be unlikely to remove living animals from snares and would probably kill them first. The third presumption is unnecessarily broad. It would technically extend to anybody travelling at night with some game biltong in his or her car. It is difficult to think of an alternative manner of addressing this issue, but perhaps unlicensed hunters could be prosecuted by means of the suggested unlawful possession provision, whereas licensed hunters might well just have to be caught in the act.

Differing penalties are provided for in this Chapter, depending on the offence. Any offences in the Chapter in relation to specially protected game carry a maximum fine of ten thousand rand or two years imprisonment or both, unless in respect of elephant or either species of rhinoceros, where the penalty is a maximum of R100 000 or ten years imprisonment or both.³⁰ Other specified offences carry a maximum fine of five thousand rand or one year's imprisonment or both.³¹ Any offence not specified will be punished by a maximum fine of five hundred rand or imprisonment for six months or both.³²

In addition to these penalties, the ordinance provides for the imposition of double the fine or double the imprisonment provided for, or imprisonment without the option of a fine, in the case of a second or subsequent conviction.³³ It is also provided that a person convicted of hunting or capturing game without the necessary licence, shall be ordered by

³⁰ Section 55(1)(a).

³¹ Section 55(1)(b).

³² Section 55(1)(c).

³³ Section 55(2).

the Court to pay the licence fees and charges in addition to whatever other penalty is imposed.³⁴ Given the value of many species, it would be a good idea to provide for payment of compensation to the owner of game in the event of contravention of this Chapter, also in addition to whatever other penalties may be imposed.

1.1.3 Offences in relation to private reserves

It is an offence for any person, within a private nature serve or private wild-life (*sic*) reserve to:

- ❑ Gather any indigenous plant or hunt any wild bird without a permit;³⁵
- ❑ Hunt any ordinary pr protected game without a permit;³⁶
- ❑ Hunt any specially protected game;³⁷
- ❑ Trespass.³⁸

1.1.4 Offences in relation to mammals;

The offences provided for in this Chapter are as follows:

- ❑ Possession and disposal of endangered mammals: Section 79 provides that no person shall at any time purchase, acquire by any means, possess, sell, exchange

³⁴ Section 55(3).

³⁵ Section 60. The maximum penalty is a five hundred rand fine or six months imprisonment or both (s 76(1)).

³⁶ Section 61. The maximum penalty is a five thousand rand fine or one year's imprisonment or both (s 76(2)).

³⁷ Section 62. Exemption can be given by means of authorisation of the Premier. The maximum penalty is a ten thousand rand fine or two years imprisonment or both; except in the case of an offence in respect of elephant or either species of rhinoceros, where the maximum penalties are R100 000 fine or ten years imprisonment or both (s 76(1A)).

³⁸ Section 76(3), which provides for a maximum penalty of one hundred rand fine or one month's imprisonment.

or otherwise dispose of, or keep in captivity any endangered mammal.³⁹ Endangered mammals are listed on Schedule 6 and the list consists primarily of exotic (that is, not from South Africa) species.

- ❑ Keeping mammals in captivity without a permit: Section 80 provides for the necessity of a permit for the keeping of animals, whether exotic or indigenous, in captivity.⁴⁰
- ❑ Sale, purchase or exchange of mammals: No person shall sell, purchase or exchange in any manner whatsoever any indigenous mammal or exotic mammal, save in accordance with a permit.⁴¹
- ❑ Operation of zoo without authorisation: No person shall establish, conduct or maintain any zoo without the prior approval of the Premier, or contrary to any conditions imposed by the Premier in granting such approval and without being in possession of a valid certificate of registration and a licence.⁴²
- ❑ Cruelty to mammals: No person shall keep any indigenous mammal or exotic mammal secured by means of a rope, cord, chain or anything serving a similar purpose.⁴³

The ordinance provides for a doubling of the maximum penalty in cases of subsequent convictions.⁴⁴ It also provides that any licence or permit or other authority granted to any person found guilty of an offence under this Chapter, or the regulations made thereunder

³⁹ The maximum penalty for contravention of this prohibition is a fine of five hundred rand or six months' imprisonment or both (s 90(1)(a)).

⁴⁰ The maximum penalty for contravention of this prohibition is a fine of two hundred and fifty hundred rand or three months' imprisonment or both (s 90(1)(b)).

⁴¹ Section 81. The penalty is as indicated in the previous footnote.

⁴² Section 82. The maximum penalty for contravention of this prohibition is a fine of five hundred rand or six months' imprisonment or both (s 90(1)(a)).

⁴³ Section 86. This is not explicitly referred to in the 'Offences' section, which means that the maximum penalty for contravention of this prohibition is a fine of one hundred rand or one month's imprisonment or both (s 90(1)(c)).

⁴⁴ Section 90(2).

shall be cancelled by the court.⁴⁵ There is nothing remarkable about these offences, save that the penalty provided for cruelty to mammals is rather lenient.

1.1.5 Offences in relation to professional hunting;

Chapter VI of the ordinance deals with professional hunters and hunting-outfitters. The offences provided for in this Chapter are essentially administrative in nature and will not be discussed here.

1.1.6 Offences in relation to amphibians, invertebrates and reptiles;

Chapter VII concerns amphibians, invertebrates and reptiles, and in this respect the ordinance provides for the following offences:

- Killing or capturing a protected indigenous amphibian, invertebrate or reptile: No person shall kill or capture any protected indigenous amphibian, invertebrate or reptile, save in accordance with a permit.⁴⁶ A ‘protected indigenous amphibian, invertebrate or reptile’ is defined as ‘any species of amphibian, invertebrate or reptile included in Schedule 7, whether alive or dead, indigenous to the Republic or South West Africa or any territory which formed part of the Republic and in terms of an Act of Parliament became an independent state’.⁴⁷ Schedule 7 contains all indigenous tortoises, two monitors, the Nile crocodile and two snakes. The penalty for this offence is the rather inadequate maximum fine of five hundred rand or, in default, six months imprisonment or both.⁴⁸

⁴⁵ Section 91.

⁴⁶ Section 101(1). There is an exemption for the killing or capture, without the requisite permit, of any protected indigenous reptile in defence of human life or property; provided that any officer or honorary officer may require that any protected indigenous reptile so killed or captured be surrendered to the Board for disposal in such manner as the Board may deem fit (s 101(2)).

⁴⁷ Section 1.

⁴⁸ Section 109(1)(a).

- ❑ Keeping in captivity a protected indigenous amphibian, invertebrate or reptile: Section 102(1) prohibits this without a permit. The penalty for this offence is a maximum fine of two hundred and fifty rand or, in default, three months imprisonment or both.⁴⁹
- ❑ Exporting an indigenous amphibian, invertebrate or reptile: Section 104(1)(a) provides that no person shall export from the Province any indigenous amphibian, invertebrate or reptile, except in accordance with a permit. The penalty is the same as for killing a protected indigenous animal.
- ❑ Importing an amphibian, invertebrate or reptile: No person shall import into the Province any indigenous amphibian, invertebrate or reptile unless he is in possession of a valid licence or permit;⁵⁰ nor any exotic amphibian, invertebrate or reptile.⁵¹ The penalty for importing an indigenous *protected* species is as for keeping a protected indigenous species in captivity. If the imported species is not protected, the penalty is a maximum fine of one hundred rand or, in default, one month's imprisonment or both.⁵² The penalty for importing an exotic species is the same.⁵³

As was the case in other chapters in the ordinance, the penalty is doubled for subsequent convictions, or the Court may impose imprisonment without the option of fine.⁵⁴ Moreover, a permit or licence held by an offender under this chapter is subject to cancellation.⁵⁵ There is a further provision that enables the relevant official to seize and confiscate any indigenous species subject to this Chapter, if there is contravention of any

⁴⁹ Section 109(1)(b).

⁵⁰ Section 104(3).

⁵¹ Section 104A.

⁵² Section 109(1)(c).

⁵³ Ibid. The offence is not explicitly specified but this subsection contains the penalty for any offence not specified.

⁵⁴ Section 109(2).

⁵⁵ Section 109A.

of the provisions of the Chapter.⁵⁶ This does not prejudice the right to prosecute the individual in question.

Finally, this Chapter contains certain presumptions which, as was the case with those used in the game Chapter, are unlikely to survive constitutional challenge (for the same reasons as expounded in the discussion of those presumptions). They are a presumption of killing or capture of a protected indigenous species in contravention of the Chapter if the person in question is found in possession of the species in question;⁵⁷ and a presumption of killing or capture of a protected indigenous species in contravention of the Chapter if the person in question is found removing the species from a trap or snare.⁵⁸

1.1.7 Offences in relation to wild birds;

Chapter VIII is the applicable Chapter and it provides for the following offences:

- Killing or capture of wild birds: No person shall at any time kill or capture any wild bird without a permit,⁵⁹ nor shall any person remove the nest or eggs of any wild bird, except in accordance with a permit, and no person shall at any time destroy, injure or disturb the nest or eggs of any wild bird save in so far as that may be necessary in exercise of any authority conferred upon him by any such permit aforesaid.⁶⁰ A 'wild bird' is any non-domestic bird of a species which inhabits either permanently or temporarily any part of the Republic, but does not include any such bird which is classified as game by virtue of its inclusion in Schedule 1, 2, 3, or 4 and shall include any skin or egg of any such bird which has not been completely processed.⁶¹ The penalty for this offence is a fine not exceeding one thousand rand or, in default of payment, imprisonment for any

⁵⁶ Section 110.

⁵⁷ Section 110A(1).

⁵⁸ Section 110A(2).

⁵⁹ Section 114(1).

⁶⁰ Section 114(2).

⁶¹ Section 1.

term not exceeding twelve months or both.⁶² Sale and purchase of wild birds: Section 115(1) prohibits any person from selling any wild bird or disposing of the possession of any wild bird to any other person in any manner whatsoever; purchasing any wild bird or acquisition of the possession of any wild bird from any other person in any manner whatsoever, save in accordance with a permit.⁶³ The penalty is the same as for the previous offence.

- ❑ Unlawful keeping of wild bird in captivity: No person shall keep any wild bird in captivity except in an aviary of a capacity of at least 8,50 m³ which has been registered in his or her name and in respect of which there is in operation a certificate of registration and an aviary licence granted to him or her.⁶⁴ The penalty is the same as for the offences discussed above.
- ❑ Importation of foreign birds: foreign birds may not be imported without a permit.⁶⁵ A 'foreign bird' is any non-domestic bird which is not indigenous to the Republic and shall include any egg or skin of any such bird which has not been completely processed.⁶⁶ The penalty for this offence is not individually specified, which means that it is a fine not exceeding two hundred and fifty rand or, in default of payment, imprisonment for not more than three months or both.⁶⁷
- ❑ Release from captivity of foreign birds: no person may release wild birds from captivity without a permit.⁶⁸ The penalty is the same as for importing a foreign bird. This is potentially an act that could have very serious environmental consequences and the penalty provided is consequently completely inadequate.

⁶² Section 130(1)(a).

⁶³ The provisions of subsection (1) shall also apply, *mutatis mutandis*, to the nest or eggs, or both, of any wild bird.

⁶⁴ Section 118(1).

⁶⁵ Section 123.

⁶⁶ Section 1.

⁶⁷ Section 130(1)(c).

⁶⁸ Section 124.

- ❑ Exportation of wild birds: wild birds may not be exported from the province without a permit.⁶⁹ The penalty for this offence is a fine not exceeding one thousand rand or, in default of payment, imprisonment for any term not exceeding twelve months or both.⁷⁰
- ❑ Killing or capturing wild birds by means of prohibited methods: Section 127 prohibits any person from killing or capturing any wild bird by means of poison, drugs or birdlime; or with the aid of artificial light of any kind; or between half-an-hour after sunset on any one day and half-an-hour before sunrise on the following day, without a permit. The penalty is as for the offence of importing foreign birds.
- ❑ Prohibition of killing or capture of wild birds in public roads: No person shall kill or capture any wild bird in any public road or in the road reserve of any public road, nor shall any person in any such road or reserve aforesaid kill or discharge any weapon at any wild bird which is off such road or reserve.⁷¹ The penalty is as for the previous offence.

Chapter VIII contains the same provision relating to repeat offenders as in previous Chapters. It also contains presumptions of the sort contained in the game Chapter, which, for the reasons outlined in discussion of those presumptions, are most likely unconstitutional. There is a presumption that someone in possession of a wild bird killed or captured such bird in contravention of the Chapter;⁷² a presumption relating to removal of a wild bird from a trap; and a presumption to the effect that a person conveying a wild bird during the period between half-an-hour after sunset on any day and half-an-hour before sunrise on the following day, will be presumed to have killed or captured it during those hours (which is prohibited).

⁶⁹ Section 125.

⁷⁰ Section 130(1)(a).

⁷¹ Section 129.

⁷² Section 132(1).

1.1.8 Offences in relation to freshwater fish;

These offences, provided for in Chapter IX, are as follows:

- Operation of angling competitions: No person shall promote, organise, conduct or take part in any angling competition in any waters of the Province, without the necessary authorisation.⁷³ ‘Waters’ in respect of freshwater fish, are defined as any river, stream, estuary or creek which is not subject or liable to tidal influence, or that portion of any river, stream, estuary or creek which, being subject or liable to tidal influence, lies upstream or inland of a point of demarcation fixed in terms of regulations made in that behalf, and any freshwater lake, pan, pond, furrow or other collection of water, whether natural or artificial, in which fish may be found, including the foreshores or banks of any such waters.⁷⁴ The penalty for carrying on an unauthorised angling competition is a fine not exceeding five hundred rand or in default of payment, imprisonment for not more than six months or both.⁷⁵
- Unauthorised catching of fish: The ordinance envisages the catching of fish subject to a licence. In addition, it provides for open and closed seasons for the catching of fish and also provides for the prohibition, for a stated time or indefinitely, of the catching of all fish or certain species of fish. It is thus an offence for any person to:
 - Catch a fish for which an open season was proclaimed without a licence;
 - Catch a fish for which an open season was proclaimed during the closed season;
 - Catches or wilfully disturbs any fish for which a prohibition was issued;
 - Catches any fish without a licence where a licence is required.⁷⁶

In addition, no person shall at any time wilfully injure or disturb the spawn of fish or any spawning bed, bank or shallow whereon or wherein such spawn is deposited.⁷⁷ The penalty is as for the previous offence.

⁷³ Section 142.

⁷⁴ Section 1.

⁷⁵ Section 154(1)(b).

⁷⁶ Section 143(2).

- ❑ Use of prohibited net: Section 150 prescribes a certain type of net that may be used for the catching of bait. Use of any net other than the prescribed type is an offence.⁷⁸ The penalty is a fine not exceeding two hundred and fifty rand or, in default of payment, imprisonment for a maximum of three months or both.⁷⁹
- ❑ Contravention of licence conditions: it is an offence to fail to comply with the applicable licence/permit conditions issued under this Chapter.⁸⁰ The penalty is the same as for the previous offence.
- ❑ Export or import of live fish: Export or import of live fish without a permit is an offence.⁸¹ The penalty is as for the previous offence.
- ❑ Sale of trout: No person may sell trout without the necessary authorisation.⁸² The penalty is the same as for the previous offence.
- ❑ Placing of trap in waters: Any person who places any unauthorised trap or obstruction in any waters for the purpose of capturing fish or preventing the free passage of fish in such waters is guilty of an offence.⁸³ The penalty is a fine not exceeding five hundred rand or in default of payment, imprisonment for not more than six months or both.⁸⁴
- ❑ Catching fish in unauthorised manner: There is a prohibition of the catching, injuring or destroying of fish in any waters by means of any unauthorised trap, firearm, explosive, poisonous or stupefying substance, electrical device, gaff, spear or any unauthorised implement of fishing.⁸⁵ The penalty is as for the previous offence.

⁷⁷ Section 143(3).

⁷⁸ Section 150(2).

⁷⁹ Section 154(1)(c).

⁸⁰ Section 151(1)(a).

⁸¹ Section 151(1)(b).

⁸² Section 151(1)(c).

⁸³ Section 151(1)(d).

⁸⁴ Section 154(1)(b).

⁸⁵ Section 151(1)(e).

- ❑ Breaking down banks in order to catch fish: No person may without the necessary consent cut through, break down, destroy or damage any wall, bank, dam or barrier of any pond, reservoir, lake, stream or other waters with intent to drain water therefrom for the purpose of capturing fish or causing the loss or destruction of fish.⁸⁶ The penalty is the same as for the previous offence.
- ❑ Pollution of waters: No person shall deposit or discharge or allow to enter or percolate into any waters, any substance, matter or thing, whether solid, liquid or gaseous, which is injurious or is liable to become injurious to fish or fish food.⁸⁷ The penalty for this offence is a fine not exceeding one thousand rand or, in default of payment, imprisonment for any term not exceeding twelve months or both.⁸⁸

Once again, there is the subsequent conviction provision,⁸⁹ and several questionable presumptions.⁹⁰ The presumptions all cast a reverse onus on the accused and none of them appear to be essential to the effective operation of the Chapter.

⁸⁶ Section 151(1)(f).

⁸⁷ Section 152. Excluded from the ambit of the prohibition is any discharge permitted by s 21 of the Water Act of 1956, which has been repealed.

⁸⁸ Section 154(1)(a).

⁸⁹ Section 154(2).

⁹⁰ Section 156 provides-

- (1) Any person who in a close season is in possession of any species of fish to which such close season applies, shall be deemed to have caught such fish in contravention of section 143 (2) (b) unless the contrary is proved.
- (2) Any person who at any time is in possession of any species of fish the capture of which is prohibited by proclamation of the Administrator, shall be deemed to have caught the same in contravention of section 143 (2) (c) unless the contrary is proved.
- (3) Any person who is in possession of any species of fish for the capture of which a licence in terms of this Chapter is required, shall be deemed to have caught such fish without a licence, unless the contrary is proved.
- (4) Any person who is in possession of any unauthorised trap, firearm, explosive, poisonous or stupefying substance, electrical device, gaff, spear, or unauthorised implement of fishing upon or adjacent to any waters, in circumstances indicating his intention to capture fish by means thereof, shall be deemed to

1.1.9 Offences in relation to marine fish;

Chapter X deals with coastal fishing and is concerned with marine resources. In terms of the Constitution, although nature conservation is an area of concurrent national and provincial competence, ‘marine resources’ is explicitly excluded from this, meaning that it is of national competence only. Conservation of marine resources is addressed on a national level by the Marine Living Resources Act.⁹¹ Although Chapter X of the Natal ordinance has not been repealed, it is no longer being implemented by the authorities in KwaZulu-Natal. The conservation officers in this province who are responsible for marine resources are implementing the Marine Living Resources Act. For this reason, this Chapter in the ordinance will not be discussed.

1.1.10 Offences in relation to indigenous plants.

Indigenous plants are the subject of Chapter XI of the ordinance. ‘Indigenous plant’ is defined as any plant or part thereof, including cycad and any cycad hybrid, indigenous to the Republic, but does not include any plant which is a noxious weed by virtue of any law.⁹² The offences in the Chapter apply only to protected and specially protected indigenous plants. A ‘protected indigenous plant’ means any indigenous plant mentioned in Schedule 11, which is any indigenous plant not listed on Schedule 10 (unprotected indigenous plants) or Schedule 12 (specially protected indigenous plants). ‘Specially protected indigenous plants’ include several species and whole families, including cycads, lilies, tree ferns, and orchids. The offences provided in this Chapter are listed below:

have employed the same in contravention of section 151 (1) (e), unless it is proved that the same was being employed or was intended to be employed for a lawful purpose.

⁹¹ Discussed above at 147-163.

⁹² Section 1.

- ❑ Purchase of specially protected indigenous plants: No person shall purchase any specially protected indigenous plant except from a person lawfully entitled to sell it under the provisions of this Chapter.⁹³
- ❑ Sale of specially protected indigenous plants: A specially protected indigenous plant may be sold only in terms of a licence.⁹⁴
- ❑ Donation of specially protected indigenous plant without a permit: No person shall donate or exchange any specially protected indigenous plant without a permit.⁹⁵
- ❑ Exportation of indigenous plants: No person shall export from the Province any indigenous plant save under the authority of and in accordance with a permit issued to him in terms of this Chapter.⁹⁶
- ❑ Importation of specially protected indigenous plants: Such importation into the province requires a permit.⁹⁷
- ❑ Gathering of specially protected indigenous plants: no person shall gather any specially protected indigenous plant save under the authority of and in accordance with a permit, and such gathering shall only take place on land, by the owner of such land, or by any person with the prior written permission of such owner.⁹⁸
- ❑ Prohibition of gathering on public roads: No person who is not in possession of a permit, shall gather any indigenous plant on any public road or in the road reserve of any public road without the prior permission of the Administrator.⁹⁹
- ❑ Possession of specially protected indigenous plants: Section 203 provides that any person who is in possession of any specially protected indigenous plant and is unable to give a satisfactory account of such possession shall be guilty of an offence; provided that a specially protected indigenous plant growing in a wild

⁹³ Section 194.

⁹⁴ Section 196.

⁹⁵ Section 197.

⁹⁶ Section 198.

⁹⁷ Section 199.

⁹⁸ Section 200.

⁹⁹ Section 202.

state on private land shall not be deemed for the purposes of this section to be in the possession of the owner or occupier of such land.

- Trespass on land: Whenever any person is found trespassing on land for the purpose of gathering any indigenous plant he or she shall be guilty of an offence.¹⁰⁰

The penalties are all the same for the offences under this Chapter: a fine or imprisonment for a maximum period of ten (10) years or to both such fine and imprisonment.¹⁰¹ Although the fine is unspecified (a practice which differs from the rest of the ordinance), the prison term indicates that this is a heavy penalty. This is presumably to serve as a deterrent to the lucrative business of taking cycads out of the wild, which is a serious environmental problem.

As is the practice in other Chapters in the ordinance, there are several presumptions designed to assist with enforcement. The first is likely to be found unconstitutional for the reasons set out in discussion of a similar provision in the Chapter dealing with game: s 210(1) provides that any person who at any time is in possession of any specially protected indigenous plant for the gathering of which a permit or licence is required in terms of this Chapter shall, failing a satisfactory account of such possession, be deemed to have gathered the same in contravention of the Chapter. In any event, this presumption is redundant given that the possession of a specially protected indigenous plant is in itself an offence in terms of s 203. Section 210(2) provides that, whenever in any proceedings under this Chapter the question arises as to whether or not any indigenous plant is specially protected, it shall be deemed to be such unless the contrary is proved. This presumption also seems to be unnecessary, since this information would surely have to be determined by the authorities before deciding to prosecute in the first place.

¹⁰⁰ Section 205.

¹⁰¹ Section 208.

1.1.11 Miscellaneous provisions

Chapter XII deals with various general matters, including powers of officers (including powers of search and seizure). Section 215B provides for the mandatory forfeiture of certain items wherever a person is convicted of an offence under the ordinance:

- ❑ any animal or part of an animal in respect of which there has been contravention of the prohibition on removing any animal from a park;¹⁰²
- ❑ any game or trophy, or any indigenous amphibian, invertebrate or reptile, or any wild bird or foreign bird, including any such bird found in any unregistered or unlicensed aviary or in excess of the number of such birds authorised to be kept in any such aviary, or any fish, or any indigenous plant in respect of which the offence was committed;
- ❑ any weapon, explosive trap, snare, poison, receptacle, instrument, implement of fishing, animal or any other article or object used by such person in, for the purpose of, or in connection with the commission of the offence;

Moreover, the court is given a discretion in the case of a second or subsequent conviction of an offence under the same chapter of this Ordinance, to declare forfeited to the Natal Provincial Administration any vehicle, vessel, boat, craft, float or aircraft and any right, title and interest of such person in or to such vehicle, vessel, boat, craft, float or aircraft used in, for the purpose of, or in connection with the commission of the offence.¹⁰³ These forfeiture provisions are unlikely to be problematic since they target either the subject matter of the offence, or the objects used in the commission of the offence.

The final noteworthy provision is one which requires the payment to the Board of all fines or estreated bail moneys paid or recovered in respect of any contravention of this ordinance or the regulations.¹⁰⁴ This is a useful provision in that it serves to provide

¹⁰² Section 15(1)(f).

¹⁰³ Section 215B(1)(b).

¹⁰⁴ Section 216.

funds for the implementation of the legislation in question, instead of such funds being lost in the general government coffers.

1.1.12 Evaluation

The Natal Nature Conservation Ordinance makes liberal use of the criminal sanction as an enforcement device. In many cases, it operates as a subsidiary sanction, in cases of failure to act with the necessary permit or licence. Although in certain cases penalties provided for are heavy, many of the offences carry small maximum penalties which would make use of the criminal court process of questionable value. For these offences, alternatives to the criminal sanction (administrative penalties, for example) would be ideal. Another noteworthy aspect is the fact that the ordinance is riddled with presumptions that have little chance of avoiding negative constitutional scrutiny. Although enforcement officials would probably argue strongly that they are necessary in order to enforce the legislation, in most cases they could quite feasibly be replaced by something that has much the same effect without infringing the right to a fair trial, as argued above.

Given that the ordinance is more than twenty-five years old, it is not surprising that it is caught in the traditional ‘command and control’ paradigm, but the fact that much of the focus of the ordinance is on relatively minor infractions makes it the ideal vehicle for the application of alternative enforcement measures.

1.2 *Orange Free State Nature Conservation Ordinance 8 of 1969*

The Free State Ordinance is a shorter and less complex document than the Natal legislation. It regulates wild animals (including hunting); fish; indigenous plants and nature reserves. Instead of containing offences provisions in each Chapter like the Natal ordinance, there is one section dealing with all offences under the General Chapter, Chapter VI.

1.2.1 Offences

The offences which carry the heaviest penalties are:

- ❑ Hunting protected game: No person shall hunt protected game, except under authority of a permit.¹⁰⁵ Protected game is not defined in the body of the Act, but Schedule 1 contains a list of protected game, which includes, inter alia, elephant, both species of rhinoceros, and some reptiles and birds.
- ❑ Prohibition of hunting with or laying of poison: No person shall hunt with poison or lay poison or cause poison to be laid at any place where it is likely to be picked up by a wild animal, except under authority of a permit.¹⁰⁶ ‘Poison’ includes any poison, preparation or chemical substance used to catch, immobilize, sterilize or to harm physically a wild animal.¹⁰⁷
- ❑ Activities in respect of Schedule 3 animal: Except under authority of a permit, no person shall possess, convey, buy, sell, grant, exchange, process or manufacture any product from any part of the body of a wild or exotic animal of a species specified in Schedule 3.¹⁰⁸ Schedule 3 contains two entries: all elephants and all rhinoceroses.
- ❑ Export of animals: No person shall export from the Province an animal of an endangered or scarce species.¹⁰⁹ ‘Endangered species’, in relation to an animal or plant, is a species specified in Appendix 1 to the Convention on International Trade in Endangered species of Wild Fauna and Flora (Washington, 1973) and includes any reasonably identifiable part or derivative of such species; while a ‘scarce species’, in relation to an animal or plant, is a species specified in Appendix 11 to the Convention on International Trade in Endangered Species of

¹⁰⁵ Section 2(3).

¹⁰⁶ Section 7.

¹⁰⁷ Section 1.

¹⁰⁸ Section 14(2).

¹⁰⁹ Section 15(a).

Wild Fauna and Flora (Washington, 1973) and includes, in the case of an animal, any reasonably identifiable part or derivative of such species.¹¹⁰

- ❑ Importation of animals: No person shall import into the Province an animal of an endangered or scarce species.¹¹¹
- ❑ Prohibited acts in respect of certain plants: No person shall sell, donate, import into or export from the Province any protected plant or a plant of an endangered or scarce species, except under authority of a permit.¹¹² Schedule 6 contains a long list of protected plants, including cycads and yellowwoods.

The penalty for the offences listed above is a maximum fine of R100 000 or imprisonment for a period not exceeding 10 years or both.¹¹³

The penalty for other offences in terms of the Act, including the offence of being in possession of a wild animal, fish or plant, or derivative or part thereof, in respect of which there is a reasonable suspicion that it has not been hunted, caught, picked or obtained in accordance with the provisions of this Ordinance and being unable to give a satisfactory account of such possession; is a fine not exceeding R20 000 or imprisonment for a period not exceeding 5 years or both.¹¹⁴

1.2.2 Miscellaneous provisions

The ordinance does contain a provision providing for compensation, but only in respect of poisoned animals (damages are payable to the owner of the animal).¹¹⁵ There is also a section dealing with forfeitures, ranging from forfeiture of any animal involved in the offence to instruments (weapons and fishing tackle, for example) to vehicles used in connection with the commission of such offence or for the conveyance of anything in

¹¹⁰ Section 1.

¹¹¹ Section 16.

¹¹² Section 33.

¹¹³ Section 40(1)(i).

¹¹⁴ Section 40(1)(ii).

¹¹⁵ Section 40(2)(a).

respect of which such offence was committed.¹¹⁶ This provision is very similar to that found in the Natal ordinance. Payment to an informant is provided for.¹¹⁷ Finally, the ordinance contains several presumptions:

In any prosecution in terms of this Ordinance it shall be presumed until the contrary is proved -

- (a) in the case where it is alleged that a person is not the holder of a permit, licence, exemption or document issued in terms of this Ordinance, that such person is not the holder of such permit, licence, exemption or document;
- (b) in the case where it is alleged that an animal, fish or plant is of a specified species or sex, that such animal, fish or plant is of that species or sex;
- (c) in the case where an animal, fish or plant is found on a vehicle, vessel, float or aircraft or at a camping place, that every person, who at the time such animal, fish or plant was so found, was upon such vehicle, vessel, float or aircraft or at such camping place or was in any way associated therewith, was in possession of such animal, fish or plant;
- (d) that any person caught in the act while removing an animal or fish from a snare, trap, gin, net, bird-lime, fish-trap, set line, pitfall, holding pen, trap-cage or any other like means or contrivance, was busy hunting or catching such animal or fish;
- (e) in the case where an animal, fish or plant is found in any shop or other place of sale, that the person in whose possession it is found or who has control over such shop or place, has attempted to sell such animal, fish or plant;
- (f) in the case of a contravention of section 7 (1), that the owner of the land on which poison or an animal which died of poison was found laid or caused such poison to be laid on such land.¹¹⁸

Presumptions (b) and (d) are similar to presumptions contained in the Natal ordinance and are likely to be problematic for reasons outlined in the discussion of the Natal presumptions. As far as the other presumptions are concerned, let us examine them in turn. Presumption (a), although it may be of questionable evidential value, would probably not be struck down because it is easy for the accused to discharge the reverse onus – if he or she has the relevant authorisation, production of such authorisation would rebut the presumption.

Presumption (c) is similar in effect to the presumption in the Drugs and Drug Trafficking Act¹¹⁹ that was declared unconstitutional in *S v Mello*.¹²⁰ This presumption

¹¹⁶ Section 41.

¹¹⁷ Section 41A.

¹¹⁸ Section 42.

¹¹⁹ Section 20 of Act 140 of 1992.

extends too far – it would not be difficult to conceive of instances where a person who had nothing to do with the offence could be presumed to be involved without being able to satisfy the reverse onus. It is likely that this presumption, if challenged, would suffer the same fate as the one in *Mello*.

The presumption in (e) could be avoided by changing the nature of the offence to which it relates. Instead of making it an offence only to sell the prohibited item, the offence could include being in possession of the item in a shop or place of sale. This would obviate the need for the presumption.

The last presumption concerns the laying of poison. This presumption is, of all the presumptions in the ordinance, probably the one most necessary for the administration of justice. It is difficult to conceive how the state could prosecute this offence in certain instances without such a presumption. On the other hand, the presumption is very broad – if a poisoned animal after being poisoned elsewhere moves onto a person's land and dies on that land, the presumption will require the landowner to prove that he did not lay the poison, which might be very difficult and lead to the possibility of an innocent person's conviction for this offence. It is not immediately apparent, however, how to get around the practical difficulties in prosecuting this offence. Perhaps the severance of the words 'or an animal which died of poison was found' would make the provision more acceptable.

1.2.3 Evaluation

This is another enactment firmly embedded in the command and control paradigm. Like the Natal ordinance, it makes liberal use of subsidiary sanctions, penalising activities carried out without a permit or contrary to the permit conditions. It does not provide for alternative enforcement measures other than the criminal sanction. A further shortcoming is the inclusion of several presumptions that are unlikely to pass constitutional scrutiny. On the other hand, however, for an old ordinance, the penalties

¹²⁰ 1998 (3) SA 712 (CC).

provided for are reasonable - this is one piece of legislation that cannot be criticised for having unreasonably low penalties.

1.3 Cape Nature and Environmental Conservation Ordinance 19 of 1974

This ordinance covers roughly the same subject matter as the ordinances discussed above. Like the Free State ordinance, it deals with offences and penalties in the General Chapter, rather than in each individual chapter, with one exception. The offences are of the same sort found in the previous two ordinances. Noteworthy aspects of the ordinance are as follows:

1.3.1 Fines in respect of commercial value of animal that is subject of offence

A provision not found in either of the previous ordinances discussed, is provision for a fine to be paid that does not exceed three times the commercial value of the animal or carcase in respect of which the offence was committed. This is provided for in a special Chapter dealing with rhinoceroses,¹²¹ and in the general offences section.¹²² This is a significant penalty, since the commercial value of wild animals can be considerable. Someone who commits an offence in respect of a rhinoceros, for example, is liable to a maximum fine of one hundred thousand rand or ten years imprisonment or both and, in addition, a fine not exceeding three times the value of the rhinoceros, which could be worth approximately five hundred thousand rand. It is possible, then, that the offender could be facing a fine of more than R1.5 million.

It is submitted that an improvement to this provision would have been to provide that an amount equal to the commercial value of the animal in question be payable to the owner (which would be an organ of state in the case of an offence in a protected area).

¹²¹ Section 47A(2).

¹²² Section 86(1)(a)-(d).

1.3.2 Presumptions

There are several presumptions in the ordinance that cast a reverse onus on the accused. Some are similar to those found in the other ordinances. There is, first, a presumption that an animal or firearm found in a vehicle or other stated means of conveyance shall, unless the contrary is proved, be presumed to be in the possession of the person in charge of that vehicle or other means of conveyance at the relevant time.¹²³ This is similar to the presumption that the Constitutional Court struck down in *S v Mello*.¹²⁴ It would seem that the presumption is unnecessary in any event, because proof of the fact that the animal or firearm was found in the vehicle *would* constitute proof of possession if the accused did not explain otherwise. The problem with the presumption is that it reverses the onus – if the presumption did not operate, the accused would have to raise reasonable doubt, but the absence of the presumption would not cast any extra burden on the prosecution.

Then there are two presumptions relating to possession of flora and wild animals. A person in possession of flora is presumed to have picked it or bought it in contravention of the ordinance¹²⁵ and a person in possession of a wild animal is presumed to have kept the animal in captivity in contravention of the ordinance.¹²⁶ Both these presumptions could be avoided by merely making the possession of flora and wild animals unlawful without a permit or reasonable explanation on the part of the accused. There is, in fact, an offence of being in possession of wild animal without being able to give a satisfactory account of that possession.¹²⁷

The fourth presumption is one much like those found in the previous two ordinances presuming that a person removing an animal from a snare, trap etc laid the snare and captured the animal.¹²⁸ For the reasons set out above, this presumption is problematic but

¹²³ Section 84(1)(a).

¹²⁴ (Supra n120).

¹²⁵ Section 84(1)(b).

¹²⁶ Section 84(1)(b).

¹²⁷ Section 85(k).

¹²⁸ Section 84(1)(d).

it could be addressed by redrafting the relevant offence.¹²⁹ Similarly, a presumption that somebody trespassing while in control of a dog was hunting wild animals by use of that dog,¹³⁰ could be removed and an offence created of trespassing with a dog. This would have the same effect without the constitutional problems of reversing the onus.

The final presumption is drafted in a relatively complex manner. It reads-

(2) Whenever-

- (a) a vehicle, vessel, boat, craft, float, aircraft or other means of conveyance is being or has been used for the purpose of or in connection with the commission of an offence under this ordinance;
- (b) any wild animal, the carcase of such animal or fish in respect of which an offence is being or has been committed under this ordinance is found or has been in or on a vehicle, vessel, boat, craft, float, aircraft or other means of conveyance, or
- (c) a weapon, line, poison, net or any other object which could be used for the hunting of wild animals or the catching of fish and which is being or was used or forms or formed an element in the commission of an offence under this ordinance, is found or has been in or on a vehicle, vessel, boat, craft, float, aircraft or other means of conveyance,

the owner of such vehicle, vessel, boat, craft, float, aircraft or other means of conveyance as well as the person in charge thereof at the time of the commission of the offence or at the time when the wild animal, carcase, fish or any object contemplated by paragraph (c) is found or was in or on such vehicle, vessel, boat, craft, float, aircraft or other means of conveyance shall be presumed to have committed the offence concerned and be liable to be convicted and sentenced in respect thereof unless it is proved that he did not commit such offence and was unable to prevent the commission thereof.¹³¹

This is a very broad presumption and certainly raises the constitutionally unacceptable spectre of conviction of the innocent. For the reasons set out in *S v Mello*,¹³² this presumption would almost certainly be struck down if challenged in a Court. It is not immediately clear what the purpose of this presumption is and therefore it is difficult to suggest an alternative way of dealing with the problem.

¹²⁹ See above, 219.

¹³⁰ Section 84(1)(e).

¹³¹ Section 84(2).

¹³² (Supra n120).

1.3.3 General

The ordinance provides for three levels of penalties. The most serious, for offences relating to protected species and similar offences, is a maximum fine of one hundred thousand rand or ten years imprisonment or both.¹³³ The intermediate penalty, for offences like hunting a protected wild animal other than an elephant is a maximum fine of ten thousand rand or two years imprisonment or both.¹³⁴ The penalty for offences not specified individually is a fine of not more than five thousand rand or one year's imprisonment or both.¹³⁵ These penalties conform to the penalties provided for in the previous ordinances discussed.

There are also provisions relating to discretionary cancellation by the Court of authorisations and forfeiture provisions¹³⁶ similar to those found in the previous ordinances discussed.

1.3.4 Evaluation

There is nothing in the Cape ordinance significantly different from what was found in the Free State and Natal ordinances, other than the fine equal to three times the commercial value of an animal or plant in respect of which an offence was committed. The observations made about those ordinances relating to the reliance on command and control and the problems with presumptions are of equal applicability to the Cape ordinance.

1.4 *Transvaal Nature Conservation Ordinance 12 of 1983*

The Transvaal ordinance shares several common features with the three ordinances already considered. It deals with the same subject matter, by and large, and a large

¹³³ Section 86(1)(a).

¹³⁴ Section 86(1)(c).

¹³⁵ Section 86(1)(d).

¹³⁶ Section 87.

portion of the ordinance is concerned with issues relating to hunting. The ordinance contains a plethora of offences, of much the same sort as those found in the other ordinances. What is particularly noteworthy about the Transvaal ordinance is the large number of presumptions that have reference to criminal proceedings. The ordinance contains no fewer than fifteen reverse-onus presumptions and several presumptions imposing an evidential burden on the accused. Several of these are similar to presumptions found in the other ordinances, but there are some that relate to particular matters that are not regulated by the other ordinances. For instance, there is a prohibition of making an opening in a fence from which a game animal cannot readily escape.¹³⁷ There is a corresponding presumption that deems a hole or opening in the fence to have been made by the owner or occupier of land and that it is designed as contemplated in the prohibition.¹³⁸

One of the presumptions in the ordinance was successfully challenged in the case of *S v Mumbé*.¹³⁹ At first glance this may appear to have inflicted a severe blow to the authorities' ability to enforce the law, but, as has been argued in respect of some of the other presumptions already considered in this Chapter, redrafting of the law to change the essence of the offence in question would enable the authorities to prove the offence relatively easily without falling foul of the bill of rights.

The presumption in question is relevant to s 98(1) of the ordinance which prohibits any person from importing into or exporting from the province an endangered species or a rare species unless he or she is the holder of a permit which authorises him or her to do so (save in certain specified circumstances which are not relevant to the case at hand). The 'endangered species' and 'rare species' referred to in the section are those species of fauna and flora which are so designated in Appendices I and II of the Convention of International Trade in Endangered Species of Wild Fauna and Flora (Washington DC 1973) ('CITES').

¹³⁷ Section 26.

¹³⁸ Section 110(1)(h).

¹³⁹ 1997 (1) SA 854 (W).

South Africa, as a party to CITES, is required to take appropriate measures to enforce the provisions of the Convention and to prohibit trade in specimens in violation thereof. These shall include measures to penalise trade in, or possession of, such specimens, or both.¹⁴⁰ Section 98 of the ordinance is clearly designed to fulfil South Africa's obligations in this regard as far as the province of Transvaal is concerned.

In evidence before the court in *Mumbe*, the commanding officer of the Endangered Species Protection Unit (a unit of the South African Police Services) testified, in respect of smuggling and illegal trade in ivory and rhinoceros horn (both falling within the definitions of endangered and rare species mentioned above) that 'control at border posts leaves much to be desired and that the Republic would by virtue of its superior communication and transport facilities continue to feature prominently as an exporter of illegal goods from other parts of Africa for as long as this can take place with little or no risk of detection'.¹⁴¹

Seemingly to overcome the problem of poor border controls, the ordinance contains a presumption to the effect that, where at criminal proceedings in terms of this ordinance, it is proved that any person was in possession or in control of an endangered species or rare species, such person will be deemed to have imported such species into the province, until the contrary is proved.¹⁴²

In *S v Mumbe*, the appellant had been convicted of contravention of section 98(1) of the ordinance solely on the basis of the presumption contained in section 110(1)(m). On appeal, he challenged the constitutionality of this presumption.

Respondent contended that the presumption cast on the accused only an evidential burden to adduce evidence which raised a reasonable doubt as to whether he was guilty of importation. The court (Streicher J, with whom Southwood J concurred) held, however, that 'there can be no doubt that the section is a reverse *onus* provision which imposes a burden of proof on the accused to prove on a balance of probabilities that he was not

¹⁴⁰ Article VIII.1(a).

¹⁴¹ At 858E.

¹⁴² Section 110(1)(m).

guilty of importation¹⁴³ and that the provision, therefore, conflicted with the presumption of innocence.

The question which now remained to be established was whether the limitation of the right effected by section 110(1)(m) was a reasonable, necessary and justifiable limitation in an open and democratic society based on freedom and equality.¹⁴⁴ (section 33 of the interim Constitution). Having established that the presumption of innocence was ‘crucial’ and ‘essential in a society committed to fairness and social justice’,¹⁴⁵ the Court also held that:

It is of considerable importance to an open and democratic society that the environment be protected for the benefit of present and future generations. The [interim] Constitution ... recognises the right of everyone to have the environment protected for the benefit of present and future generations through legislative and other measures that promote conservation’.¹⁴⁶

As far as the extent of the limitation was concerned, the Court held that the effect of the presumption is that a person could be convicted of contravening s 98(1) of the ordinance in circumstances where reasonable doubt as to guilt was present. Moreover, although ‘the presumption is no doubt efficacious in the sense that it facilitates convictions’,¹⁴⁷ the Court decided that ‘an evidential burden as opposed to a deeming provision until the contrary is proved is less damaging to the right in question and should be reasonably efficacious in securing a conviction of a guilty accused’.¹⁴⁸

The court consequently decided that the presumption did not satisfy the requirements of the limitations clause. Whilst recognising the importance of enforcing the legislation in question, and acknowledging the difficulty of proving contravention of the ordinance, the Court was of the view that there was an alternative manner of dealing with the difficulty which would be ‘less damaging’ to the presumption of innocence. The Court’s words in this regard are instructive:

¹⁴³ At 856I.

¹⁴⁴ Section 33 of the interim Constitution.

¹⁴⁵ At 857J-858C, quoting from *R v Oakes* (1986) 26 DLR (4th) 200 at 212-3.

¹⁴⁶ At 858J-859A

¹⁴⁷ At 859G.

¹⁴⁸ At 860A.

[The] difficulty [of proving the offence] can be dealt with adequately in a way which is less damaging to the constitutionally entrenched rights, for example by imposing an evidential burden on an accused by providing that possession would constitute *prima facie* evidence of importation. Such a provision would be of assistance to the prosecution whilst at the same time being less invasive of s 25(3) rights ... *That is not to say that such a provision would be constitutional but only that such a provision has a better chance of passing the constitutionality test*'.¹⁴⁹

An evidential burden would have the effect of requiring the accused to adduce evidence raising reasonable doubt as to whether the offence was committed, which is less onerous than having to disprove a presumed fact. Yet, as the Court indicates, there is still doubt that an evidential burden would pass constitutional muster. If it did not, would this mean that the authorities would have to prove the actual import of the rare or endangered species, a task which apparently is extremely difficult? If so, South Africa's efforts at meeting its responsibilities under CITES would suffer an important setback.

Fortunately, it is possible to redraft the ordinance so as to create a different offence which would be much easier to prove and which would not infringe the accused's constitutional rights. Rather than focussing on the illegality of the import and therefore having to presume the importation of the items in order to establish the offence, it is suggested that the ordinance make it an offence for any person to be in possession of an endangered or rare species without a permit. Such a permit could be issued to legal importers as well as existing possessors of such species. This provision would satisfy CITES, since the relevant article in the Convention requires 'measures to penalise trade in, or possession of, such specimens'. It would also be easy to prove that someone was not in possession of the necessary permit.

This is, thus far, the only presumption in environmental legislation to have been subjected to judicial scrutiny and the Court's approach does not send an encouraging message for the other presumptions contained in this and the other nature conservation ordinances. It is possible, however, as has been argued here, to make up for the loss of the presumption by considering more closely exactly what it is that the state is attempting to prohibit. Imaginative 'offence-creation' would in nearly all cases obviate the need for reverse onus presumptions, or even evidential burdens.

¹⁴⁹ At 860E-F, emphasis added.

The remaining presumptions in the ordinance will not be considered in any detail, since the general themes of the Transvaal ordinance have been identified.

1.5 Natal and Free State pollution ordinances

Both the Free State and Natal have short ordinances dealing with environmental pollution: the Free State Prohibition of the Dumping of Rubbish Ordinance 8 of 1976 and the Natal Prevention of Environmental Pollution Ordinance 21 of 1981.

The Free State ordinance prohibits the throwing, dumping or leaving of any rubbish without authority on land (other than private land) in a defined area or in or on water on such land; or in or on any public water, except in a container or at a place specially adapted and set apart for such purpose; or on private land in a defined area or in or on water on such land in such manner that it is visible from a public road or place, unless such act is performed in connection with farming activities or for the purpose of the immediate burying or destruction of such rubbish.¹⁵⁰ Also, when there is an accumulation of rubbish, or rubbish lies scattered, on land in a defined area in sight of a public road or place an authorized officer may, by written notice directed to the owner or occupier of such land, order such owner or occupier to clean up or remove such rubbish within a period of not less than seven days specified in such notice and if such owner or occupier refuses or fails to give effect to such order within such period the authorized officer may clean up or remove such rubbish at the expense of such owner or occupier.¹⁵¹ Any person who contravenes a provision of section 2 (1); or refuses or fails to comply with an order in terms of section 2 (2); is guilty of an offence and liable upon conviction in the case of an offence involving the throwing, dumping or leaving of rubbish, to a fine not exceeding four hundred rand or to imprisonment for a period not exceeding twelve months or to both such fine and imprisonment; and in all other cases, to a fine not exceeding two hundred rand or to imprisonment for a period not exceeding six months or to both such fine and imprisonment. These penalties are somewhat low.

¹⁵⁰ Section 2(1).

¹⁵¹ Section 2(2).

There is a presumption in the ordinance to the effect that when in a prosecution in terms of the ordinance it is alleged that rubbish has been thrown or dumped out of or from a vehicle it shall be presumed, until the contrary is proved, that such rubbish was so thrown or dumped by the owner or driver of such vehicle. This presumption may well be acceptable on the grounds set out in the case of *S v Meaker*.¹⁵²

The Natal ordinance contains much the same prohibition as the Free State ordinance, without the provision relating to an officer's order to clean up rubbish. The penalty provided for littering or pollution in the Natal ordinance is a fine not exceeding R 1 000 or in default of payment, imprisonment for a period not exceeding 12 months or both such fine and imprisonment or such imprisonment without the option of a fine.¹⁵³

The Natal ordinance is purely within the command and control paradigm whilst the Free State ordinance does have a directive procedure in certain circumstances. Neither departs much from the usual enforcement methods of provincial legislation of the time.

1.6 Overall Evaluation

The purpose of this exercise is to examine general trends in the provincial environmental legislation, and the analysis of the four provincial ordinances reveals more general similarities than differences. Although there are obviously differences in individual provisions and different emphases in parts, all four ordinances are based on a command and control approach, prohibiting numerous different acts and providing penalties for these that range in seriousness from fines of R100 000 or ten years imprisonment (in the case of all four ordinances, primarily for offences relating to endangered species like elephant and rhinoceroses) to fines of one hundred rand. All four make use of reverse onus provisions in order to facilitate proof of offences and all four have provisions relating to forfeiture of items used in the commission of the offence and the subject matter of the offence. What is noteworthy, however, about the ordinances as far as what

¹⁵² 1998 (8) *BCLR* 1038 (W). See above at 46-8.

¹⁵³ Section 6.

they do not contain is concerned, is alternative enforcement measures are conspicuous by their absence.

2 Post-1994 Provincial legislation

The three Acts that will be considered are the KwaZulu-Natal Planning and Development Act 5 of 1998; Mpumalanga Nature Conservation Act 10 of 1998; and the Western Cape Planning and Development Act 7 of 1999. The two enactments dealing with planning and development will be discussed first, followed by the Mpumalanga statute.

2.1 KwaZulu-Natal Planning and Development Act 5 of 1998

This Act is intended to regulate spatial planning and development in the province and, to this end, it deals with matters such as town planning, zoning, subdivision of land, development of buildings and land and the institutional arrangements for administering these matters. The primary enforcement procedure provided for by the Act is a notice process whereby any person failing to comply with the Act is required to take steps to remedy the situation. One of the consequences of failure to do so is possible criminal prosecution, so criminal sanctions are used here only as a back-up to the notice procedure. Let us examine the provisions in more detail.

Section 47 provides –

(1) If any person –

- (a) develops or subdivides land;
- (b) sells land in the process of subdivision;
- (c) erects a building or other structure;
- (d) uses land, a building; or other structure;
- (e) causes any land, building or other structure to be developed, erected or used in any manner other than in terms of an approval under this Act or any other applicable law, the responsible authority concerned shall serve a prohibition notice on the person concerned.

(2) The prohibition notice referred to in subsection (1) shall -

- (a) set out the unauthorised activity concerned; and
- (b) invite the person concerned to make representations to the responsible authority why it should not issue an order contemplated in subsection (3).

- (3) If after considering the representations made to it, if any, the responsible authority concludes that the activity referred to in subsection (1) is unauthorised, it shall serve a prohibition order -
- (a) declaring that the unauthorised activity is prohibited;
 - (b) ordering the person concerned to cease such prohibited activity by a date specified in the notice;
 - (c) where necessary, ordering the person concerned to demolish any unauthorised building or other structure by a specified date; and
 - (d) where applicable, notifying the person concerned of any financial penalty which will be payable for not complying with the terms of the notice.
- (4) Should the person concerned fail to comply with any of the requirements of the order, the responsible authority may -
- (a) use any other remedy it has in terms of this Act or any other law; or
 - (b) apply to a court of competent jurisdiction for an order restraining the person concerned from continuing the prohibited activity, or both.
- (5) Where it has come to the attention of the Minister that the responsible authority referred to in subsection (1) has failed to serve the required prohibition notice or order, the Minister may after hearing the responsible authority, act in accordance with the provisions of subsections (2) and (3).
- (6) Where the Minister has issued a notice or order in terms of subsection (5) the Minister may exercise the powers in subsection (4) to enforce compliance therewith.
- (7) Nothing in this section shall preclude any person in receipt of a prohibition notice or order under this section from making an application in terms of this Act or any other applicable law for approval of the activity concerned.

The prohibition notice essentially provides the alleged offender with a hearing, after which, if the responsible authority¹⁵⁴ concludes that the activity is unauthorised, the prohibition order is served. This requires the offender to take steps to remedy the situation, failing which the authority may seek further remedies. There is also provision for the Minister to act in the case of default by the responsible authority.

Section 47(3)(d) provides for the imposition of a penalty by the responsible authority (an extra-curial penalty, in effect) that is provided for by regulations made

¹⁵⁴ 'Responsible authority' means the relevant body or person required –

- (i) under section 23 to prepare or administer a development plan;
- (ii) under section 34(2) to consider a development application; or
- (iii) under section 39 to consider a subdivisional application (s 1).

under the Act.¹⁵⁵ Regulation 63(2) provides that, in determining any penalty in terms of this section of the Act, the responsible authority may determine a different penalty for different or recurring contraventions, provided however that the penalty must be reasonable in all the circumstances, taking into account the anticipated enforcement costs of the responsible authority; the prevalence of the contravention and desirability of a deterrent element in the penalty; and the need for a punitive element appropriate to the contravention concerned.

As far as the criminal aspect is concerned, section 48 provides that any person who fails to comply with any requirement contained in an order contemplated in sections 47(3), (5) or (6) shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred thousand rand, or to a period of imprisonment not exceeding five years, or both. Regulation 62 provides that, if in any prosecution under section 48 of the Act, it is proved that the accused was either (a) the registered owner of the land, or the lessee or occupier of that portion of any land, building or structure on or in which the contravention was taking place; or (b) the owner of any business or other enterprise which was prohibited; the accused is required to prove that he or she did not cause or knowingly permit the offence to take place. It is not immediately clear what the purpose of this provision is.

The Planning and Development Act regulates an area that has probably not historically been one regulated by command and control mechanisms, so the muted role of the criminal sanction in this Act is not surprising. On paper, the mix of enforcement mechanisms provided for in the Act falls squarely behind the overall objective of sustainable development. As a primary tool, attempt is made to remedy the situation. The criminal sanction operates a subsidiary sanction, being invoked only upon failure of the primary administrative enforcement tool. Whether the enforcement tools provided for are being effectively used in practice, however, is not readily apparent.

¹⁵⁵ February 2000.

2.2 Western Cape Planning and Development Act 7 of 1999

The Western Cape Act regulates essentially the same subject matter as the KwaZulu-Natal Act discussed above, and its enforcement procedure, although somewhat more complex, is similar in effect.

Section 60(2)(a) prohibits any person from contravening or failing to comply with the provisions incorporated in a zoning scheme in terms of this Act; or conditions, including title conditions, imposed in terms of the Act or under any law listed in Schedule III,¹⁵⁶ or the provisions of the Act, or of any law listed in Schedule III which apply in terms of the Act or any by-law made under the Act. It also prohibits the utilisation of any land for a purpose or in a manner other than that indicated on a zoning map or approved building plan, or where a zoning has not yet been indicated on a map, according to the lawful utilisation of the land.¹⁵⁷ Any contravention of these prohibitions may then be addressed by means of a directive procedure. If land or a building or any part thereof was developed or utilised or any other action was taken in contravention of s 60(2), the municipality shall serve a directive on the owner to rectify that contravention before a date specified therein, being not more than 2 months after the date of the directive.¹⁵⁸ If the owner fails to comply with the directive, the municipality shall take all further steps required to rectify the contravention.¹⁵⁹ Such steps may include the imposition of a contravention levy on the offender.¹⁶⁰

Section 63 provides for a judicial order which may be applied for by the Provincial Minister where provincial or regional interests so require, or by a municipality when the development or utilisation of land is in contravention of or does not comply with a provision of the Act or an approval or authorisation granted in terms thereof; or where the environment concerned has been damaged as a result of an act or omission which

¹⁵⁶ This Schedule contains a list of other legislation concerned with planning and land development.

¹⁵⁷ Section 60(2)(b).

¹⁵⁸ Section 62(1)(a).

¹⁵⁹ Section 62(2).

¹⁶⁰ Section 62(5).

constitutes an offence in terms of this Act. The Act empowers a judge or magistrate to make an order in the circumstances described above -

- (a) prohibiting any person from commencing or proceeding with the development or utilisation of land;
- (b) authorising the Provincial Minister or municipality, as the case may be, to demolish any structure or any portion thereof; provided that the relevant decision to do so has been made by the authority in question;
- (c) ordering a person to restore the environment on the basis and conditions deemed fit by the judicial officer;
- (d) authorising the Provincial Minister or municipality, as the case may be, to execute the repairs as contemplated in paragraph (c) if the person mentioned therein fails to execute the repairs on the basis and conditions set out in the order, and
- (e) awarding compensation to the Provincial Minister or municipality, as the case may be, for the repairs in the circumstances as contemplated in paragraph (d).¹⁶¹

There is substantial similarity with the approach taken by the KwaZulu-Natal Act as far as the objective and the impact on the offender is concerned, but the big difference is that the KZN Act makes use of an administrative procedure whereby the orders are made, whereas the Western Cape makes use of a judicial procedure. This is more cumbersome and expensive than an administrative procedure, although the order may well be regarded as carrying more weight. It is not clear from the Act whether the judicial order would be used only after the municipality has issued a directive in terms of s 62.

Offences, imposition of fines and penalties are provided by section 64. There is an offence relating to obstruction of officials, but the important offence for present purposes is to the effect that any person who contravenes or fails to comply with any provision of this Act or any order, directive, prohibition, condition, requirement or notice made, issued, imposed, stipulated or given in terms thereof, shall be guilty of an offence and liable on conviction to an appropriate fine not exceeding R500 000 or to imprisonment

¹⁶¹ Section 63(2). and thereafter the provisions of section 300(2), (3), (4) and (5) of the Criminal Procedure Act, 1977 (Act 51 of 1977), shall apply mutatis mutandis. This section deals with the power of the Court to award compensation where an offence causes damage to or loss to property.

for a period not exceeding 5 years or to both such fine and such imprisonment.¹⁶² Moreover, a person convicted of an offence under this Act who, after conviction, continues with the conduct in respect of which he or she was so convicted shall be guilty of a continuing offence and liable on conviction to a fine not exceeding R10 000 in respect of each day on which he or she so continues or has continued with it.¹⁶³

Much the same general comment can be made about the Western Cape Planning and Development Act as was made about the KZN Act. It is probably somewhat more difficult to enforce than the KZN Act is due to the requirement of applying for a judicial order rather than simply dealing with the matter administratively.

2.3 Mpumalanga Nature Conservation Act 10 of 1998

Before the enactment of this legislation, nature conservation in Mpumalanga (formerly part of the Transvaal province) was regulated by means of the Transvaal Nature Conservation Ordinance discussed above. The Mpumalanga Nature Conservation Act is based substantially on the ordinance, the main differences being removal of matters relevant to the Transvaal (for instance, exclusion of Chapter 2 of the ordinance, dealing with the institutional structures for nature conservation in the former Transvaal). The Chapters dealing with wild animals, professional hunting, problem animals, fisheries, indigenous plants, endangered species, and cave formations are much the same as those in the ordinance. The offences in respect of these matters are essentially the same as well.

An examination of the Chapter dealing with general matters, including enforcement, reveals that the Mpumalanga Act does not specify the amount of fines, but follows the trend apparent in many more recent enactments¹⁶⁴ of leaving this to the Court's discretion. Despite the obvious Constitutional problems with reverse onus provisions, the Mpumalanga Act makes use of 12 of the 15 presumptions contained in the Transvaal

¹⁶² Section 64(1)(a).

¹⁶³ Section 64(2).

¹⁶⁴ See, for example, the National Water Act 36 of 1998. See comment above at 212.

ordinance. Interestingly, the presumption struck down in *S v Mumba*¹⁶⁵ does not appear in the Act. There is, however, a provision to the effect that no person shall possess an elephant tusk or a rhinoceros horn unless he or she is the holder of a permit which authorizes him or her to do so.¹⁶⁶ Any person who contravenes or fails to comply with this provision shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment.¹⁶⁷

In general, then, the comments made about the Transvaal ordinance can be made with equal relevance to the Mpumalanga Act. The Act contains no enforcement provisions different from the ordinance that add anything to the current analysis.

2.4 Evaluation of post-1994 provincial legislation

While the Mpumalanga Nature Conservation Act is caught in the old 'command and control' paradigm, the two Planning and Development Acts make use of administrative procedures as a first means of attack on infringements of the legislation. The criminal sanction is reserved as a back-up in the case of default by the offender of the instructions contained in the administrative order or directive concerned. This procedure, it is submitted, is potentially far more effective than exclusive reliance on criminal sanctions.

3 Local legislation

Two local enactments will be considered as fairly typical examples of local by-laws dealing with environmental issues. First, the Pietermaritzburg-Msunduzi Transitional Local Council industrial effluent by-laws, and then the noise regulations made in terms of the Environment Conservation Act that are implemented at local authority level.

¹⁶⁵ 1997 (1) SA 854 (W).

¹⁶⁶ Section 22.

¹⁶⁷ Section 22(2).

3.1 Pietermaritzburg-Msunduzi Transitional Local Council industrial effluent by-laws

These by-laws provide for the discharge of industrial effluent into the municipal sewer system provided that the person discharging the effluent has the necessary authorisation and that the effluent conforms to certain specified standards. Section 21 of the by-laws provides that any person who contravenes or fails to comply with any provisions of the by-laws or with the conditions of any permit or notice issued under the by-laws is guilty of an offence and liable on conviction to a fine not exceeding five hundred rand or to imprisonment for a period not exceeding six months or both. The penalty for a subsequent conviction is a fine not exceeding one thousand rand or one year's imprisonment or both. The section also provides that the Court may, in addition to the punishment specified, impose an amount equal to any costs and expenses found by the Court to have been incurred by the Council as a result of any breach of the by-laws. In addition, the by-laws provide that any person who discharges any industrial effluent into the sewer in contravention of the by-laws which damages any component of the sewer or the industrial effluent treatment works or which entails additional treatment costs shall be liable, in addition to prosecution under the by-laws, for the costs of any necessary repairs to the sewer and industrial effluent treatment works and the additional treatment costs thereby incurred.

The most noteworthy aspect of the by-laws is the ludicrously low penalty provided for non-compliance. In reality, most industrial polluters are more likely to contravene these by-laws than other water pollution legislation and the lack of deterrent value in this small fine is worrying. Frequently, local legislation is practically the most immediately applicable of the environmental legislation that people are required to comply with, and for this reason it is important that the penalties make enforcement of the by-laws worthwhile.

3.2 Noise control regulations

Regulations dealing with noise control were made under s 25 of the Environment Conservation Act 73 of 1989 in January 1992.¹⁶⁸ At the time, regulations made under the Act that affected local authorities, would become applicable within the areas of those local authorities only with the consent of those authorities. The noise control regulations were designed for implementation at local authority level and over some time just over 30 local authorities decided to implement these regulations. Subsequently, the provision in the Environment Conservation Act requiring concurrence with local authorities was repealed and draft noise control regulations for the entire country were published, but these have yet to be finalised.

The regulations are comprehensive, dealing with issues relating to town planning and targeting through prohibitions various noisy activities. Reg 3 contains a general prohibition on activities like carrying out certain specified developments without taking noise control measures; use of power tools in prohibited times; driving a vehicle which emits noise greater than that allowed by specified standards; and so on. There is also a prohibition of a disturbing noise, produced or caused by any person, machine, device or apparatus or any combination thereof.¹⁶⁹ A 'disturbing noise' is a noise level which exceeds the ambient sound level at the same measuring point by 7 dBA or more. This is a standard which can be objectively assessed by means of an integrating impulse sound level meter.

In addition to the objectively-determined disturbing noise prohibition, there is a prohibition of a noise nuisance. The prohibition in regulation 5 specifies a number of activities that are prohibited if they cause a noise nuisance, which is defined as any sound which disturbs or impairs or may disturb or impair the convenience or peace of any person. Some of the prohibited activities are the playing of instruments or devices reproducing or amplifying sound; allowing an animal to cause a noise nuisance; discharge of firearms or explosives; allowing sirens and alarms to emit sound, except in

¹⁶⁸ GN R154 GG 13717 of 10 January 1992.

¹⁶⁹ Reg 4.

an emergency; operation of machinery; and the driving of a vehicle in such a manner that it causes a noise nuisance.

The local authority is given various powers of enforcement, including an abatement notice procedure,¹⁷⁰ and the power to impound animals¹⁷¹ and vehicles.¹⁷² There is also a criminal prosecution provision – a person who contravenes the regulations is guilty of an offence and liable to a fine of not more than R20 000 or two years imprisonment or both, and in the event of a continuing contravention, to a fine not exceeding R250, or imprisonment for not more than twenty days, for each day on which the contravention continues.

One of the biggest noise problems is noise caused by motor vehicles and it is interesting how the authorities have tended to deal with this problem. The noise pollution regulations prohibit the driving of a car on a public road if it makes a noise exceeding specified sound levels.¹⁷³ The maximum noise levels set down in this legislation are the same as those set down in the Road Traffic Act 29 of 1989, which prohibits operation on a public road of a vehicle causing noise which is in excess of the prescribed noise level.¹⁷⁴ The Act provides that a motor vehicle which causes excessive noise is regarded as unroadworthy and allows officials to suspend such vehicle from use pending removal of the fault causing the excessive noise.¹⁷⁵ As a matter of course, officials who come across an offending vehicle, prefer to suspend the vehicle's certificate of roadworthiness (COR) rather than prosecute. Suspension of the COR, which is a decision that can be made by a traffic official without any judicial inquiry, is an effective measure to use since the noise pollution problem will have to be remedied before the vehicle can be used again. In the case of heavy vehicles, which are the main offenders, owners will be reluctant to allow these vehicles to remain off the road for too long because this will lead

¹⁷⁰ Reg 2(c).

¹⁷¹ Reg 2(g).

¹⁷² Reg 2(h).

¹⁷³ Reg 3(j).

¹⁷⁴ Section 103(1), read with reg 344(e) GN 910 GG 12441 26 April 1990 as amended by reg 25 GN 1954 GG 12701 17 August 1990.

¹⁷⁵ Section 73(1).

to loss of revenue. On the other hand, use of the criminal penalties in the Environment Conservation Act would require court proceedings at which attendance of traffic officials would be necessary to prove contravention of the maximum noise levels. The costs of the absence of the official from normal duties, when weighed against the extreme unlikelihood of the court's imposing anything like the maximum penalty, make the COR suspension option much more attractive.

This observation aside, the noise control regulations do allow for enforcement measures other than the criminal sanction and the penalty provided for does make the criminal sanction's use worthwhile, even if only in theory.

4 Overall evaluation

The two recent provincial enactments in the Western Cape and KwaZulu-Natal dealing with planning and development both contain alternatives to the criminal sanction that appear workable and likely to be effective if used. Otherwise, provincial environmental legislation is mostly firmly rooted in the command and control paradigm. Alternatives to the criminal sanction are few and far between and many provincial enactments make use of constitutionally questionable reverse-onus presumptions in order to facilitate criminal prosecution. While this may be explained on the basis that much provincial legislation is from a time when questions of alternative modes of enforcement were not regarded as pertinent as they are today, the recent Mpumalanga nature conservation legislation reveals a distinctive lack of imagination as to enforcement and remains firmly rooted in the traditional paradigm.

Chapter 7

Strengths and weaknesses of using criminal sanctions to enforce environmental law

1 Introduction: Inadequate enforcement of environmental law

As was pointed out in the introduction, there is a widely held perception that environmental law in South Africa is inadequately enforced. Bearing in mind the analysis in the previous three Chapters of South African environmental legislation and the enforcement mechanisms provided in that legislation, the notion of inadequate enforcement could be translated as meaning infrequent successful criminal prosecution of environmental offenders. In other words, if the principal enforcement mechanisms provided for in South African legislation are criminal sanctions (which the preceding analysis has established), then the infrequency of criminal prosecutions means that the law is not being enforced. This is a tempting conclusion to draw but, although it is not entirely misguided, is somewhat misleading.

The reason for this is that the role of criminal sanctions in regulatory enforcement is not only the obvious one of use in criminal prosecutions. Their existence is also vital in reinforcing other modes of enforcement. It is instructive in discussing this idea to take into account the difference between compliance and deterrence systems of social control. According to Reiss,¹

‘Compliance and deterrence forms of law enforcement have different objectives. The principal objective of a compliance law enforcement system is to secure conformity with law by means insuring compliance or taking action to prevent potential law violations without the necessity to detect, process, and penalize violators. The principal objective of deterrent law enforcement systems is to secure conformity with law by detecting violations of law, determining who is responsible for their violation, and penalizing violators to deter violations in the future, either by those who are punished or by those who might do so were violators not punished’.

¹ Albert J Reiss Jr ‘Selecting strategies of social control over organizational life’ in Keith Hawkins & John M Thomas (eds) *Enforcing Regulation* (1984) 23 at 23-4 (emphasis in original).

If the only mode of law enforcement were the deterrence model, then absence of successful prosecutions would be evidence of the failure of enforcement. But if the compliance model is followed, authorities use methods like negotiation to motivate compliance with the law. In following the compliance approach, the threat of criminal sanctions being imposed if people do not comply with the law, is very often a crucial bargaining tool on the part of the authorities. Criminal law, then, is playing a vital role in the enforcement of law where officials are following the compliance approach, but its role is not an immediately obvious one.

A large number of successful prosecutions, then, is not necessarily an indicator of successful law enforcement. In fact, if the predominant mode of enforcement is the compliance model, criminal prosecutions are often seen as the failure of the system – the carrot has not worked, which means that the stick must be used.² Are there, then, other indicators that suggest South African environmental law is not effectively enforced?

If there are laws that prohibit pollution, for example, and there is evidence of pollution all around, this would be a good indicator of inadequate enforcement of the law. This is a better indicator than the infrequency of criminal prosecutions, for reasons outlined above. It is probably this indicator, more than the absence of criminal prosecutions, that leads people to claim that our environmental law is not being enforced adequately.

If this is the case, and there is certainly widespread evidence of non-compliance with environmental law, it is necessary to consider why the law is not being enforced. The reasons may be –

- ❑ inadequate resources for monitoring and inspection;
- ❑ administrative paralysis – in other words, officials know what is happening, but are not sure of what to do next or afraid of taking the next step;
- ❑ reluctance to use the enforcement mechanisms provided for (in many cases, only the criminal sanction); and/or

² Reiss op cit at 25; Keith Hawkins *Environment and Enforcement* (1984) at 179; Jeremy Rowan-Robinson, Paul Watchman & Christine Barker *Crime and Regulation* (1990) at 186; David Farrier 'In search of real criminal law' in Tim Bonyhady *Environmental Protection and Legal Change* (1992) 79 at 89.

- ‘capture’ by the regulated community. ‘Capture’ describes the process whereby government agencies responsible for corporate regulation shift from enforcing law in the public interest to serving the interests of the regulated community, most often corporate bodies.³ There are several possible reasons for this, only one of which, and the crudest form, is corruption.

There are clearly resource constraints at many levels of government that are responsible for enforcement of environmental laws and this will have a negative impact on the enforcement of the law. It is beyond the scope of this work to suggest how to combat this problem (and it would not help much to suggest that government allocate more resources to environmental matters, in any event), but increased vigilance by the general public would be of immense value.

Administrative paralysis is another problem that is unfortunately prevalent in government today. This may simply be due to what Rowan-Robinson calls the pusillanimity of the enforcement agency.⁴ Often, however, the problem is that government departments (at all levels) are assigned administrative responsibilities in respect of environmental legislation without being given any guidance as to how to implement, administer or enforce the law. For example, the powers of various organs of state in terms of section 28 of the National Environmental Management Act⁵ have great enforcement potential, but the section is a complex one that many government departments are unsure of how to use. This may be relatively easy to remedy by supplying government departments with step-by-step guidelines on how to use legislative powers and how to avoid pitfalls with their use. This should be the responsibility of the government department where the legislation originated – in the case of NEMA, for example, with the Department of Environmental Affairs and Tourism.

Another reason for administrative paralysis seems to be related to division of administrative responsibility. This would arise in circumstances where more than one

³ Michael Briody & Tim Prenzler ‘The enforcement of environmental protection laws in Queensland: A case of regulatory capture?’ (1998) 15 *EPLJ* 54 at 55; Hawkins op cit at 3.

⁴ Rowan-Robinson op cit at 8.

⁵ Discussed above at 188 ff.

government agency is involved in the administration of a particular law and each one thinks that the other is responsible for problems that arise.

Tied in with the notion of administrative paralysis is the reluctance to use available enforcement measures. The preceding analysis has shown that the available enforcement measures are overwhelmingly criminal sanctions. In many cases, where there is non-compliance with environmental legislation, the only options available to an official would be negotiation (not officially sanctioned by the legislation) or criminal prosecution. Even if negotiation was unsuccessful, the official may still be reluctant to resort to criminal sanctions. What would be the reasons for this?

Reluctance to use the available criminal prosecution can be explained by considering the strengths and weaknesses of criminal law. Once this examination has been completed, consideration will be given as to how to improve the situation.

2 Strengths of criminal law

The strengths of criminal law relate mainly to the purposes of criminal law identified in Chapter 2.

2.1 *Punishment*

In Chapter 2, the conclusion reached was that criminal law could be identified by its stigmatising quality and the fact that it could be used to impose sentences of imprisonment on offenders. It was also argued that the goal of punishment for environmental offences, other than in serious cases, is deterrence. Since deterrence of less serious cases (that is, those for which imprisonment would be excessive punishment) can be achieved through non-criminal means, the strength of the criminal law is that it alone can be used for more serious offences where imprisonment may be warranted. These would be cases where the stigmatising quality of criminal law, discussed in Chapter 2, would be most appropriate.

2.2 *Familiarity*

A second strength of criminal law, particularly in South Africa, is that those responsible for enforcing the law are familiar with it. Since criminal sanctions are the ‘default’ mode of enforcement for most environmental legislation, as shown by the analysis in Chapters 4-6, they are the means that people are used to. This, however, is not to say that criminal sanctions are frequently used. Neither should it be taken to indicate that familiarity with criminal sanctions connotes expertise in their use, as will be suggested below.

3 Weaknesses of criminal law

It is possible to identify two broad categories of weakness. First, there are those that are characteristically found in all systems of criminal law or, at least, those systems which are based on the same accusatorial-type procedural approach as South Africa’s. These can be called inherent weaknesses. The second category comprises those that are found particularly in South Africa’s criminal law system (or environmental criminal law system). These are by no means unique to South Africa, and may indeed be shared by many other developing nations, but are not invariably found in all criminal systems. These could also conceivably be removed or otherwise ameliorated (at least in theory) by means of extra resources, change in political will, amendment of legislation or a combination of these. In reality, however, improvement may be unlikely. These will be called contingent weaknesses, as they are contingent on matters that are not invariably part of a criminal law system.

3.1 *Inherent Weaknesses*

3.1.1 Burden of time and cost

Criminal prosecutions involve significant costs to the state and there is a considerable time delay between the commission of the offence and the conclusion of the trial. The delay may be even lengthier in respect of environmental crimes because of the necessity

of carrying out scientific analyses etc. By way of illustration, although there are aspects of this case that make it somewhat unusual, in *Feedmill Develoments (Pty) Ltd and another v Attorney-General, KwaZulu-Natal*,⁶ samples for analysis were taken during July 1993 and charges first put to the accused in March 1997, a delay of nearly four years. Because of the need to use expert evidence in certain types of pollution trials, costs are higher than in trials dealing with the more frequently encountered common-law crimes. Witnesses and other people involved in prosecutions are frequently inconvenienced by numerous delays and postponements. Authorities are justifiably reluctant to institute costly criminal prosecutions when the likely consequence in most cases is a small fine. Part of the problem is that sentences provided for are small, but the problem would not be necessarily resolved by stiffening penalties. In many cases, even if the maximum fine provided for were severe, the facts would not justify a large fine, making a costly criminal trial unattractive. This argument would obviously be one that the law and economics theorists would put forward, but it is not confined to a particular theory of law. Inefficient use of resources is bad in any language.

The practical impact of this feature of the criminal law is well illustrated by Veljanovski,⁷ who observes that-

‘since prosecution is from eight to ten times more time-consuming to the [Health and Safety] inspectorate than the average factory visit, it would be rational to concentrate resources on information production rather than prosecution, especially when the former is more likely to increase compliance’.

Another problem with the time-consuming nature of the criminal process is one which relates to the next shortcoming discussed immediately below – the delay in resolution of a matter may well delay the remediation of the harm for which liability is being determined in the court proceedings.⁸

⁶ [1998] 4 All SA 34.

⁷ C Veljanovski ‘Regulatory enforcement: An economic study of the British Factory Inspectorate’ (1983) 5 *Law and Policy Quarterly* 75.

⁸ Nicola Pain ‘Criminal law and environment protection – Overview of issues and themes’ in Neil Gunningham, Jennifer Norberry & Sandra McKillop (eds) *Environmental Crime* (1995) 19 at 21.

3.1.2 Reactive nature of criminal law

The second weakness of criminal law is that it is designed to react to offences that have already been committed, which might often be too late to prevent damage to the environment. Bearing in mind that the purpose of environmental law is protection of the environment, the criminal law in such circumstances does not achieve this objective, other than by deterring people from committing similar harmful actions in the future. There are other instruments, however, which achieve the ends of protection by adopting a more preventive approach. An abatement notice procedure (or an interdict) would serve in many instances to halt the damaging activity before the harm becomes too severe.

3.1.3 Problems of proof

Third is the universal problem of the more stringent standard of proof to be satisfied in criminal cases. Proof of commission of an offence beyond reasonable doubt, it need hardly be said, is considerably more difficult than the balance of probabilities required in civil actions. In general, there are three principal evidential problems facing the prosecution – identification of the offender; the requirement to obtain sufficient evidence to provide proof beyond reasonable doubt, and the difficulty of establishing mens rea in cases where the offence is not a strict liability offence.⁹

3.1.4 Procedural safeguards

Tied in with problems of proof are the additional obstacles to prosecution presented by the constitutional rights to a fair trial.¹⁰ The courts, in considering these constitutional rights, have consistently insisted on their importance, thereby suggesting that any

⁹ Rowan-Robinson *op cit* at 256. These authors identify four problem areas but one, the need for corroboration, is not an essential requirement of the South African law of evidence, although corroboration is of importance.

¹⁰ Section 35(3) of the Constitution of the Republic of South Africa, Act 108 of 1996. See discussion in Chapter 3.

limitation of these rights would have to be justified very strongly indeed.¹¹ South African environmental legislation is awash with reverse-onus provisions, presuming certain elements of environmental offences unless the accused can prove otherwise.¹² Whereas some of these clearly are unnecessary, others were designed to deal with the extreme difficulty of proving elements of certain offences.¹³ Although very few of these provisions in environmental legislation have yet been challenged in the courts, most reverse onus provisions have not passed constitutional muster.¹⁴ None have passed the scrutiny of the Constitutional Court. As others are likely to follow in the same way, the prosecutor's task will undoubtedly become more difficult.

In general, the presence of 'due process' safeguards makes criminal prosecution a cumbersome and time-consuming business. As Kagan reflects, 'Formal enforcement ... is slow, labour-intensive and subject to numerous procedural steps designed to protect the innocent, each step allowing the defendant further opportunities for delay and obfuscation'.¹⁵

3.1.5 Preparation of cases for prosecution

The preparation of cases for prosecution may be a significant drain on the resources of an enforcement agency and may constitute a powerful disincentive to embark on a criminal prosecution, particularly where the possible penalty is light and, in addition, where any

¹¹ See, for example, O'Regan J in *S v Bhulwana, S v Gwadiso* 1996 (1) SA 388 (CC) at para 24: '[the presumption of innocence] is a pillar of our system of criminal justice'.

¹² See Chapter 4.

¹³ See, for example, the presumption contained in s 2(3) of the Prevention and Combating of Pollution of the Sea by Oil Act 6 of 1981. The history of this provision can be traced through *S v Peppas* 1977 (2) SA 643 (A) particularly at 653A et seq and (1981) 91 *House of Assembly Debates* column 573 (Wednesday 4 February 1981). This section has now been repealed, but it still serves as a useful illustration.

¹⁴ See discussion in Chapter 3. For a presumption in environmental legislation which was struck down, see *S v Mumba* 1997 (1) SA 854 (W).

¹⁵ RA Kagan 'On regulatory inspectorates and police' in Hawkins & Thomas op cit at 41.

fine imposed does not go into the coffers of the agency in question but rather into the general fiscus.¹⁶

3.1.6 Officials' attendance in Court

Enforcement officials would frequently be required to appear in Court as key prosecution witnesses. The time spent in Court is necessarily time sacrificed for carrying out other enforcement activities. Not only is this problematic but appearance in Court may also be regarded as an unpleasant experience by some officials.¹⁷

3.1.7 The 'moral' aspect of criminal law

The idea of punishment under criminal law is frequently seen as involving a moral judgment being made over the offender. People who are morally blameworthy are seen as morally deserving of punishment. In the case of environmental offences, however, several offences are purely regulatory and hence morally neutral – illegal but not criminal, in other words. A possible moral dilemma is hence faced by enforcement officials who may well be reluctant to use the criminal law to punish offenders for morally neutral conduct.¹⁸ Tied in with this consideration is the fact that the criminal law is seen as a device to be used on 'criminals', people seen as disreputable, whereas environmental offenders often do not conform to that stereotype – polluters may well be otherwise morally-upstanding contributors to the community's economy.

¹⁶ Rowan-Robinson op cit at 258-9, citing various studies that have made this observation.

¹⁷ Rowan-Robinson op cit at 262-3.

¹⁸ SA Kadish 'Some observations on the use of criminal sanctions in enforcing economic regulation' (1963) 30 *University of Chicago LR* 423 at 444-9.

3.2 Contingent Weaknesses

3.2.1 Inadequate policing

Inadequate policing is a further problem faced by South Africa and many other countries with strained government resources. The situation is hardly likely to improve. The administration of a number of South African environmental statutes has been assigned to provinces who are spending most of their budgets on matters which are seen as more pressing, namely education, health and welfare. Unfortunately, this defect would probably undermine the efficacy of alternative methods of state control as well, so it is not a problem unique to criminal law.

3.2.2 Lack of public awareness

Lack of public awareness of threats to the environment and, in addition, as to what is prohibited, also impairs the efficacy of the criminal law. People who are aware that conduct is wrong and prohibited by law may well assist officials by bringing offences to their notice. In addition, public awareness - let us call it an environmental ethos – would serve to underpin the status of the environmental criminal law and would be likely to contribute to the attitude of judicial officers in hearing environmental cases. Currently, the lack of development of this environmental ethos would mean that most of the population would be relatively unconcerned with less serious contraventions of environmental legislation. A fact that exacerbates the lack of environmental ethos is the incidence of serious common law criminal activity that is prevalent in South Africa today. This serves to numb people to the significance of even serious environmental offences. People who are concerned about the rate of murder, rape, robbery and similar offences will understandably be less attuned to the seriousness of environmental offences.

3.2.3 Difficulties of investigation

Difficulties of investigation present further challenges for criminal law. Many officials not only require specialist scientific and technical expertise but must also be au fait with the rules of evidence and criminal procedure. The need for proper training is important but this is also undermined by lack of resources.

3.2.4 Lack of expertise of court officials

A further problem relates to lack of expertise of court officials. Many prosecutors in South Africa are inexperienced, young lawyers who are often 'thrown in the deep end'. Those who do not drown have to learn very quickly and develop expertise in prosecuting mainly common-law crimes and everyday statutory offences like traffic matters. Because environmental prosecutions are few and far between, however, there is little expertise in prosecuting these offences, which often require proof of difficult scientific facts. Moreover, it is difficult to escape the conclusion that, even where such cases are competently prosecuted, magistrates can sometimes be intimidated by the intricacies of the scientific evidence into requiring proof beyond *any* doubt rather than reasonable doubt.

3.2.5 Inadequate penalties

There are two aspects to this. First, is the penalty provided for by legislation. Second, the penalty actually imposed by the Court. Much of the criticism of criminal enforcement of environmental law in South Africa is levelled at the inadequate penalties provided for by legislation.¹⁹ For example, the maximum penalty for a first-time offence under the Atmospheric Pollution Prevention Act 35 of 1965 is a R500 fine or imprisonment for a

¹⁹ RF Fuggle & MA Rabie *Environmental Management in South Africa* (1992) at 130; Cheryl Loots 'Making Environmental Law Effective' (1994) 1 *SAJELP* 17 at 18.

period of six months. This has somewhat politely been described as ‘rather mild’,²⁰ but it makes the prosecution of such offences an exercise in futility, which is why air pollution authorities have used other means to deal with offenders.²¹ The analysis in the preceding chapters indicates, however, that although there are some glaring examples of ludicrously low penalties, most penalties provided for on paper seem to be commensurate with the seriousness of the offence in question. What is important, then, where there are adequate penalties provided for, is that the Courts use the full range of the penalties at their disposal – imposing heavy penalties where the circumstances of the case warrant this. Studies elsewhere have shown that judicial officials often impose inadequate penalties.²² Although there are no equivalent studies for South Africa, it would seem that South African judicial officials seem to err on the side of leniency.

4 Assessment

The strengths of the criminal sanction identified above suggest that it be used ideally in serious cases – the main strength of the criminal sanction is that offenders may be subject to serious penalties including imprisonment. On the other hand, there are several drawbacks in using the criminal sanction which make the criminal process a relatively unattractive route to follow. Under what circumstances, then, is criminal prosecution used and when *ought* it to be used?

Keith Hawkins, in a study of the regulation of water pollution control in England,²³ found that officials tended to use a compliance approach rather than the deterrence approach described above. In other words, officials negotiated with polluters in an attempt to secure their compliance with the law as the ‘default’ approach. It was only when this approach failed that the criminal sanction was utilised.²⁴ More specifically,

²⁰ Fuggle and Rabie op cit at 441.

²¹ See 73 (supra).

²² Rowan-Robinson op cit at 264-5.

²³ *Environment and Enforcement* (1984).

²⁴ See also Rowan-Robinson op cit at 8 and 201.

‘... there are two types of case where efficiency decrees prosecution to be the most appropriate response. First, where persistent, noticeable failure to comply is concerned, belief in individual and general deterrence demands public sanctioning....Secondly, where a pollution incident which causes substantial and noticeable damage, hazards water supplies, or involves the agency in heavy expenditure takes place, the response will again be to prosecute’.²⁵

In the first type of case, the moral blameworthiness of the offender is plain from his or her actions in persistently failing to comply with the law, most likely in circumstances where the offender has been subject to persuasion from the relevant officials to comply. In the second instance, there is not necessarily any blame or, more specifically, *mens rea*, but the water pollution offences in effect at the time Hawkins was writing were strict liability offences. Prosecuting the morally blameless in such circumstances is justified on the basis that ‘the gravity of the harm is the key factor in this kind of case, outweighing any complaints that morally blameless behaviour is being stigmatised as criminal by the enforcement of a strict liability statute’.²⁶

The use of the criminal sanction as a last resort or long-stop, as it is sometimes referred to,²⁷ has been observed in Australia²⁸ and Canada²⁹ as well. This approach can only be understood in the context of the relationship between the officials and the regulated community. Since this is often an ongoing relationship, where field officials periodically inspect the premises and operations of the regulated, use of the criminal sanction at the first sight of an offence, however minor, will sour the future relationship. What must also be borne in mind is that the regulated persons in such circumstances are most often productive members of society whose offences consist of carrying on an activity which is not illegal *per se*, but only illegal where a certain standard is exceeded. In many cases, as well, the reason for the infringement is not wilful disregard for the law but, at worst, negligence.

It would seem that the situation is similar in South Africa, where officials would prefer to use the compliance approach (negotiation) in the first instance before resorting to

²⁵ Hawkins *op cit* at 201.

²⁶ Hawkins *op cit* at 202.

²⁷ Farrier *op cit* at 86, 88-92.

²⁸ *Ibid.*

criminal sanctions. This is a tendency that this author has observed in numerous discussions with enforcement officials in South Africa, but is also revealed from this analysis by Fuggle and Rabie:³⁰

‘... statistics on criminal prosecutions reveal only the ultimate phase of control where all other strategies have failed and the sanction is engaged as a last resort. Such statistics tend to conceal the considerable persuasive force of the negotiation process which precedes – and in many cases obviates – criminal proceedings. For instance, during the past five years 91 criminal cases involving soil erosion were served in the courts. Of this number, 25 were withdrawn because of the accused’s compliance, while 11 are still pending. In 38 of the remaining 55 cases, the outcome was successful. However, these statistics do not reveal that informal negotiation led to compliance by 52 per cent of the approximately 1 400 land-users who are annually identified as transgressors of soil conservation control measures. Moreover, 47 per cent of land-users comply with such measures after having been formally served with a direction in terms of the Conservation of Agricultural Resources Act. It is only in respect of 1 per cent of land-users that court proceedings are eventually initiated. It is important, nevertheless, to remember that the success of the above negotiation process is due, in large measure, to the threat of criminal proceedings which underpins the process’.

While use of criminal sanctions as a last resort would probably be the approach in circumstances where there is likely to be an ongoing relationship between officials and the regulated persons, not all environmental laws would present this type of scenario. This would frequently be the situation in pollution control and land-use planning regulation, but the situation would be different in many nature conservation offences.

Nature conservation offences are very often more akin to ‘traditional’ crimes, in that their commission is not usually the unintended side-effect of otherwise socially-useful behaviour. People do not usually shoot elephants by accident. Although many nature conservation offences (and here one thinks particularly of unlawful killing of animals or, to be pejorative, poaching) may be attributable to poverty, ignorance³¹ or traditional culture, many are carried out for personal profit in wilful disregard of the law. In these circumstances, a compliance approach would not be ideal, particularly since the damage to the environment (in the form of a dead animal) has already been done.

²⁹ Kernaghan Webb *Pollution Control in Canada: The Regulatory Approach in the 1980s* (1988) at 18.

³⁰ Fuggle & Rabie op cit at 130.

³¹ See, for example, *S v Ntimbane* 1990 (2) SACR 302 (N).

Having said that, it is not necessary, however, to resort to criminal sanctions in every instance of infringement of nature conservation laws. In practice, however, current South African nature conservation law may make this unavoidable. A nature conservation official is unlikely to enter into negotiations with an offender due to the unlikelihood of there being an ongoing relationship between the parties, of the type that there often is between polluters and pollution officials. The only alternative available to the nature conservation official is, however, the criminal sanction. While this would certainly be the appropriate response to premeditated poaching on a commercial scale, for example, many nature conservation offences (picking indigenous plants, for example) are not in themselves very serious and warranting the type of heavy penalties for which criminal prosecutions are suitable. There is a need for alternative means of enforcement in these circumstances.

Returning to the pollution example and the Hawkins study, he favours (or, at least, does not reject) the use of strict liability in cases of serious environmental harm. This position must be understood in the context of Hawkins's failure to take into account modes of enforcement other than criminal prosecution. It is possible to address serious pollution events, where the polluter does not have *mens rea*, by using alternatives to the criminal sanction and it will be argued in Chapter 9 that the use of strict liability in environmental offences is both undesirable and unnecessary.

Where does the discussion in the preceding paragraphs lead us in respect of determining the appropriate role to be played by criminal sanctions. It is apparent that, as a matter of fact, criminal prosecution is often used as a last resort in the case of environmental offences. But *ought* this to be the case?

It is possible to refine this approach somewhat. In suggesting an appropriate approach, it should be borne in mind that criminal prosecution is most appropriate in cases demanding heavy penalties. On the other hand, where an offence is likely to attract a small penalty, efficiency, both financial and otherwise, militates against the use of criminal sanctions, especially if there are alternative modes of enforcement available.

This suggests that the criminal sanction should be reserved for the most serious environmental offences. This is by no means a novel view. Herbert Packer³² states that

‘The criminal sanction is the law’s ultimate threat. Being punished for a crime is different from being regulated in the public interest, or being forced to compensate another who has been injured by one’s conduct, or being treated for a disease. The sanction is at once uniquely coercive and, in the broadest sense, uniquely expensive. It should be reserved for what really matters’.

Richard Lazarus suggests that ‘criminal sanctions should be reserved for the most culpable subset of offenses and not used solely for their ability to deter’.³³

If this view is accepted, and it is submitted that this is a compelling view, the next question that must be answered is: what are the most serious or egregious environmental offences? In the United States, according to Smith,³⁴

‘...criminal prosecutions are the pinnacle of a finely-tuned environmental enforcement system that has strong administrative and civil enforcement mechanisms with both injunctive and civil penalty powers. This allows criminal prosecution to be reserved for circumstances where there is moral culpability in terms of criminally negligent, reckless or deliberate conduct’.³⁵

Following this broad approach, it is submitted that criminal sanctions should be reserved, first, for cases where there is intentional wrongdoing. These would include so-called ‘midnight dumping’ offences, deliberate killing of animals or gathering of plants and failure to comply with notices, directives or similar instructions by officials. Secondly, prosecution should be used in cases where there is persistent wrongdoing, which is indicative at least of *dolus eventualis*. For example, a polluter who repeatedly fails to comply with emission standards where past infractions have been pointed out to him or her would fall into this category. The third type would be an offender who has caused

³² Herbert L Packer *The Limits of the Criminal Sanction* (1968) at 250.

³³ Richard J Lazarus ‘Assimilating environmental protection into legal rules and the problem with environmental crime’ (1994) 27 *Loyola LA LR* 867 at 883. See also Zada Lipman ‘Old wine in new bottles: Difficulties in the application of general principles of criminal law to environmental law’ in Gunningham et al op cit 31 at 42; C Reasons ‘Crimes against the environment: Some theoretical and practical concerns’ (1991) 34 *Crim LQ* 86 at 104, who suggests that, ‘there is a role to be played by the use of criminal sanctions, but only for the most serious harms and persistent offenders’.

³⁴ Susan L Smith ‘An iron fist in the velvet glove: Redefining the role of criminal prosecution in creating an effective environmental enforcement system’ (1995) 19 *Criminal LJ* 12 at 13.

³⁵ See also Pain op cit at 28.

serious harm to people or to the environment – for example, cases of the Exxon Valdez, Bhopal, Seveso, Merriespruit and recent Treasure type – but only where there is mens rea on the part of the offender, at least in the form of negligence.

The decision as to the circumstances in which criminal sanctions ought to be used would probably have to be subject to enforcement officials' discretion – it would be difficult, if not impossible, for legislation to stipulate that criminal sanctions could be imposed only in the situations outlined above. In order to allow the officials to exercise this discretion in the manner suggested, however, it is necessary that there be alternative methods of enforcement available to the officials. This is the topic of the following Chapter.

Chapter 8

Alternatives to the Criminal Sanction

Chapter 6 has established that the weaknesses of criminal sanctions are such that it would be undesirable to use them as the primary, default tool of enforcement. If this is the case, it is necessary to consider what alternatives there are to the criminal sanction. The consideration of alternatives to criminal sanctions works at two levels: first, at the level of the overall regulatory regime that is used and, second, the individual methods that can be used instead of criminal prosecution.

Criminal sanctions are at the forefront of the so-called ‘command and control’ regulatory approach. This approach envisages the state’s laying down of regulatory commands, compliance with which is enforced by punishing non-compliers by means, primarily, of criminal sanctions. This approach, and alternatives to it will be considered in more detail below.

As far as alternatives to the criminal sanction are concerned at an instrumental level, there are several that will be considered in this Chapter: both those of the administrative variety and civil variety. In the former category are abatement notices, withdrawal of permits and administrative penalties. Civil measures include injunctive processes (interdicts) and civil liability tools including civil penalties and delictual mechanisms.

1 Alternatives to Command and Control

The command and control approach to enforcement is becoming increasingly unpopular. Instead, regulatory approaches in many countries are moving towards increased use of economic incentive-driven approaches or co-regulatory approaches, involving negotiated agreements between regulator (typically the state) and the regulated community as to performance and indicators. Detailed consideration of regulatory approaches is an immense study in its own right and is, consequently, beyond the scope of this work. It will be useful, however, to consider in general terms the reasons why command and

control approaches are being rejected and what the benefits of the alternative approaches are. Despite the widespread trend away from command and control, however, it will be argued here that there is nevertheless still an important role for the use of criminal sanctions. Instead of being the main weapon under the command and control approach, criminal sanctions are part of a mix of instruments used in alternative approaches and often operate either as a last resort or ‘long-stop’,¹ or are reserved for serious offences, or both.

Before examining the alternative approaches, however, let us consider why command and control approaches have been set aside in favour of alternative regimes, and what the alternative approaches are.

1.1 The drawbacks of command and control

Excessive responsibility on government.

In countries like South Africa, where state resources are strained and often directed at sectors other than the environment, the central role to be played by the state under the command and control approach may be too much to ask. This can be seen in South Africa, where many of the commands are present on paper, but the control is frequently absent. The responsibility is not confined to enforcement aspects like monitoring and investigation. One of the biggest burdens on the state is to set the standards that have to be complied with, especially where these standards are not uniform but rather industry- or source-specific (and the problem with uniform standards is that they can be excessively rigid – see below).²

Cost

This relates to the previous point. In order adequately to monitor and enforce compliance, the financial burden on the state is considerable.

¹ See above, 272.

Excessive rigidity

Command and control typically requires the regulated parties to comply with either explicitly set standards (maximum emission levels, for example) or best available technology. If the regulated entity meets those requirements, then there is no incentive to reduce emissions further by, for example, development or installation of new technology. The command and control approach, therefore, constitutes a licence to pollute, provided such pollution remains within a predetermined maximum level.³ Command and control often also relies on uniform standards that fail to take into account different situations and the assimilative capacities of different local or regional environments.

Focus on 'end of pipe'

Also related to the previous point, the command and control approach usually focuses on 'end of pipe' solutions, mandating emission levels rather than providing for alternative cleaner technology approaches. In short, command and control does not take into account a holistic approach.⁴

1.2 The advantages of alternative regulatory approaches

Cost benefits

According to Breger et al, the cost savings in a price-based system 'can run anywhere from 20 to 30 percent to as much as 50 percent or more. Given that the amount that society is actually willing to spend for environmental protection is limited, that means we can get more environmental protection for the same amount of money by using economic

² See Jonathon Hanks 'Achieving industrial sustainable development in South Africa: What role for "self-regulatory" and "co-regulatory" instruments?' (1998) 5 *SAJELP* 298 at 311.

³ See Marshall J Breger, Richard B Stewart, E Donald Elliott & David Hawkins 'Providing economic incentives in environmental regulation' (1991) 8 *Yale Jnl on Regulation* 463 at 468; Hanks op cit at 311.

⁴ See Breger et al *ibid*; Hanks op cit at 312.

incentives'.⁵

Greater incentives for innovation

As pointed out above, command and control impedes (or, at least, fails to provide incentive for) innovation. In an approach based on market mechanisms or co-regulation, the manner in which regulated entities can operate is not limited by regulation. Where the target is cost reduction (based on reduction of emissions), whatever method will best achieve that target will be utilised and this will often be an innovative approach that does not take into account only end-of-pipe solutions. This is a dynamic process – polluters will constantly be striving for further cost reduction through less pollution.

Less responsibility on government

Although the role of government is not removed altogether, the government's role is reduced to a monitor, not also an administrative body that has to set a host of individual emission levels.

1.3 What are the alternatives?

The alternatives to command and control are:

- ❑ Market-based or economic instruments;
- ❑ Co-regulatory instruments;
- ❑ Information-based instruments; and
- ❑ Self-regulatory instruments.⁶

⁵ Ibid. See also RW Hahn & GL Hester 'Marketable permits: Lessons for theory and practice' (1989) 16 *Ecology LQ* 361; BA Ackerman & RB Stewart 'Reforming environmental law: The democratic case for market incentives' (1988) 13 *Columbia Jnl of Environmental Law* 171 at 175-77.

⁶ Hanks op cit at 309-10.

Market-based instruments or economic incentives

Much has been written on market-based instruments⁷ and it is beyond the scope of this work to consider in detail their intricacies and the extent to which they should be implemented. The purpose of using these instruments is in order to cure market failure caused by the externalities which occur when environmental costs are incurred without payment. For example, a person who discharges emissions into a river imposes a 'cost' onto the environment. If he or she does not pay for the privilege of polluting the river, then an externality occurs because the cost is incurred without corresponding payment. To express it somewhat differently, economic or market-based instruments are designed to encourage environmentally-beneficial behaviour by altering (which in some cases means setting a price that has not existed before) the price of environmental resources in order that they reflect more accurately the environmental costs of production and/or consumption.⁸ By imposing a charge on the water polluter, the externality will be removed and, moreover, the polluter will be provided with the incentive to reduce pollution thus further reducing his or her costs. Market-based instruments thus encourage persons to go beyond compliance. Examples of market-based instruments are taxes and charges, tradable permits, environmental bonds, subsidies and deposit-refund systems.⁹

⁷ See, for example, (and this is a very small sample) Klaus Bosselmann & Benjamin J Richardson (eds) *Environmental Justice and Market Mechanisms: Key Challenges for Environmental Law and Policy* (1999); J Bernstein *Alternative Approaches to Pollution Control and Waste Management* (1994); Richard B Stewart 'Economics, environment and the limits of legal control' (1985) 9 *Harvard Environmental LR* 1; and the authorities cited in n9 (infra).

⁸ See Hanks op cit at 309.

⁹ Ruth A Eblen & William R Eblen *The Encyclopedia of the Environment* (1994) at 177-8; RB Stauth & PH Baskind 'Resource economics' in Fuggle & Rabie op cit 26 at 40-47. Cf Robert W Hahn and Robert N Stavins 'Incentive-based environmental regulation: A new era from an old idea?' (1991) 18 *Ecology LQ* 1, who suggest that 'most incentive-based approaches fall within one (or more) of five major categories: pollution charges, marketable permits, deposit-refund systems, market barrier reductions, and government subsidy elimination' (at 7).

Co-regulatory instruments

A co-regulatory approach involves an interactive relationship, typically an agreement or covenant, between the regulator and the regulated. In this situation, the overall policy objectives are set by the regulator whilst the details are subject to negotiated agreement between the two parties. This type of approach is particularly suitable for industry. South African legislation currently provides for negotiated agreements, or, as they are referred to in the National Environmental Management Act, environmental management co-operation agreements.¹⁰

Information-based instruments

According to Hanks, these instruments ‘include measures taken to enhance awareness on environmental issues, such as technical assistance programmes, advertising, eco-labelling, performance reporting, group empowerment programmes and small business incentive schemes’.¹¹

Self-regulatory instruments

As the name suggests, this entails business imposing its own regulatory structure without any direct compulsion from the relevant regulator in that community. There may well be pressure on the business to carry out self-regulation in the form of acceptance in the market place or competitive advantage. Examples of self-regulation approaches are the ISO 14000 environmental management system standards¹² and the chemical industry’s Responsible Care programme. Self-regulation by itself would probably not work due to the problem of free-riding, but as a parallel system to other regulatory approaches, it is an important force.

¹⁰ NEMA, Act 107 of 1998 section 35. See also a Department of Environmental Affairs & Tourism Discussion Document *Environmental Management Co-operation Agreements: A Guide for their Design and Use* (June 2000).

¹¹ Hanks op cit at 309-10.

¹² See Neil Gunningham ‘From adversarialism to partnership?: ISO 14000 and regulation’ unpublished paper, ISO 14000 Conference, Australian National University (1996).

1.4 The role of criminal sanctions under alternative regulatory approaches

It is not the task of this work to make recommendations as to the best regulatory approach to choose, but a combination of the approaches above would constitute an improvement on the dominant command and control culture that is the current approach. What is important for present purposes is to consider the role that is played by criminal law in the equation. Even if the emphasis is switched predominantly to a co-regulatory approach, the threat of criminal sanctions is still important as a means to persuade vacillating participants to stay within the parameters that have been agreed upon, and to deal with serious breaches of the agreements. Criminal law also deals with the free riders – those who do not wish to play the game. This role for criminal law corresponds with the suggestion made at the end of the previous Chapter. In short, then, moving away from command and control envisages a changed role for criminal law but does not dispense with it and, indeed, it still remains an important tool in the overall regulatory toolbox.

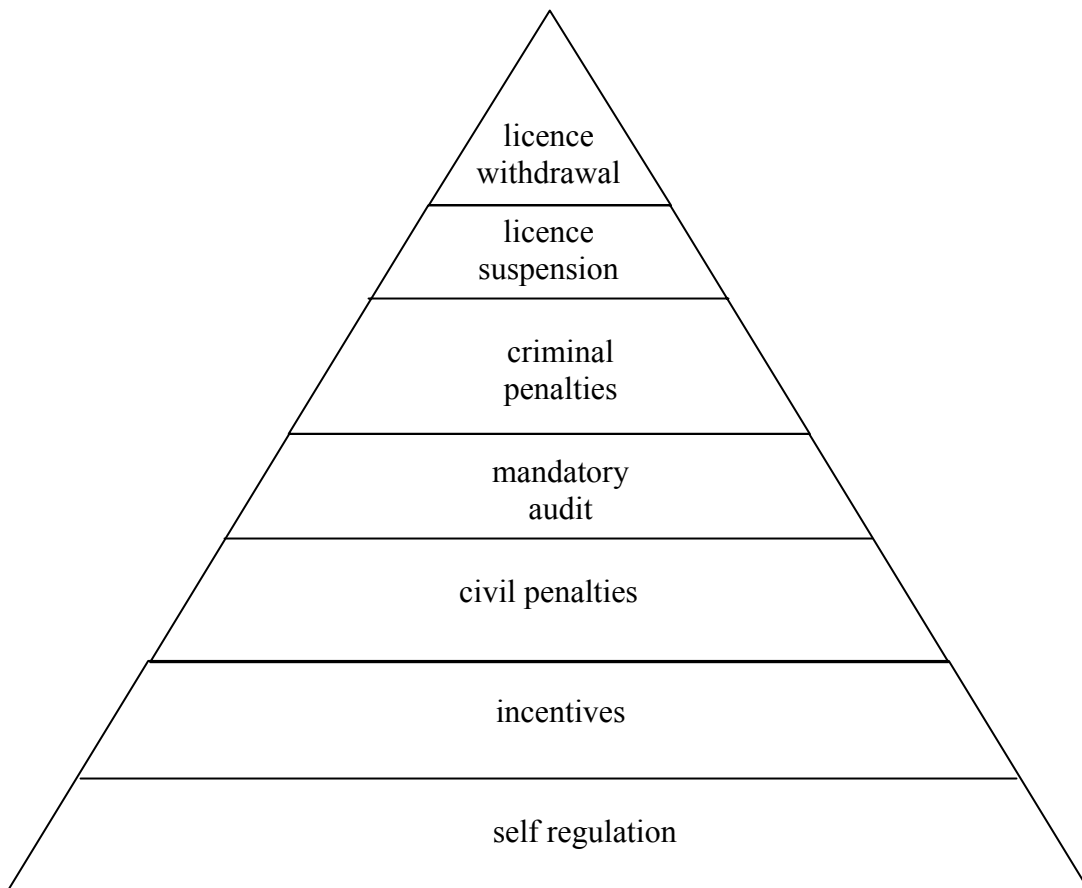
This is well illustrated by John Braithwaite in his regulatory enforcement pyramid.¹³ The pyramid is designed to respond to the dilemma faced by regulators as to whether to treat firms (the model focuses on the corporate community as the regulated community) as being committed to self-regulation or having to be coerced with the ‘big stick’ into compliance. The problem with treating firms as being interested in voluntary action is that this approach fails to deter effectively those firms that have no interest in responding to voluntary initiatives. On the other hand, threatening all firms with the threat of strict enforcement of laws in order to achieve compliance serves to alienate and impose unnecessary costs on firms that are willing to comply voluntarily, with the result that a culture of resistance to regulation is created.¹⁴

The regulatory enforcement pyramid appears on the following page. The idea behind the pyramid is that regulators will start at the bottom of the pyramid, assuming virtue (voluntary self-compliance) on the part of the regulated community, but that provision is

¹³ I Ayres and J Braithwaite *Responsive Regulation* (1992) at 35-41.

¹⁴ Neil Gunningham ‘Beyond compliance: Management of environmental risk’ in Ben Boer, Robert Fowler & Neil Gunningham (eds) *Environmental Outlook* (1994) 254 at 273. See also E Bardach & R Kagan *Going by the Book* (1982).

made for dealing with the situation that arises where this assumption is disappointed. Under three circumstances, the regulator may move up the pyramid to increasingly deterrence-oriented strategies. Finally, when ‘deterrence fails, strategy shifts again to an incapacitative response’.¹⁵



But, according to Braithwaite, this might not be necessary due to the ‘paradox of the pyramid’, which is that-

‘the signalled capacity to escalate regulatory response to the most drastic of measures channels most of the regulatory action to the cooperative base of the pyramid. The bigger the sticks at the disposal of the regulator, the more it is able to achieve results by speaking softly. When the consequence of

¹⁵ John Braithwaite ‘Responsive business regulatory institutions’ in C Cody & C Sampford (eds) *Business, Ethics and Law* (1993) at 88.

firms being non-virtuous is escalation ultimately to corporate capital punishment, firms are given reason to cultivate virtue'.¹⁶

It must be borne in mind that the discussion about regulatory approaches above focuses predominantly on environmental law that targets industry, which would mainly be of the pollution-control type. It is likely that the nature conservation regulatory regime will remain situated towards the command and control side of the regulatory continuum, due to the nature of the regulated community and the types of offences. It is not necessary, however, for the control to be carried out solely by means of criminal sanctions. There are several alternative enforcement measures available that will be considered in the second part of this Chapter. These instruments will not only be useful in the nature conservation sphere, but also have an important role to play in pollution control, land use planning and other environmental areas, irrespective of the overall regulatory approach which is chosen.

2 Alternatives to the criminal sanction

As indicated above, the alternatives broadly fall into two categories – administrative measures and civil measures.

2.1 Administrative measures

There are several obvious benefits to using administrative enforcement measures instead of criminal sanctions:¹⁷

- Administrative measures are easier to use because it is not necessary to have the matter decided in Court. In addition, it is not necessary to worry about the standard of proof and constitutional safeguards inherent in a criminal trial.¹⁸

¹⁶ Ibid.

¹⁷ See Laura J Kerrigan (ed) 'Project: The decriminalization of administrative penalties' (1993) 45 *Administrative Law Review* 367; also European Committee on Crime Problems *The Contribution of Criminal Law to the Protection of the Environment* (1978) at 17ff..

¹⁸ See John Swaigen *Regulatory Offences in Canada: Liability and Defences* (1992) at 217.

- ❑ Less costly. This follows from the previous point.
- ❑ More efficient. Again, this follows from the previous points – efficiency means the ability to achieve the same results as achieved by the criminal process more quickly or at a lower cost. Many administrative measures can simply be carried out by officials in the field and, if successfully used, can have an immediate positive impact.
- ❑ Less likely opposition from offenders. The fact that the stigma attached to criminal prosecution is absent from the realm of administrative measures would be likely to result in offenders opposing findings of wrongdoing less vigorously.¹⁹ Another factor influencing this, and probably more so than the absence of stigma, is the lower penalties involved.²⁰

2.1.1 Notices/directives

The power to issue notices or directives mostly requiring abatement or remediation are frequently encountered legislative devices in environmental law in many countries.²¹

This power is provided for in several South African environmental statutes as follows:

Legislation	Section	Type	Functionary
Atmospheric Pollution Prevention Act	19(1)	Smoke abatement	Local authority
Atmospheric Pollution Prevention Act	29(1)	Dust abatement	Chief officer
Health Act	27	Remediation of offensive/dangerous condition	Local authority

¹⁹ Swaigen op cit at 217.

²⁰ Swaigen op cit at 221.

²¹ For example, s 31A of the Environment Protection Act in Victoria, Australia, provides for pollution abatement notices that can be issued by the Environment Protection Authority.

Minerals Act	41(1)	Limitation of damage to surface of land	Director: Mineral Development
Environment Conservation Act	31A	General remediation	Minister/Competent authority
National Water Act	53	Rectification of contravention	Responsible authority
National Water Act	19	Prevention and remediation of pollution	Catchment management agency
National Water Act	20	Emergency measures	Catchment management agency
National Forest Act	4(8)	Remedy of breach	Forest officer
National Environmental Management Act	28	Prevention and remediation of environmental harm	Competent authority
Free State Prohibition of the Dumping of Rubbish Ordinance	2(2)	Remediation	Authorised officer
KZN Planning and Development Act	47	Rectification of breach	Responsible authority
W Cape Planning and Development Act	62	Rectification of breach	Local authority
Noise control regulations in terms of Environment Conservation Act	Reg 2(c)	Abatement	Local authority

The notice/directive procedure is a useful enforcement measure in that it is not difficult to use and it is effective in that it is usually (but not always, the NEMA s 28 notice procedure being an important exception) visited by criminal sanctions in the event of default. Another incentive in the case of several of the notice procedures provided for in

South African legislation, is the provision for the authority in question to take the necessary steps if the person in question defaults. The latter is required then to pay the costs of the authority's measures.

In making provision for notice/directive measures, the legislator should ensure that the officials intended to use them know how to do so. It is apparent in the case of the NEMA s 28 powers, for example, that several 'competent authorities', those authorities empowered to issue directives under s 28, are not sure how to use the section effectively. This could be remedied by the production of use guidelines by the relevant government department. One of the important considerations, for example, is whether the requirement of natural justice requires the person upon whom the directive or notice is served to have the opportunity to state his or her case before the directive takes effect.

In *Evans and others v Llandudno/Hout Bay Transitional Metropolitan Substructure and another*,²² the legality of a direction issued under section 31A of the Environment Conservation Act²³ was under scrutiny. The applicants were building a jeep track on land owned by them in Hout Bay and the municipality issued a direction ordering them to cease the activity. The principal issue raised in the case was whether the applicants (the recipients of the direction) were entitled to the rights of natural justice.

The court decided that the direction was unlawful and held that a person who will be directly affected by the direction must be given adequate notice of what the direction proposes in order to enable them to make representations on their own behalf; to appear at any hearing or enquiry that is held; and to prepare their cases effectively in order to answer the case they have to meet.

From the perspective of administrative law, the decision appears to be correct. Section 31A is a powerful tool for use against environmentally destructive activities, and in order to make sure it is effective, officials who use the section need to ensure that they give notice of intention to issue the direction and give the persons to whom the notice is directed an opportunity to state their case. The decision in *Evans* suggests that natural justice would require the affected party to be given the right to be heard before a notice or

²² 2001 (2) SA 342 (C).

²³ Act 73 of 1989.

directive is issued to him or her, whether under s 31A of the Environment Conservation Act or other environmental legislation.

Another crucial consideration is that diligent record-keeping must be carried out in order to ensure that, once a person has been served a notice or directive, the necessary follow-up takes place. This may also involve subsequent imposition of criminal sanctions in cases where a person has been issued and fails to heed an abatement notice or notice to rectify a breach of legislation.

2.1.2 Withdrawal of authorisation

Some environmental statutes in South Africa provide for the withdrawal of any permit, licence or other authorisation by a Court upon conviction for an offence involving an activity for which the authorisation was given.²⁴ This, however, is not an administrative measure since it rides on the back of a criminal conviction.

A very effective enforcement measure, although a somewhat extreme one, is the power of the relevant authority to withdraw authorisations in the case of failure to comply with the conditions of that authorisation. It is a serious measure since in many cases it will serve to put a stop to the activity in question (or, at least, serve to remove the lawfulness of the activity in question).

An example is the suspension of a vehicle's certificate of roadworthiness by the road traffic authorities in the case of the vehicle emitting excessive noise.²⁵ Other examples are found in the Environment Conservation Act²⁶ and the Marine Living Resources Act.²⁷

It is obviously less cumbersome for the authorisation to be withdrawn by the authority which issued it, rather than having to rely on a Court order. The provision in the Marine Living Resources Act²⁸ is a good one, since it allows the holder of the authorisation to make representations why the authorisation should not be revoked in circumstances

²⁴ For example, s 109A of the KZN Nature Conservation Ordinance.

²⁵ See above, 258.

²⁶ Section 21.

²⁷ Section 28.

²⁸ Ibid.

where the authority desires to do so. The authority may withdraw the authorisation if it is not satisfied with the case made out by the holder.

In the event of a person continuing with an activity requiring authorisation after the authorisation has been withdrawn, the authority may have to resort to an interdict²⁹ and/or criminal prosecution.

2.1.3 Administrative penalties

Administrative monetary penalties are penalties that are imposed by government officials rather than by courts. In Canada, they are distinguished from ‘tickets’ (roughly equivalent to admission of guilt fines in South Africa), by the fact that administrative penalties provide more flexibility in the range of penalty that can be imposed; and due to differences in the burden of proof and available defences.³⁰ According to Rolfe, the ‘clear’ advantages of these penalties over tickets and criminal prosecution are that they provide for more effective deterrence, especially for minor offences, and that they ensure consistency as to the penalties imposed on violators while at the same time being more flexible than ticketing systems. ‘Minor’ advantages are that they can be applied by officials with specialised understanding of industry, and often appeals are to tribunals with specialised understanding, and that they involve lower costs per sanction than offences dealt with by alternative procedures.³¹

Rolfe’s ‘clear’ advantages are, it is submitted, not that clear, although the advantages that he regards as less important are sufficiently compelling to suggest that administrative penalties have a role to play in South African enforcement measures.

Effective deterrence, Rolfe argues, is determined by five factors: the chances of getting caught, the chances of an enforcement response, the speed of the enforcement

²⁹ See, for example, two cases both concerning the Atmospheric Pollution Prevention Act: *Minister of Health & Welfare v Woodcarb (Pty) Ltd and another* 1996 (3) SA 155 (N) and *Minister of Health v Drums and Pails Reconditioning CC t/a Village Drums and Pails* 1997 (3) SA 867 (N).

³⁰ Chris Rolfe ‘Administrative monetary penalties: A tool for ensuring compliance’ on West Coast Environmental Law Association website: <http://www.vcn.bc.ca/wcel/wcelpub/1997/11685.html>

³¹ Ibid.

response, the chances of a penalty being imposed, and the severity of the penalty. Even in Rolfe's analysis, he concludes that only in respect of the chances of an enforcement response do administrative penalties have an advantage. He cites empirical research to indicate that administrative penalties are imposed more frequently than penalties are imposed using alternative processes and this, he argues, is due to their ease of use.

Their ease of use ties in with their lower cost, and the ease of use is determined in part by the less stringent standard of proof and exclusion of defences (in Canada, in any event). What is important is that, in the event of an appeal against an administrative penalty, the responsibility for providing evidence will rest on the alleged violator.

Administrative penalties also play an important role in German law. In the Federal Republic of Germany, the majority of regulatory offences (and many environmental offences fall in this category) are classified as *Ordnungswidrigkeiten*, which are not prosecuted in the criminal courts but by administrative agencies.³² They are distinguished from 'real' criminal offences which, in the environmental sphere, are reserved for acts that have led to 'actual damaging effects'³³ on the environment. One of the reasons why *Ordnungswidrigkeiten* are important in German law is that corporate bodies cannot be subject to criminal prosecution, whereas they can be sanctioned in terms of the *Ordnungswidrigkeiten*.³⁴

What would the benefits of administrative penalties be in the South African context? First, it would seem that their use is certainly more efficient (easier and less costly) than imposition of criminal sanctions by means of prosecution in court. Although it has been suggested that this is an unproved assumption,³⁵ the only reason for this not being the case would be if administrative penalties were usually taken on appeal or review. The statistics that Rolfe supplies suggest that this is not the case and, in fact, less than one

³² Günther Heine 'Environment protection and criminal law' in Owen Lomas *Frontiers of Environmental Law* (1991) 75 at 83.

³³ Ibid.

³⁴ Heine op cit at 90.

³⁵ See Swaigen op cit at 219.

percent of administrative penalties imposed by the United States Environmental Protection Agency are taken on appeal.³⁶

Their use in South Africa will only be justified, however, if it can be shown that they have an advantage over the admission of guilt fine procedure, which is provided for in s 57 of the Criminal Procedure Act.³⁷ An admission of guilt fine is a summons to appear in court that specifies a fine payable before a specified date. If the offender pays the fine, then the necessity to appear for trial falls away. Should the accused avail himself or herself of the right to trial, then it is a 'regular' criminal trial – the state bears the onus of proving the offence beyond reasonable doubt and the safeguards guaranteeing a fair trial apply.

In the case of an administrative penalty, on the other hand, the initial act by the enforcement official would be much the same – detection of an infringement, and service of a document on the offender which specifies payment of a particular penalty. It is widely agreed, and would probably be required in terms of the Constitutional right to administrative justice in South African law,³⁸ that if an agency has the power to impose penalties, then some form of independent appeal or review of the agency's finding of liability and its assessment of penalty should be provided for.³⁹

If the person receiving the administrative penalty decided to appeal, then the impact in terms of time and cost on the authority in question would probably be much the same as in the case of a person who received an admission of guilt fine insisting on going to trial. The crucial difference, however, is that the appellant (in the case of the administrative penalty) bears the onus of convincing the appellate forum (probably an administrative tribunal) that his or her case should prevail, which is considerably different from the state agency in question having to prove the offence beyond reasonable doubt.

This is the essential difference between the two measures. The fact that the case is kept out of court (unless there is an administrative review) in the case of administrative penalties is, it is submitted, a strong reason for their implementation, but only in the case

³⁶ Rolfe op cit.

³⁷ Act 51 of 1977. See also s 56.

³⁸ Section 33 of the Constitution.

³⁹ Swaigen op cit at 217.

of offences that do not carry a large penalty and certainly only in the case of monetary penalties (fines).

This leads on to the question of whether the use of administrative monetary penalties would in any way fall foul of the Constitution. It will be suggested that administrative penalties are used in cases where the infringement is relatively minor and the penalty corresponds to this. Under such circumstances, it is doubtful that the Court would regard administrative penalties as problematic. From the point of view of the right to a fair trial, this right applies only to an accused person, which the person who receives an administrative penalty is not. It may be claimed that the difference is merely semantic and that the recipient of an administrative penalty is, in effect, an accused person, but if this argument is accepted by a court, and it is found that the imposition of administrative penalties does infringe a person's fair trial rights, it is submitted that the limitation on these rights will be justifiable. The reason for this is the important rationale (effectiveness of the administration of justice) behind the use of administrative penalties, coupled with the relatively minor impact that it will have on 'victims'. It is arguable that the alternative to administrative penalties, the 'regular' criminal process, is more invasive of a person's rights, even with the fair trial safeguards.

Another argument in favour of the state, and this is also relevant to the question of administrative justice, is that administrative penalties should not be provided for without the possibility of the recipient being able to appeal. The opportunity to review the imposition of the penalties is provided by the common law in any event.

There is at least one example of a recent South African Act that has provided for administrative penalties. In the Firearms Control Act,⁴⁰ section 122 provides -

(1) If a person is alleged to have committed an offence contemplated in section 120 for which that person may be sentenced to a fine or imprisonment for a period not exceeding five years in terms of section 121, the Registrar may cause to be delivered by hand to that person (hereinafter referred to as the infringer) an infringement notice which must contain the particulars contemplated in subsection (2).

(2) A notice referred to in subsection (1) must—

(a) specify the name and address of the infringer;

⁴⁰ Act 60 of 2000.

- (b) specify the particulars of the alleged offence;
 - (c) specify the amount of the administrative fine payable, which—
 - (i) if the period contemplated in subsection (1) does not exceed two years, may, in respect of a first infringement, not exceed R5 000 and, in respect of a second or subsequent infringement, not exceed R10 000;
 - (ii) if the period contemplated in subsection (1) does not exceed three years, may, in respect of a first infringement, not exceed R15 000 and, in respect of a second or subsequent infringement, not exceed R30 000;
 - (iii) if the period contemplated in subsection (1) does not exceed four years, may, in respect of a first infringement, not exceed R20 000 and, in respect of a second or subsequent infringement, not exceed R40 000; or
 - (iv) if the period contemplated in subsection (1) does not exceed five years, may, in respect of a first infringement, not exceed R50 000 and, in respect of a second or subsequent infringement, not exceed R100 000;
 - (d) inform the infringer that, not later than 30 days after the date of service of the infringement notice, the infringer may—
 - (i) pay the administrative fine;
 - (ii) make arrangements with the Registrar to pay the administrative fine in instalments; or
 - (iii) elect to be tried in court on a charge of having committed the alleged offence; and
 - (e) state that a failure to comply with the requirements of the notice within the time permitted, will result in the administrative fine becoming recoverable as contemplated in subsection (4).
- (3) If an infringer elects to be tried in court on a charge of having committed the alleged contravention or failure, the Registrar must hand the matter over to the prosecuting authority and inform the infringer accordingly.
- (4) If an infringer fails to comply with the requirements of a notice, the Registrar may file with the clerk or registrar of any competent court a statement certified by him or her as correct, setting forth the amount of the administrative fine payable by the infringer, and such statement thereupon has all the effects of a civil judgment lawfully given in that court in favour of the Registrar for a liquid debt in the amount specified in the statement.
- (5) The Registrar may not impose an administrative fine contemplated in this section if the person concerned has been charged with a criminal offence in respect of the same set of facts.
- (6) No prosecution may be instituted against a person if the person concerned has paid an administrative fine in terms of this section in respect of the same set of facts.
- (7) An administrative fine imposed in terms of this section does not constitute a previous conviction as contemplated in Chapter 27 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

The Registrar referred to in this section is the National Commissioner of the South African Police Services. The Act empowers the Registrar to delegate any of his or her powers to ‘any official in the service of the State’.⁴¹ It is unlikely, for reasons of convenience, that the Commissioner himself or herself will be responsible for issuing infringement notices but that, in all likelihood, this power will be delegated to members of the South African Police Services. Significant features of the section are that there is no provision for appeal against the decision of the official in question to issue the infringement notice and that the penalties provided for can be quite severe – up to R100 000 fine in some cases.

There is also provision for the payment of administrative fines in the Mine Health and Safety Act.⁴² The procedure provided for here is quite complex and the official empowered to impose fines is the Principal Inspector of Mines. The maximum fine provided for is R200 000.

One final issue of relevance as far as administrative penalties is concerned is the way in which they can be used. Discretionary administrative penalties are those where the decision to impose the penalty and the quantum of the fine are within the discretion of the official in question. This is probably the more common way in which they are used. They can also be used automatically, however. An example of this is provided by Title IV of the USA’s Clean Air Act, in terms of which utilities are required to install tamper-proof continuous emissions monitoring systems. If the monitors indicate that the maximum sulphur dioxide level has been exceeded, there is an automatic penalty of \$2 000 payable for every ton or part thereof by which the limit has been exceeded. This type of penalty is important in order to sure the effective use of economic instruments like emission charges and tradeable permits. The system will break down if polluters who break the rules are not penalised.

⁴¹ Section 141.

⁴² Act 29 of 1996. See s 55-55H.

2.2 Civil measures

2.2.1 Injunctive processes (interdicts)

An interdict is potentially a very useful enforcement tool because it can be used to put a stop to harmful activity and often at an early stage, allowing proactive intervention. An interdict can be sought by anybody, given the wide locus standi provisions in NEMA.⁴³ For present purposes, however, what is of interest is the state's power to apply for an interdict.

In *Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another*,⁴⁴ the Minister was seeking an interdict requiring the respondent to cease operating an incinerator in the absence of the necessary authorisation under the Atmospheric Pollution Prevention Act.⁴⁵ One of the arguments raised by the respondent was that the Minister was not authorised by the Act to apply for an interdict – the fact that the Act provided for criminal sanctions served to exclude alternative remedies. The Court rejected this argument and the reasoning adopted by the Court would probably be persuasive in similar cases in the future. There is also now the provision in s 32 of NEMA which would apply not only to members of the public but with equal weight to government officials and agencies.

Nevertheless, it could do no harm, and would reduce the opportunity for challenge to the official's right to use an interdict procedure, to make explicit the power to use this procedure in legislation. This is what has been done in the National Water Act.⁴⁶ Section 155 provides that a High Court may, on application by the Minister or the water management institution concerned, grant an interdict or any other appropriate order against any person who has contravened any provision of this Act, including an order to discontinue any activity constituting the contravention and to remedy the adverse effects of the contravention.

⁴³ Section 32.

⁴⁴ 1996 (3) SA 155 (N).

⁴⁵ Act 45 of 1965.

⁴⁶ Act 36 of 1998.

It must be borne in mind, however, that an interdict still requires the involvement of a Court and hence is a relatively costly and time-consuming process (although it is quicker to have a matter resolved through an interdict than by using criminal sanctions). Administrative notice procedures, although lacking the *gravitas* of a High Court order, may be equally if not more effective in putting a stop to harmful activities and the interdict should not be used as a matter of course but only in cases where alternatives such as a notice procedure are likely to be ineffective or otherwise problematic.

2.2.2 Civil penalties

A civil penalty can be defined as punitive sanctions that are imposed by courts otherwise than through the normal criminal process.⁴⁷ Civil penalties are an important facet of the enforcement mechanisms used in environmental law in the United States. According to Mann,

‘Punitive civil sanctions are replacing a significant part of the criminal law in critical areas of law enforcement, particularly in white-collar and drug prosecutions, because they carry tremendous punitive power. Furthermore, since they are not constrained by criminal procedure, imposing them is cheaper and more efficient than imposing criminal sanctions’.⁴⁸

They have also been used in other countries but are not found (with few if any exceptions) in South African law.

In the US Clean Water Act, any person who violates certain specified sections of the Act shall be subject to a civil penalty not to exceed \$25 000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters

⁴⁷ Definition adapted from the ‘broad’ definition given by Michael Gillooly & Nii Lante Wallace-Bruce ‘Civil penalties in Australian legislation’ (1994) 13 *University of Tasmania LR* 269 at 269. Their definition excluded the requirement of judicial implementation.

⁴⁸ Kenneth Mann ‘Punitive civil sanctions: The middleground between criminal and civil law’ (1992) 101 *Yale LJ* 1795 at 1798.

as justice may require.⁴⁹ A single operational upset which leads to simultaneous violations of more than one pollutant parameter is regarded as a single violation. There is a similar provision in the Clean Air Act.⁵⁰ Note that the penalty provided for is significant, but in other instances of the use of civil sanctions, the penalties can be even stiffer and do not bear relation to any damages suffered.⁵¹

By way of further illustration, civil penalties are used in a variety of Australian statutes regulating ‘white collar’ enterprise: the Industrial Relations Act,⁵² Trade Practices Act,⁵³ state consumer credit legislation,⁵⁴ and the Corporations Law.⁵⁵ Penalties do not include imprisonment, but the financial penalties can be severe: under the Trade Practices Act, offenders can be fined a maximum of \$500 000,⁵⁶ whilst bodies corporate may be fined up to \$10 million.⁵⁷

What is the rationale behind civil penalties? It would appear that they essentially boil down to two considerations. The first is that they are less severe (in some ways) than criminal penalties in that they do not impact upon personal liberty, they do not attract the stigma that a criminal conviction does, and the person upon whom a civil penalty is imposed does not acquire a criminal record. This makes them suitable for use in cases where a person may have infringed the law (probably regulatory in nature) without criminal mens rea, but where the regulator regards penalisation as important for the purposes of deterrence.

The second reason for their use is a practical one – they are easier to impose than criminal sanctions are because of the less stringent standard of proof in civil litigation – it

⁴⁹ § 1319(b) of USC Title 33.

⁵⁰ § 7413(b) of USC Title 42.

⁵¹ See Mann *op cit* at 1797-8.

⁵² 1988 (Cth) s 178(1).

⁵³ 1974 (Cth) s 76.

⁵⁴ See Gilloolly *et al op cit* at 280ff.

⁵⁵ As amended by the Corporate Law Reform Act 1992, Part 9.4B.

⁵⁶ Section 76(1B).

⁵⁷ Section 76(1A).

is easier to satisfy the balance of probabilities than proof beyond reasonable doubt and hence it is easier to establish the defendant's liability.⁵⁸

Although this is an important consideration, it must be borne in mind that civil penalties share the same shortcoming of criminal law in that both require the time-consuming, onerous and costly requirement of a Court decision.

Moreover, civil penalties may be criticised as being, in effect, substantially similar to criminal penalties (certainly criminal fines) which means that the absence of the criminal procedural safeguards that an accused has in a criminal trial are problematic.⁵⁹ This is exacerbated by the fact that the civil penalties provided for in US law, for example, can be severe and in some cases even heavier than criminal sanctions provided for the same offence.⁶⁰

From a practical perspective, the Australian Institute of Criminology has investigated the use of civil penalties under the Australian Corporations Law and discovered that the penalties are noticeably underutilised.⁶¹ The reasons suggested for this are as follows:⁶²

- ❑ The availability of apparently more viable alternative remedies, such as injunctions.
- ❑ The delays and other drawbacks associated with use of the court system, including difficulties in interpretation by the courts.
- ❑ A tendency amongst enforcement personnel to prefer criminal sanctions to civil sanctions.
- ❑ The requirement to liaise with the Director of Public Prosecutions impacts negatively on the use of civil penalties.

⁵⁸ See Gillooly et al op cit at 270. As the authors point out at 293, the use of civil penalties enables the Legislature 'to promote compliance with its legislation without the need to criminalise the conduct in question. The individual penalised is not subjected to imprisonment or the stigma of criminal conviction and the civil rules of procedure and standard of proof are sufficiently flexible to ensure that innocent persons are not caught in the civil penalties net'. See also Mann op cit at 1853 ff.

⁵⁹ See Gillooly et al op cit at 270-1.

⁶⁰ See Mann op cit at 1798.

⁶¹ George Gilligan, Helen Bird & Ian Ramsay 'The efficacy of civil penalty sanctions under the Australian Corporations Law' (November 1999) 136 *Trends & Issues in Crime and Criminal Justice*.

⁶² Gilligan et al op cit at 5-6.

- ❑ Action that may attract civil penalties in terms of the Corporations Law (Commonwealth legislation) may also infringe State law that is easier to use, meaning that enforcement personnel prefer to use the State law's criminal prosecution provisions.
- ❑ Civil penalties are of limited utility in certain situations – for example, where the offender is bankrupt.
- ❑ Under-utilisation of civil penalties has undercut the deterrent function of the measure, leading to negative perceptions amongst enforcement personnel of their worth which in turn leads to further under-utilisation.

What does this analysis suggest about the possibility of using civil penalties in South Africa? First, although there are benefits in using civil penalties, as pointed out above, there is the drawback of still having to use the Court and misgivings about procedural safeguards for the defendant, which we will return to in a moment. Another relevant consideration is that research has shown in Australia, where civil penalties are not as established in the legal landscape as in the USA, that they have not been well utilised. Since they would be a novelty in South Africa, this may well turn out to be the case here as well.

Probably the biggest problem with civil penalties, though, would be the probability that our Courts would regard their punitive nature as being their main characteristic and therefore regarding them as effectively criminal sanctions dressed up as civil measures. It is unlikely that South African courts would allow the imposition of severe civil penalties without the same (or similar) constitutional safeguards required for accused persons in criminal trials. Although this might not be the case if the penalties imposed were less severe, then the use of civil penalties would be unnecessary since administrative sanctions could be used for this purpose.

The United States Supreme Court judgment in *United States v Halper*⁶³ is, it is submitted, an indication of how the South African courts could approach the question of civil penalties, at least in broad terms. In *Halper*, the defendant was the manager of medical laboratory who had made false claims for reimbursement on sixty-five separate

⁶³ 490 US 435 (1989).

occasions, resulting in an unjustified government payout of \$585. He was prosecuted criminally and sentenced to two years imprisonment and a fine of \$5 000. In addition, after the criminal conviction, the government sued him for a civil penalty of approximately \$130 000.

The issue before the Court was whether the imposition of the civil penalty in addition to the criminal penalty violated the Double Jeopardy clause in the US Constitution. The Court held that the disparity between the amount of the civil penalty and the damages suffered by the government was so great that the civil penalty constituted a second punishment and therefore contravened the Double Jeopardy clause. According to the Court, '[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term'.⁶⁴

It is likely that South African Courts, coming from the tradition where punishment is from the realm of criminal law and the purpose of civil law is compensation, would take a similar view to the United States Supreme Court. For this reason, it is submitted, it would be unlikely for civil penalties, especially if they provided for severe penalties, to gain a foothold in South African law.

2.2.3 Delictual measures

It is important that an environmental law system allows victims of harm caused by environmentally-harmful activities to be able to claim compensation. The availability of compensation measures is not necessarily an alternative to criminal sanctions and in many cases may be used in addition to criminal sanctions. There are, however, some instances where compensation measures may be used as an alternative to criminal sanctions and, maybe, in conjunction with other non-criminal enforcement measures. This will be discussed further below.

It may be argued that the availability of delictual remedies already serves to provide for compensation for victims of environmental harm, but the use of the Aquilian action

⁶⁴ *Halper* (supra) at 448.

may be less than ideal in certain circumstances. In 1994, Loots argued for the express inclusion in environmental legislation of the right to civil action.⁶⁵ Although the main focus of her article was on locus standi, the position in respect of which has now been ameliorated by the Constitution and s 32 of NEMA, there is another important consideration that she highlighted. This is the rule in *Madrassa Anjuman Islamia v Johannesburg Municipality*⁶⁶ to the effect that where a specific remedy such as a criminal sanction or administrative measure is provided for in legislation, then the legislature is presumed to have intended to exclude all other remedies, except an interdict.⁶⁷ This would serve to exclude delictual actions for damages, as was illustrated in the case of *Hall and Another v Edward Snell & Co Ltd*.⁶⁸ In this case, the Court refused to allow a claim for damages as a result of food poisoning caused by contaminated cooking oil. The reason was that the relevant legislation made it a criminal offence to sell contaminated foodstuffs and that the legislature could not have intended to subject the offender to both criminal sanctions and civil damages. As Loots says, 'the possibility that environmental offenders could escape claims for damages brought by those who suffer harm as a result of their activities is totally unacceptable'.⁶⁹ The solution is to provide expressly in legislation that persons may claim damages for harm or injury suffered as a result of breach of the legislation in question.

In certain circumstances, however, even this may not be enough. Due to the difficulty of proving fault on the part of the defendant in many environmental cases, it may be useful to provide in legislation for strict delictual liability in cases of breaches of the legislation causing harm. There is case authority to the effect that a person claiming damages for a breach of a statutory duty (such breach constituting a criminal offence) does not have to allege negligence. In *Lascon Properties (Pty) Ltd v Wadeville Investment Co (Pty) Ltd*,⁷⁰ the Witwatersrand Local Division held, in effect, that a breach

⁶⁵ Cheryl Loots 'Making environmental law effective' (1994) 1 *SAJELP* 17 at 33.

⁶⁶ 1917 AD 718.

⁶⁷ See *Minister of Health v Woodcarb* (supra).

⁶⁸ 1940 NPD 314.

⁶⁹ Loots op cit at 34.

⁷⁰ 1997 (4) SA 578 (W).

of a statutory duty allowed a strict liability remedy separate from the Aquilian action. This decision, it is submitted, is wrong: the breach of the statutory duty determines whether there has been *wrongfulness* in a particular case (or, in other words, whether the defendant owed a duty of care to the plaintiff), it does not have any impact on the normal Aquilian requirement of fault. (Interestingly, the Court in *Lascon* completely ignored the *Madrassa Anjuman Islamia* rule).

If *Lascon* is correct, then it is not necessary for legislation to provide for no-fault liability since an offender will be strictly liable for the breach of a statutory duty. Since, however, *Lascon* would not be likely to withstand more careful legal scrutiny, it would be beneficial in certain cases to provide for strict civil liability for breach of environmental statutes. This may provide for a defence of due diligence⁷¹ in which case, in effect, the burden of disproving negligence shifts to the offender.

The question of the constitutionality of this may be raised, but it was held by the Constitutional Court that shifting the onus onto the defendant to disprove negligence is not unconstitutional. In *Prinsloo v van der Linde*,⁷² in issue was the constitutionality of s 84 of the Forest Act,⁷³ which provided ‘when in any action by virtue of the provisions of this Act or the common law the question of negligence in respect of a veld, forest or mountain fire which occurred on land outside a fire control area arises, negligence is presumed until the contrary is proved’. The Court was concerned with whether this presumption conflicted with the Constitutional right to be proved innocent or with the right to equality.

The first argument was to the effect that, since the section referred to ‘any action’, it extended also to criminal prosecutions under the Act and, if the reverse onus provisions was unconstitutional in the criminal context, then it would be unconstitutional in the civil context as well. The Constitutional Court rejected this argument on the basis that s 35(2) of the interim Constitution required the Court to give to a provision a reasonable restricted interpretation that was constitutional. Moreover, s 98(5) also provided that ‘in

⁷¹ Discussed in more detail in the next Chapter.

⁷² 1997 (3) SA 1012 (CC).

⁷³ Act 122 of 1984.

the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with the Constitution, it shall declare such law or provision invalid to the *extent of its inconsistency*'. This was a further barrier to the argument.

The second argument related to equality. It was contended that the differentiation between defendants in veld fire cases and other delictual matters had no rational basis. The Court held that there as a rational connection between the purpose of the impugned section and the means chosen to do so. Moreover, the differentiation between owners and occupiers within fire control areas and those without was not unfair discrimination as envisaged by the Constitution. In sum, the Court held that s 84 of the Forest Act was not inconsistent with the Constitution.

There is a good example of a strict civil liability provision in South African environmental law in the National Nuclear Energy Regulator Act.⁷⁴ The Act provides in section 30 for strict civil liability of the holder of a nuclear installation licence for nuclear damage⁷⁵ caused by or resulting from the nuclear installation in question arising during that person's period of responsibility. It would be desirable for environmental legislation dealing with hazardous activities to include this type of provision. People engaging in such activities would be on their guard that harm caused by such activities would result in liability, irrespective of fault or lack thereof on the part of the defendant.

In certain circumstances, delictual liability could play a role as an alternative to criminal sanctions. For example, in the case of industrial effluent discharged into municipal sewers, the penalty provided for contravention of the emission limits is usually rather low, yet the damage caused to the sewerage works may be substantial. Even where there is no damage as such, the cost of cleaning up may be significant. In such circumstances, particularly where there would be difficulty in proving mens rea on the part of the polluter, the relevant legislation could provide for strict liability for the costs of clean up or repair of the sewerage works. Since this amount could be quite substantial, this would provide an incentive for the polluter to take steps to ensure non-repetition, and

⁷⁴ Act 47 of 1999.

⁷⁵ Defined above, §10.2.

the task of claiming damages for the operator of the sewerage works would be facilitated by not having to prove fault.

One further issue relating to liability for damages should be mentioned and that is that legislation frequently provides for the power of the Court to order payment of damages assessed by the Court upon conviction of the accused.⁷⁶ This is a power that is a supplement to the criminal sanction rather than an alternative but it is an important provision in that it obviates the need for the victim to launch separate civil litigation in order to claim damages. A similar provision is one which allows the Court to order a convicted accused to remediate the harm, rather than awarding damages.⁷⁷ This would be particularly useful in cases where there is no human victim who has suffered loss.

3 Evaluation

The discussion above indicates that there are several alternatives to the criminal sanction that could be effectively utilised in enforcement of environmental law. Several are already relatively common in South African law but some could be reinforced through explicit provision in legislation (injunctive powers and delictual liability, for example). Civil penalties, on the other hand, although common in other jurisdictions, would be unlikely to find favour in South Africa.

In considering alternatives to the criminal sanction as the primary mode of enforcement of environmental law, the focus in this Chapter has been on the enforcement of environmental law by organs of state. This, however, is likely to be only part of the enforcement picture in South Africa in the future and it can be expected that citizens (individually or as part of non-governmental environmental activist organisations) will be increasingly taking up the cudgels on behalf of the environment. The legal environment for them to do so, with liberal standing rules provided by the National Environmental Management Act and the Constitution, makes this a likely scenario.

⁷⁶ For example: s 7 of the Game Theft Act 105 of 1991; s 153 of the National Water Act 36 of 1998; s 34(1) of the National Environmental Management Act 107 of 1998.

⁷⁷ For example: s 12A(3) of the Sea-Shore Act 21 of 1935; s 29(7) of the Environment Conservation Act 73 of 1989.

Although the National Environmental Management Act does provide for private prosecutions, it is doubtful that this will be utilised much by the public, who would be more likely to use interdicts or actions for damages. Whatever instruments are used by members of the public, it is likely that their efforts will constitute a significant part of environmental law enforcement efforts in years to come.

This, it is submitted, is something to be encouraged. The liberal standing provisions mentioned above are invaluable in this regard and, in effect, provide for a blanket ‘citizen suit’ clause. This can be reinforced by the disclosure of information which will empower members of the public to exercise their rights more effectively.⁷⁸ South Africa does have provision for access to information in the form of the Promotion of Access to Information Act,⁷⁹ together with s 31 of the National Environmental Management Act.⁸⁰

4 Conclusion

The message of this and the previous Chapter, in short, is that criminal sanctions, suffering as they do from several shortcomings, should be reserved for the more egregious contraventions of environmental law. Other infringements can be addressed by a combination of the measures discussed in this Chapter. A mix of alternatives (statutory, delict, civil, criminal, amongst others) should be used according to the nature and magnitude of the harm.

This brings us to the point where a suggestion has been made as to the circumstances in which to employ the criminal law. The remainder of this thesis examines the way in which the criminal law may be implemented so as to make it as effective as possible when it is called upon, as explained in Chapter One.

⁷⁸ But cf. Cass Sunstein, who argues that provision for increased disclosure of information often has the paradoxical effect of making people less informed: ‘Paradoxes of the regulatory state’ (1990) 57 *Univ of Chicago LR*. 407 at 424-5.

⁷⁹ Act 2 of 2000.

⁸⁰ Act 107 of 1998.

Chapter 9

The Use of Strict Liability in the Prosecution of Environmental Crimes

1 Introduction

A factory manager pours a certain substance into the municipal sewers and is then prosecuted for contravening environmental regulations prohibiting the introduction of the substance into the sewerage system. It may well be that the manager responds to the charge by claiming ignorance of the terms of the prohibition. Should he or she be able to avoid liability on these grounds?

Environmental law can be a very technical field and environmental legislation often contains reams of technical requirements, including prohibitions. It has been estimated that in the United States, for example, the body of federal environmental legislation amounts to about 11 000 A4 pages. Is it reasonable to expect people to know all of this law? On the other hand, if people can avoid responsibility for their actions by claiming ignorance of the law, will this not undermine the law and be detrimental to the environmental interests supposed to be protected by the legislation?

These are some of the issues that arise within the context of debating the benefits and shortcomings of strict criminal liability, a device frequently used to impose liability on accused persons even if they are mistaken as to the law. This device is used relatively widely in environmental criminal law,¹ the focus of this Chapter.

The purpose of this Chapter is to consider the necessity of using strict liability in environmental criminal law, given that it offends against one's basic sense of justice in that somebody could be convicted without knowing what he or she was doing was wrong. Obviously, the dictates of justice have to be balanced against the environmental interests

¹ Keith Hawkins *Environment and Enforcement* (1984) at 13-14.

that will be undermined by the possible difficulty in bringing environmental offenders to book without strict liability.

It will be argued that, even if there was once a certain legal logic to the imposition of strict liability in public welfare offences, this logic has been distorted over time so that now strict liability tends to be imposed somewhat randomly. Consequently, the use of strict liability in the realm of environmental criminal law needs to be regulated more explicitly or excluded altogether.

2 What is strict liability?

Strict liability is usually taken to mean that mens rea is not a necessary element for liability for contravention of the offence.² The effect of the doctrine of strict liability is that the accused is denied a defence based on ignorance or mistake of fact or law.³ This is the only departure from the general principles of liability, since it is still incumbent on the prosecution to prove the performance of a voluntary unlawful act carried out with the necessary capacity, and the accused may raise any of the defences relating to these elements.⁴ In this respect, strict liability must be distinguished from absolute liability, which entails liability merely upon proof of the prohibited act.

This is the way in which strict liability has been ‘defined’ in South Africa. There are various types of strict liability that will emerge in the comparative analysis below. We will return to the appropriate meaning of strict liability after this analysis. Strict liability has historically been used most frequently in so-called ‘regulatory’ or ‘public welfare’ offences.

It was in 1933 that Francis Sayre coined the term ‘public welfare offence’. This was ‘a specialized type of regulatory offense involving a social injury so direct and widespread and a penalty so light that in exceptional cases courts could safely override the interests of innocent individual defendants and punish without proof of any guilty

² JRL Milton and MG Cowling *South African Criminal Law and Procedure* Vol III: Statutory Offences (1988) at Liability 26.

³ Ibid.

⁴ Ibid.

intent’.⁵ Typically, the public welfare offence involved threats to public interests like health and safety in commercial, industrial and social undertakings.⁶ Pollution offences, which are today responsible for most instances of what may be called ‘environmental crime’, are the archetypical public welfare offence.

3 The rationale for the use of strict liability

Essentially, the criminal law is seen to have developed in order to punish people who committed the ‘traditional’ common-law type crimes, and the general requirements for criminal liability, including mens rea, developed in this context. Once it became evident that it was necessary to regulate areas of life that had not traditionally been regulated (certainly not by statute, at any rate) such as public health and labour, the criminal law was invoked in order to deal with those who failed to comply with the statutes. But it became evident that there were problems with the use of traditional criminal law principles. The requirement of proof of fault, for instance, was, in many cases, almost impossible to satisfy and reliance on fault was seen to have the potential for inundating the courts with offences that were seen as rather trivial. The time spent in dealing with proof of fault would not be economically warranted in the circumstances,⁷ leading to the effective nullification of the legislation.⁸ As Burchell and Milton state,

‘In essence [the justification for strict liability] is, first, that strict liability contributes to the efficient administration of regulatory legislation and, secondly, that strict liability encourages and stimulates compliance with the provisions of the legislation’.⁹

The basic justification for strict liability offences is therefore one of expedience - a utilitarian approach. Reliance on proof of mens rea would serve to hinder the achievement of the objectives of the legislation in question. There are, however, other

⁵ Francis B Sayre ‘Public Welfare Offences’ (1933) 33 *Columbia LR* 55 at 68.

⁶ Burchell and Milton at 372.

⁷ See Mark Findlay, Stephen Odgers & Stanley Yeo *Australian Criminal Justice* 2 ed (1999) at 20.

⁸ See H Gross *A Theory of Criminal Justice* (1979) 349 and *R v City of Sault Ste Marie* (1978) 85 DLR (3d) 161 at 171.

⁹ Burchell and Milton at 372. See also the judgment of Botha JA in *Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council* 1994 (3) SA 170 (A) at 180.

vital diagnostic features of the strict liability (or public welfare) offence that are more in the nature of an apology for the use of strict liability than a justification for its use. These are that public welfare offences have traditionally been seen as, in their nature, not true crimes; and that they carry relatively light or nominal sentences, more in the nature of penalties than punishment. The distinction between offences requiring proof of mens rea and those which do not is explained by Sayre as follows. He says that there are two 'cardinal principles' which determine the distinction:

1. The character of the offence. 'Crimes created primarily for the purpose of singling out individual wrongdoers for punishment or correction are the ones commonly requiring mens rea; police offenses of a merely regulatory nature are frequently enforceable irrespective of any guilty intent'.¹⁰
2. The possible penalty: 'Crimes punishable with prison sentences ... require proof of a guilty intent'.¹¹

It will become apparent from the following examination of how strict liability has been used in various countries that these 'characteristics' of regulatory offences based on strict liability have been watered down to such an extent, certainly in some cases, that they no longer signify strict liability offences at all. The comparative analysis will begin with South Africa, and, where possible, particular reference will be made to environmental offences.

4 Strict Liability in South Africa

Sayre identified the origin of the doctrine of strict liability for public welfare offences in England in the mid nineteenth century, the doctrine emerging in the United States shortly thereafter but seemingly independently of what was happening in England.¹² Early South African decisions tended to follow the English lead,¹³ which was not surprising given

¹⁰ Sayre op cit at 72.

¹¹ Ibid.

¹² Sayre op cit at 62.

¹³ See *R v Wallendorf* 1920 AD 383; *R v von Wielligh* 1931 CPD 247; *R v Langa* 1936 CPD 158; *R v H* 1944 AD 121; Burchell and Milton op cit at 374.

that much legislation in South Africa was based significantly on English statutes. The doctrine was accepted in such a way that it threatened to run away with itself, but there was a backlash from the judiciary from the 1950s onwards, leading to increasing hostility towards the principle. In the oft-cited judgment of Holmes JA in *S v Qumbella*,¹⁴ the stricter judicial position was clearly expressed:

‘[T]he basic principle is that *actus non facit reum, nisi mens sit rea*. Current judicial thinking is recognizing more fully the scope and operation of this fundamental rule of our law ... Of course the lawmaker has it within its power to override this fundamental principle of fairness, and to make absolute the duty of compliance with its behests, thus rendering innocent violations punishable. But such an inroad into individual freedom should be made to appear very plainly, so that he who runs may read’.¹⁵

At first glance, this approach seems to fly in the face of the utilitarian considerations underlying imposition of strict liability in statutory offences, but it has been pointed out that this judgment must be seen in the light of the evolution in South African case law of certain devices which served to strike a balance between the general principle of fault as a necessary element for criminal liability on the one hand, and the utilitarian arguments in favour of strict liability on the other. These devices were, first, the placing of the onus of *disproving* fault on a balance of probabilities onto the accused, and, second, recognition of negligence as sufficient fault for a contravention of legislation.¹⁶

The reverse onus notion was raised in South Africa first in the case of *R v Wallendorf*,¹⁷ and later explicitly approved in *R v H*,¹⁸ thereby becoming part of South African law. In an obiter statement, the court in *S v Qumbella*¹⁹ cast doubt on this position, indicating that the requirement of the state having to discharge the onus of proof in criminal cases is ‘part of our basic criminal law’. This decision, however, was followed by a period of uncertainty, where courts took one of three views: that favoured by *R v H*; that requiring the state to prove mens rea in the form of intention beyond

¹⁴ 1966 (4) SA 356 (A).

¹⁵ At 364.

¹⁶ Burchell and Milton *op cit* at 375; Cowling and Milton at Liability 29.

¹⁷ 1920 AD 383 at 401-2.

¹⁸ 1944 AD 121 at 127.

¹⁹ 1966 (4) SA 356 (A) at 366.

reasonable doubt; and a third approach imposing on the accused an evidential burden requiring him or her to produce evidence in rebuttal of a prima facie case made out by the prosecution, with the onus of proof remaining on the latter.²⁰

Most commentators suggest that the position was resolved by the Appellate Division in *S v De Blom*,²¹ despite the court's not expressly overruling the earlier position.²² The decision in *De Blom* appears to accord with the third position outlined above. It is important to bear in mind, however, that this is the position only in cases where the situation as to the onus of proof is not clear from the wording of the statute. It is open to the legislature to reverse the onus by doing so explicitly. Having said this, though, the legal position of reverse-onus provisions, whether explicit or otherwise, is now subject to the provisions of the Constitution,²³ and there have been several cases in which the constitutionality of such provisions has been considered.

Other than in the case of *S v Meaker*,²⁴ the Courts have consistently found that reverse onus decisions are unconstitutional, although in *S v Manamela*²⁵ the Constitutional Court does make reference to the types of offences for which reverse onus provisions may be acceptable.²⁶ This has been discussed in detail in Chapter 3. A reading of the judicial tealeaves in this regard suggests that reverse onus provisions, although always infringing the right to be presumed innocent, might be regarded as acceptable in cases where the accused is not subject to heavy penalty (imprisonment, for example) and where the interests of administration of justice would make it necessary (as opposed to merely desirable) that the accused prove facts that are within his or her knowledge and that would be difficult if not impossible for the state to have to prove.

Given the existing state of the law in South Africa, it is possible to make some suggestions as to how the issue can be dealt with in environmental legislation. Before

²⁰ See EM Burchell & JRL Milton 'Criminal law' (1977) *Annual Survey of South African Law* 417.

²¹ 1977 (3) SA 513 (A).

²² See Cowling and Milton op cit at Liability 38.

²³ Constitution of the Republic of South Africa, Act 108 of 1996.

²⁴ 1998 (8) *BCLR* 1038 (W).

²⁵ 2000 (3) SA 1 (CC).

²⁶ At para [29].

doing so, however, let us examine the way that the law has developed as far as strict criminal liability is concerned in other jurisdictions. The trends can then all be compared in order to suggest a way ahead for the effective prosecution of environmental crime in South Africa.

5 Strict Liability in the United Kingdom

In the United Kingdom, strict liability offences are almost always creatures of statute, but (as is the case in other countries) the legislature rarely uses express words to the effect. It is left to the courts to make the decision, which they do on the basis of the wording used. Even if there is no word or phrase importing a mental element, the court will not inevitably find that mens rea is not required. There is a presumption of mens rea which must be rebutted by the prosecution, and the principles relating to this were set out by the Privy Council in *Gammon (Hong Kong) Ltd v A-G of Hong Kong*:²⁷

(1) there is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is “truly criminal” in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern; public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.

The presumption is often displaced in cases where, in effect, there is no need to prove mens rea in respect of one or more elements (usually one important element) of the offence.²⁸

There is a host of cases dealing with strict liability in the United Kingdom, which are not necessarily all that consistent in their application of the doctrine.²⁹ According to

²⁷ [1984] 2 All ER 503 (PC) at 508f-g.

²⁸ JC Smith *Smith & Hogan: Criminal Law: Cases and Materials* 7 ed (1999) at 168. In one case, the Court held not only that there was no need to prove mens rea but that the prosecution *must not* prove it: *R v Sandhu* [1997] Crim LR 288.

Smith & Hogan, the presumption of mens rea may be displaced by either (i) the words of the statute or (ii) its subject-matter. As far as the words are concerned, verbs importing a mental element (such as 'permit') suggest that mens rea is necessary.³⁰ Similarly, the adverb 'knowingly' does the same, although the word 'wilfully' seems to be treated somewhat haphazardly.³¹ In addition, use of words importing mens rea in some sections but not in others does not automatically indicate that the latter sections are strict liability provisions.³²

The subject matter of the legislation is also regarded as important. There are a number of considerations at play in this regard. First, the courts consider whether the offence is a 'real crime' or a 'quasi crime'.³³ The latter is an offence which, in the public eye, carries little or no stigma and does not involve 'the disgrace of criminality'.³⁴ Strict liability may be imposed for such offences since the ordinary person would not feel that conviction without proof of moral guilt was unjust.

Secondly, the court may be more ready to impose strict liability in the case where the provision in question relates to a specific trade, profession or activity rather than to the general public. This is the classic regulatory offence. The third factor is possibility of amendment, which has been stated by Devlin J as entailing the following:

'a safe general principle to follow ... that where the punishment of an individual will not promote the observance of the law either by that individual or by others whose conduct he may reasonably be expected to influence, then, in the absence of clear and express words, such punishment is not intended'.³⁵

²⁹ *R v Prince* [1874-80] All ER Rep 881; *R v Tolson* (1889) 23 QBD 168; *Sherras v De Rutzen* [1895] 1 QB 918 at 921; *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356 (HL); *Sweet v Parsley* [1970] AC 132, [1969] 1 All ER 347 (HL); *Pharmaceutical Society of Great Britain v Storkwain Ltd* [1986] 2 All ER 635 (HL); *B v DPP* [1998] 4 All ER 265.

³⁰ JC Smith & Brian Hogan *Criminal Law* 7 ed (1992) at 104.

³¹ Smith & Hogan op cit at 105-6.

³² Smith & Hogan op cit at 106.

³³ Smith & Hogan op cit at 107.

³⁴ *Warner v Metropolitan Police Comr* [1969] 2 AC 256 at 272.

³⁵ *Reynolds v Austin & Sons Ltd* [1951] 2 KB 135.

Finally, if the social danger which will follow from the contravention is significant, the courts will be more inclined to impose strict liability.³⁶ Pollution offences are an example, apposite for purposes of this Chapter, which the courts have tended to regard as strict liability offences.

Two important cases involving pollution offences and strict liability are *Alphacell Ltd v Woodward*³⁷ and *Atkinson v Sir Alfred McAlpine & Son Ltd*.³⁸ In the former, the House of Lords held that the defendant company was guilty of causing polluted matter to enter a river in contravention of s 2(1) of the Rivers (Prevention of Pollution) Act 1951. Settling tanks with an overflow channel into the river had been built, with pumps designed to ensure that overflow did not take place. The pumps, however, became obstructed with vegetation, and overflow of polluted water occurred. The defendant was not shown to have known of the pollution nor to have been negligent, but the court nevertheless convicted. According to Lord Salmon,

‘If ... it were held to be the law that no conviction could be obtained under the 1951 Act unless the prosecution could discharge the often impossible onus of proving that pollution was caused intentionally or negligently, a great deal of pollution would go unpunished and undeterred to the relief of many riparian factory owners. As a result, many rivers which are now filthy would become filthier still and many rivers which are now clean would lose their cleanliness’.³⁹

In *McAlpine*, Asbestos Regulations of 1969 required persons to give written notice of intention to undertake work involving crocidolite. The defendant company undertook such work, without knowing nor having reason to know that the work involved crocidolite. The court held that the words ‘knows or ought to know’, if read into the regulation, would not address the mischief sought to be combated by the regulations, that it was not open to the defendant to raise impossibility as a defence.

One of Sayre’s characteristics of the strict liability public welfare offence was a light penalty, but, as Smith & Hogan point out, if the penalty is light this suggests that Parliament thought the social danger to be slight, which seemingly contradicts the

³⁶ Smith & Hogan (1992) op cit at 108.

³⁷ [1972] AC 824, [1972] 2 All ER 475.

³⁸ [1974] Crim LR 668.

³⁹ [1972] AC 824 at 848.

previous consideration, that strict liability is often imposed in cases involving social danger.⁴⁰ The courts in the United Kingdom, however, have departed from Sayre's principle and in several cases have imposed strict liability in cases involving relatively serious terms of imprisonment as prescribed sentences.⁴¹

Often statutes provide for defences along the lines of allowing the defendant to prove absence of mens rea (meaning intention) and that he or she took all reasonable precautions and exercised all due diligence to avoid the commission of an offence. According to Smith & Hogan,⁴²

'Such provisions are a distinct advance on unmitigated strict liability; but they are still a deviation from the fundamental principle that the prosecution must prove the whole of their case; and an extensive use of offences of strict liability, even where so qualified, is to be deplored'.

6 Strict Liability in Canada

The leading case in Canada is *R v City of Sault Ste. Marie*.⁴³ Before this decision, the courts in Canada had (not all that consistently) chosen between either liability irrespective of fault (which has been called absolute liability in Canada) or the traditional position requiring proof of fault.⁴⁴ In 1976, the Canadian Law Reform Commission had recommended:⁴⁵

- (i) every offence outside the Criminal Code be recognized as admitting of a defence of due diligence;
- (ii) in the case of such offence for which intent or recklessness is not specifically required the onus of proof should lie on the defendant to establish such defence;
- (iii) the defendant would have to prove this on the preponderance or balance of probabilities.

⁴⁰ Smith & Hogan op cit at 114.

⁴¹ See, for example, *Gammon (Hong Kong) Ltd v A-G of Hong Kong* [1985] AC 1, [1984] 2 All ER 503 (PC).

⁴² Smith & Hogan op cit at 122.

⁴³ 85 DLR (3d) 161.

⁴⁴ Don Stuart *Canadian Criminal Law* 3 ed (1995) at 149-156.

⁴⁵ Canadian Law Reform Commission *Our Criminal Law* (March, 1976) at 32.

The recommendation endorsed a working paper⁴⁶ in which it was stated that negligence should be the minimum standard of liability in regulatory offences, and that such offences were:⁴⁷

‘... to promote higher standards of care in business, trade and industry, higher standards of honesty in commerce and advertising, higher standards of respect for the ... environment and [therefore] the ... offence is basically and typically an offence of negligence’.

The working paper expressed the view that, in regulatory law, to make the defendant disprove negligence – in other words, to prove due diligence – would be both justifiable and desirable.

In *Sault Ste. Marie*, the accused city had contracted with a company to dispose of its waste (garbage). The company had, in doing so, caused pollution to a river in the course of the disposal operations. The company was found guilty of contravening s 32(1) of the Ontario Water Resources Act of 1970. The main issue in the case was whether the city itself was liable, and this issue reached the Supreme Court of Canada. The court, in considering a middle position between absolute liability and requiring proof of mens rea, aimed at finding a position which fulfils the

‘goals of public welfare offences while still not punishing the entirely blameless. There is an increasing and impressive stream of authority which holds that where an offence does not require full mens rea, it is nevertheless a good defence for the defendant to prove that he was not negligent’.⁴⁸ (at 172).

Dickson J considers that there is nothing improper – given the difficulty faced by the state in proving wrongful intention – in placing the burden of proving on a balance of probabilities due diligence on the accused. This would be preferable to absolute liability, and the means of proving reasonable care (due diligence) would be within the grasp of the accused.⁴⁹ The court thus concludes that there are three categories of offences:⁵⁰

⁴⁶ *Working Paper No. 2 – Criminal Law - Meaning of Guilt - Strict Liability* (1974).

⁴⁷ Canadian Law Reform Commission at 32.

⁴⁸ At 172.

⁴⁹ At 181.

⁵⁰ At 181-2.

1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution, either as an inference from the nature of the act committed, or by additional evidence.
2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.
3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

The Court then set out the criteria as to which choice of categories is to be made as follows. The first category would contain offences which are ‘criminal in the true sense’.⁵¹ ‘Public welfare offences’ would fall into the second category, unless they were drafted to contain words such as ‘wilfully’, ‘with intent’, ‘knowingly’ or ‘intentionally’, in which case they would be in the first category. Absolute liability offences would be those where the Legislature ‘had made it clear that guilt would follow proof merely of the proscribed Act’.⁵²

The court accordingly held that the offence in *Sault Ste. Marie* was one of strict liability (category 2), since there were no express words indicating that it was an absolute liability offence and the words ‘cause’ and ‘permit’ in the statute did not indicate that the offence was a first category offence. The city would thus be allowed to raise the defence of due diligence.⁵³ This defence entails that the defendant shows that he or she did everything reasonably within his or her power to prevent the offence, or that he or she

⁵¹ At 182.

⁵² Ibid. The Court does not state that this must be expressly provided, but states that ‘The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category’.

⁵³ The defence was raised but failed and the city was convicted.

reasonably believed in a mistaken set of facts that, if true, would render the act or omission innocent.⁵⁴

In assessing the decision in *Sault Ste. Marie*, the issue of classification warrants further consideration. The judgment makes reference to ‘public welfare’ offences falling into category two, yet does not define such offences. Stuart asks ‘why is fouling a river – pollution being one of the greatest social ills of our times – not truly criminal?’⁵⁵ He continues to say:⁵⁶

‘The distinction between real and regulatory offences, a modern version of the *malum in se* and *mala prohibita* distinction, has never been satisfactorily made. Unless the courts or the legislature undertake this difficult task of substantive classification, remarks ... that criminal law principles can be relaxed in the area of regulatory offences should be viewed with suspicion, particularly as the penalties attached to many regulatory offences are severe, in some cases including the threat of imprisonment’.

Given the uncertainty in making this distinction, with the result that certain offences considered to be public welfare offences involve potential substantial penalties, Stuart expresses discomfort at *Sault Ste. Marie*’s apparent finding that the accused bears the onus of proving (as opposed to raising prima facie evidence of) due diligence.⁵⁷ Dealing with the argument that the reverse onus is necessary in public welfare offences due to the alleged difficulty or impossibility of the prosecution in obtaining evidence, Stuart suggests:⁵⁸

‘This concern seems hugely exaggerated and shows a surprising lack of faith in triers of fact. Mens rea is a matter peculiarly within the knowledge of the accused, but the accused’s testimony is only one source of evidence. In practice the Crown has little difficulty in proving mens rea by asking the trier of fact to draw reasonable inferences from the circumstances. The accused bears the evidentiary burden’.

Sault Ste. Marie was decided before the enactment in 1982 of the Canadian Charter of Rights and Freedoms. Two important post-Charter decisions are relevant to the position adopted in *Sault Ste. Marie*. First, in *Reference re Section 94(2) of the Motor Vehicle Act*

⁵⁴ Diane Saxe *Environmental Offences* (1990) at 145.

⁵⁵ Stuart op cit at 160. See also Eric Colvin *Principles of Criminal Law* 2 ed (1991) at 175.

⁵⁶ Stuart op cit at 160-1.

⁵⁷ Stuart op cit at 162-165.

⁵⁸ Stuart op cit at 166.

(BC),⁵⁹ the Court held that any penal law which imposes absolute liability violates section 7 of the Canadian Charter and would be of no force or effect where there is a potential deprivation of the liberty interest, in other words, where the accused could be imprisoned.⁶⁰ The effect of this is to make a due diligence defence a minimum constitutional standard. The issue of whether an absolute liability offence for which imprisonment can be imposed in default of payment of a fine has not been definitively decided yet, but Stuart suggests that if the Supreme Court were to hold this, absolute liability would be ‘virtually banned’.⁶¹

The second ‘Charter case’ was *R v Wholesale Travel Group Inc.*⁶² The two most important aspects of this decision concerned qualification (or ‘watering down’) of the due diligence defence and the constitutionality of placing a reverse onus on the accused in regulatory offences. First, the Court decided that the due diligence defence could not be watered down by requiring anything more onerous than demonstrating reasonable care.⁶³

Secondly, by a 5-4 majority, the Court decided that there was nothing unconstitutional in the case of regulatory offences placing a persuasive burden of proving the due diligence defence on the accused.⁶⁴ Essentially, the majority judgments rested on arguments of law enforcement efficacy and the distinction, not convincingly drawn, between regulatory and real offences. Despite the perceived shortcomings of the majority decision,⁶⁵ it constitutes the current law on the position, and the alternative of an ‘evidentiary presumption of evidence’ is not the default position but may be opted for by a court.⁶⁶

⁵⁹ (1985) 48 CR (3d) 289 (SCC).

⁶⁰ See Alan W Mewett ‘Editorial’ (1992) 34 *Criminal LQ* 257 at 258.

⁶¹ Stuart op cit at 176.

⁶² (1991) 8 CR (4th) 145 (SCC).

⁶³ Per Cory J (L’Heureux-Dubé J concurring) at 187, per Iacobucci J (Gonthier and Stevenson JJ concurring) at 189, per Lamer CJC (Sopinka and La Forest JJ concurring) at 212, per McLachlin J at 223.

⁶⁴ Per Cory J (L’Heureux-Dubé J concurring) at 184, Iacobucci J (Gonthier and Stevenson JJ concurring) at 192, Lamer CJC (Sopinka J concurring) dissenting at 219, La Forest dissenting at 223, McLachlin J dissenting at 223-4.

⁶⁵ See Stuart op cit at 177-181.

⁶⁶ Stuart op cit at 181.

As far as the defence of due diligence is concerned, several trends can be observed in the way that the Canadian courts have dealt with the defence in the context of environmental offences. According to Lowe,⁶⁷ in general, ‘any delay in investigating the cause of an environmental problem and any consequential delay in preparing a plan of rehabilitation will ordinarily be fatal to the defence’.⁶⁸ Moreover, if the defendant has knowledge of a potential environmental problem but fails to act to minimise the risk, this would have a similar effect.⁶⁹ It has been held that due diligence does not mean superhuman effort, but requires a ‘high standard of awareness and decisive, prompt and continuing action’.⁷⁰

There is authority for the view that adherence to guidelines might be seen as satisfying the due diligence defence.⁷¹ Along similar lines, due diligence can be based on the standard of care in the relevant industry. The test, known as the ‘industry standards test’, is derived from the case of *R v Gonder*.⁷² The test involves two steps in order to determine the issue of reasonable care:

‘First, the standard of care common to the business activity in question has to be determined. Is there a standard of practice or care commonly acknowledged as a reasonable level of care and did the defendant act in accordance with that standard? Secondly, are there any special circumstances which require a different level of care than the level suggested by the standard practice?’⁷³

In summary, then, the Canadian position is that, in regulatory offences (which are not clearly demarcated), strict liability is permissible. Strict liability entails the accused’s

⁶⁷ Peter Lowe ‘A comparative analysis of Australian and Canadian approaches to the defence of due diligence’ 1997 *EPLJ* 102 at 108.

⁶⁸ See *R v Laidlaw Waste Systems Ltd* (1993) 11 CELR (NS) 232 at 245-7 and *R v Toronto Electric Commissioners* (1991) 6 CELR (NS) 301 at 323-4.

⁶⁹ See *R v Rivtow Straits Ltd* (1993) 12 CELR (NS) 153 and *R v Fibreco Pulp Inc* (1993) 10 CELR (NS) 1 at 20-21.

⁷⁰ *R v Courtaulds Fibres Canada* (1992) 9 CELR (NS) 304 at 313.

⁷¹ *R v Canada (Environment Canada) and Northwest Territories (Commissioner)* (1993) 12 CELR (NS) 37 at 51.

⁷² 62 CCC (2d) 326 (1981).

⁷³ Lowe op cit at 110.

having to prove, on a balance of probabilities, the existence of due diligence or reasonable care once the prosecution has proved the *actus reus*.

7 Strict Liability in the United States of America

As indicated above, offences which Sayre labeled ‘public welfare’ offences emerged in the United States shortly after they were recognized in England. Such offences, however, are the exception rather than the rule. The Supreme Court has indicated that there is generally a presumption of *mens rea*,⁷⁴ but in certain cases this presumption is not present and strict liability may be applicable. In *Morissette v United States*,⁷⁵ the Court stated that in ‘public welfare offences’ the accused ‘if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities’.⁷⁶ The Court indicated that the criteria for delineating between crimes which require proof of *mens rea* and those which do not ‘is neither settled nor static’,⁷⁷ and held that mere omission from the provision under scrutiny of words indicating *mens rea* ‘will not be construed as eliminating that element from the crimes denounced’.⁷⁸

In *United States v Dotterweich*,⁷⁹ referring to ‘public welfare’ offences, the Court said: ‘such legislation dispenses with the conventional requirement for criminal conduct – awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger’.⁸⁰

⁷⁴ *United States v Balint* 258 US 250 (1922) at 251. See also *Morissette v United States* 342 US 246 (1952), where Jackson J stated at 250 that, ‘The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil’.

⁷⁵ 342 US 246 (1952).

⁷⁶ At 256.

⁷⁷ At 260.

⁷⁸ At 263.

⁷⁹ 320 US 277 (1943).

⁸⁰ At 280-81.

Later, in *Staples v United States*,⁸¹ it was indicated that the Supreme Court has ‘essentially ... relied on the nature of the statute and the particular character of items regulated to determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional mens rea requirements.’⁸²

The court raised the suggestion that

‘punishing a violation as a felony is simply incompatible with the theory of the public welfare offense. In this view, absent a clear statement from Congress, that mens rea is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with mens rea.’⁸³

In *United States v Park*⁸⁴ the clear statement from Congress was apparently present. The legislation in question was the same as that under scrutiny in *Dotterweich*,⁸⁵ and the Court reaffirmed that knowledge or intent were not required to be proved in prosecutions under the Act.⁸⁶ Both these cases hold corporate officers strictly liable for crimes committed by their corporations,⁸⁷ and, in particular, require individuals who

‘execute the corporate mission ... [to] seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will ensure that violations will not occur’.⁸⁸

There is some uncertainty as to whether the *Park* decision applies strict liability or negligence, but, in practice, the application of the doctrine amounts to strict liability due to the inferences the court tends to draw in the circumstances.⁸⁹

The decision in *Park* has been interpreted as providing for a defence which arises where the defendant was ‘powerless’ to prevent or correct the violation.⁹⁰ This has been

⁸¹ 511 US 600 (1993).

⁸² At 607.

⁸³ At 618.

⁸⁴ 421 US 658 (1975).

⁸⁵ The Federal Food, Drug and Cosmetic Act 1938.

⁸⁶ At 670.

⁸⁷ See Steven Zipperman ‘The Park Doctrine – Application of strict criminal liability to corporate individuals for violation of environmental crimes’ (1991) 10 *UCLA J Environmental Law and Policy* 123 at 127-134.

⁸⁸ Zipperman op cit at 134.

⁸⁹ Ibid.

⁹⁰ 421 US 658 at 673.

interpreted to require the corporate officer to prove either: (i) that he or she exercised extraordinary care through ‘vigilance’ or ‘foresight’, or (ii) that prevention of the offence would have been ‘objectively impossible’.⁹¹ Given the existence of this defence, subsequent cases⁹² have rejected the notion of strict liability and interpreted *Park* as imposing a negligence standard of ‘extraordinary care’ upon corporate officers.⁹³ The effect of the defence has been held to cast an evidential burden upon the defendant to raise evidence as to his exercise of extraordinary care. This then requires the prosecution to prove beyond reasonable doubt that ‘the defendant, by the use of extraordinary care, was not without the power or capacity to correct or prevent the violations of the Act’.⁹⁴

Shortly before *Park*, the Supreme Court had extended the ‘public welfare’ doctrine imposing strict liability to statutes involving felony penalties, as opposed to misdemeanours.⁹⁵ At almost the same time, the Court also used the public welfare approach to interpret a statute making criminal ‘knowing’ conduct in *United States v International Minerals & Chemicals Corp.*⁹⁶ The Court, in dealing with an alleged contravention of a provision in the Federal Explosives Act requiring display on shipping papers of the classification of corrosive liquids being transported across state lines, held that ‘knowingly’ applied only to the act, not to knowledge of the law:

‘[where] dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them, or dealing with them, must be presumed to be aware of the regulation’.⁹⁷

The Court also held that there was a rebuttable presumption of knowledge (which amounts to allowing the defence of mistake of fact), so that someone who thought in

⁹¹ Zipperman op cit at 136, quoting as examples *United States v Y Hata & Co Ltd* 535 F.2d 508 at 511 (9th Cir) cert denied 429 US 828 (1976) and *United States v Starr* 535 F.2d 512 at 515-6 (9th Cir 1976).

⁹² See cases cited in previous note.

⁹³ Zipperman op cit at 137.

⁹⁴ *United States v New England Grocers Supply Co* 488 F. Supp 230 at 236 (D. Mass 1980).

⁹⁵ *United States v Freed* 401 US 601 (1971). See Katherine H Setness ‘Statutory interpretation of Clean Water Act section 1319(C)(2)(A)’s knowledge requirement: Reconciling the needs of environmental and criminal law’ (1996) 23 *Ecology Law Quarterly* 447 at 461.

⁹⁶ 402 US 558 (1971).

⁹⁷ At 564.

good faith that he or she was handling something which was not regulated when, in fact, it was, would escape liability.⁹⁸

As far as strict liability in environmental offences is concerned, federal environmental crimes do not provide for strict liability⁹⁹ but in each case requires proof of ‘a particular state of mind’.¹⁰⁰ Nevertheless, this has not prevented the courts, somewhat controversially admittedly, from imposing what amounts to strict liability in cases where the statute contains words clearly requiring a form of mens rea. In *United States v Weitzenhoff*,¹⁰¹ the defendants were convicted for violating the Clean Water Act (CWA) which provides that any person who ‘knowingly violates’ certain sections of the Act ‘or any permit condition or limitation implementing any such sections’ is guilty of a felony.¹⁰² The defendants were both sentenced to significant terms of imprisonment.¹⁰³ The defendants were managers of a sewage treatment plant in Hawaii and they had instructed employees to pump, under cover of darkness, ‘waste activated sludge’ directly into the ocean. This effluent did not comply with the standards with which the plant had to comply. They had instructed the employees who did the pumping not to say anything about the discharges, because if they all stuck together and did not reveal anything, ‘they [couldn’t] do anything to us’.¹⁰⁴

The Court of Appeals confirmed their convictions by holding that the word ‘knowingly’ in the relevant section of the CWA merely required that the defendants knew that they were discharging pollutants, not that they knew that the discharges violated the relevant permit.¹⁰⁵ This decision was followed in *United States v Hopkins*.¹⁰⁶

⁹⁸ At 563-4. See Setness op cit at 462.

⁹⁹ Although environmental crimes in state legislation often do impose strict liability – see, for example, George Jugovic Jr ‘Legislating in the public interest: Strict liability for criminal activity under the Pennsylvania Solid Waste Management Act’ (1992) 22 *Environmental Law* 1375.

¹⁰⁰ Zipperman op cit at 159.

¹⁰¹ 1 F.3d 1523 (9th Cir 1993) amended on denial of rehearing and rehearing en banc 35 F.3d 1275 (9th Cir 1994) cert. Denied 115 S Ct 939 (1995).

¹⁰² § 1319(c)(2)(A).

¹⁰³ Weitzenhoff was sentenced to 21 months and his co-defendant Mariani to 33 months.

¹⁰⁴ *Weitzenhoff* at 1282.

¹⁰⁵ *Weitzenhoff* at 1283.

Carmichael argues convincingly, it is submitted, that these decisions are wrong and that ‘knowingly’ refers both to the action being performed and to the fact that such action is in violation of the law.¹⁰⁷ Wettach, on the other hand and less compellingly, agrees with the decision.¹⁰⁸ According to Wettach,¹⁰⁹ the CWA is

‘not a strict liability statute. Strict liability statutes make certain actions or omissions criminal regardless of whether the actor intended the results that occurred. No mens rea is required. In contrast, the CWA provisions do set forth a general intent mens rea. Congress requires proof of some mental state as a prerequisite to conviction under the CWA. The CWA demands that the violator engaged in “knowing” conduct to be convicted. The existence of this mens rea requisite prevents classification of the CWA as a strict liability law’.

She distinguishes¹¹⁰ ‘general intent’ crimes from ‘specific intent’ crimes on the basis that:

“‘Specific intent’ designates a special mental element which is required above and beyond any mental state required with respect to the actus reus of the crime”.

Her interpretation of the *Weitzenhoff* decision suggests that, following this decision, the defendant will be convicted without proof of mens rea but will be able to raise the defence of mistake of fact, but not mistake of law. Wettach seeks to justify this position by suggesting that, had the court extended the word ‘knowingly’ to the law, the defendants would have escaped liability.¹¹¹ This conclusion, however, is doing the triers of fact in this case great discredit: if ever there was a case, on the facts, where there would have been justification in drawing an inference that there was not ignorance of the law, *Weitzenhoff* was it.

Setness,¹¹² in the light of this decision, suggests the path the law ought to follow in order to ensure the efficacy of the legislation on the one hand and fair warning of the defendant on the other. She suggests that ignorance of the law should be disallowed as a

¹⁰⁶ 53 F.3d 533 (2d Cir 1995).

¹⁰⁷ Kepten D Carmichael ‘Strict criminal liability for environmental violations: A need for judicial restraint’ (1996) 71 *Indiana LJ* 729.

¹⁰⁸ Christine L Wettach ‘Mens rea and the “heightened criminal liability” imposed on violators of the Clean Water Act’ (1996) 15 *Stanford Environmental LJ* 377.

¹⁰⁹ Wettach op cit at 397.

¹¹⁰ Ibid, quoting *Black’s Law Dictionary* 6th ed (1990) at 1399.

¹¹¹ Wettach op cit at 377-8.

¹¹² Setness op cit at 490-1.

defence but that the government should be required to prove that the defendant, 'in his position, would have been aware that discharge of the "pollutant" was subject to strict regulation or had the potential to be harmful to others or to the environment'.¹¹³ This would not require the prosecution's having to prove that the defendant knew the precise details of the law that he was alleged to contravene. In addition, the defendant should be allowed to raise the defence of mistake of fact. This would accord with the *International Minerals* decision. While Setness advocates the defendant bearing the burden of proving this, it is submitted that an evidential burden to this effect could have substantially the same effect.

In addition, she suggests that the jury should be instructed as to 'conscious avoidance' or 'wilful blindness', as follows:

'[A] wilful blindness instruction is proper if a defendant claims a lack of knowledge, the facts suggest a conscious course of deliberate ignorance, and the instruction, taken as a whole, cannot be misunderstood as mandating an inference of knowledge'.¹¹⁴

A new twist to the saga was recently added in the case of *United States v Ahmad*,¹¹⁵ where the defendant was charged with various offences following his emptying of an underground gasoline tank which had been contaminated with water. The contents of the tank had been pumped out and disposed of in a stormwater drain and a sewer. Ahmad, the owner of the service station, claimed that he thought the substance being pumped out was water. The court in *Ahmad* concluded that violations of the Clean Water Act do not fall within the public welfare defence ambit¹¹⁶ and that the requirement of 'knowledge' applies to each element of the offence.¹¹⁷ There is some uncertainty as to whether *Ahmad* directly requires knowledge of the 'law',¹¹⁸ since the specific ground on which the appeal was allowed is that the court was concerned that the jury instructions in the court a quo suggested that the jury be satisfied only that the defendant had discharged 'something' in

¹¹³ Ibid.

¹¹⁴ *United States v Littlefield* 840 F.2d 143 (1st Cir) at 147, cert denied 488 US 860 (1988).

¹¹⁵ 101 F.3d 386 (5th Cir 1996).

¹¹⁶ At 391.

¹¹⁷ At 393.

¹¹⁸ Andrew J Turner 'Mens rea in environmental crime prosecutions: *Ignorantia juris* and the white collar criminal' (1998) 23 *Columbia J of Environmental Law* 217 at 229.

order to be convicted. The decision in *Ahmad* clearly, therefore, allows a mistake of fact defence.

Not long afterwards, *United States v Sinskey*,¹¹⁹ followed *Weitzenhoff* and *Hopkins* in excluding the defence of mistake of law in a Clean Water Act violation, distinguishing *Ahmad* on the basis that the latter dealt with mistake of fact. This position was confirmed in *United States v Wilson*,¹²⁰ where the court specified the degree of factual knowledge required for conviction:

‘the court held that the government must prove a defendant’s knowledge of the “operative” facts meeting each essential element of the substantive offense, “but need not prove that the defendant know his conduct to be illegal”’.¹²¹

Further explaining this, the court stated that the ‘government need not prove that the defendants understood the legal consequences of those acts or were ever aware of the existence of the law granting them significance’.¹²²

In summary, therefore, four different courts of appeal have come out clearly in rejection of the mistake of law defence for Clean Water Act violations involving a ‘knowing’ requirement, while one (*Ahmad*) is somewhat less than clear on this but seems to have decided on the basis of mistake of fact.

8 Strict Liability in Australia

In Australia, the High Court of Australia in the 1941 case *Proudman v Dayman*¹²³ held that ‘[a]s a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant’s act innocent affords an excuse for doing what would

¹¹⁹ 119 F.3d 712 (8th Cir 1997).

¹²⁰ 1997 WL 785530 at 1 (4th Cir 1997).

¹²¹ Turner op cit at 234, quoting *Wilson* (supra) at 11.

¹²² *Wilson* at 264.

¹²³ (1941) 67 CLR 536.

otherwise be an offence'.¹²⁴ The Court also, apparently, held that there is an evidential burden of establishing this defence on the defendant.¹²⁵

Several years later, in *R v Kennedy*,¹²⁶ the Supreme Court of Victoria was concerned with a statutory provision imposing strict liability for removing a girl under the age of 18 years out of the possession and against the will of the person having lawful charge of her with intent that she should be carnally known. The court decided that the offence will be committed whether or not the accused knew that taking the girl was or might be against the custodian's will, 'and even if the accused reasonably believed that the taking was not against the will of the custodian'.¹²⁷ In other words, the court was excluding the possibility of the defence of honest and reasonable mistake of fact.

This decision has most probably¹²⁸ been overruled by the case of *He Kaw Teh v R*.¹²⁹ The court was unanimous that proof of honest and reasonable mistake of fact did not have to be satisfied by the accused on a balance of probabilities, but that he or she bears only an evidential burden. The majority of the court, Wilson J dissenting, held that statutes providing for serious offences should not be read as dispensing with the requirement of mens rea, in accordance with the traditional common law approach. Gibbs CJ held that

¹²⁴ At 540.

¹²⁵ The wording used by the court is somewhat ambiguous: 'The burden of establishing honest and reasonable mistake of fact is in the first place upon the defendant and he must make it appear that he had reasonable grounds for believing in the existence of a state of facts, which, if true, would take his act outside the operation of the enactment and that on those grounds he did so believe. The burden possibly may not finally rest upon him of satisfying the tribunal in case of doubt'. See L Waller & CR Williams *Brett, Waller & Williams Criminal Law: Text and Cases* 6 ed (1989) at 702-3. See also *He Kaw Teh v R* (1985) 157 CLR 523 at 535, where Gibbs CJ describes the statement as 'somewhat equivocal'.

¹²⁶ [1981] VR 565.

¹²⁷ At 560.

¹²⁸ Waller & Williams op cit state that the authority of *Kennedy* 'has been severely affected' by the decision in *He Kaw Teh* (at 678) and also that the status of *Kennedy*, in the light of *He Kaw Teh*, 'must now be regarded as uncertain' (at 699).

¹²⁹ (1985) 60 ALR 449.

the ‘gravity of the offence suggests that guilty knowledge was intended to be an element of it’.¹³⁰

In the environmental law sphere, in New South Wales, the Protection of the Environment Operations Act of 1997 contains a three-tier system of offences.¹³¹ This is essentially the same system that was provided for by the Act’s forerunner, the Environmental Offences and Penalties Act 1989. Tier One offences¹³² are those which require fault in the form of intention or negligence, and for which the defendant can raise a defence of showing that the commission of the offence was due to causes over which the person had no control, and that the person took reasonable precautions and exercised due diligence to prevent the commission of the offence.¹³³ In the New South Wales context, then, the defence of due diligence applies to offences requiring mens rea, not to strict liability offences.¹³⁴

Tier two offences are offences for which strict liability is applied, giving the defendant the opportunity of raising the defence of honest and reasonable mistake of fact.¹³⁵ By way of contrast, in *Allen v United Carpet Mills (Pty) Ltd*,¹³⁶ the Victorian Supreme Court held that s 39(1) of the Environment Protection Act of 1970, prohibiting pollution of water, imposed absolute liability and therefore the defence of honest and reasonable mistake of fact was not available. In New South Wales, however, the strict liability standard applies.¹³⁷

¹³⁰ At 537.

¹³¹ Section 114.

¹³² Sections 115-119.

¹³³ Section 118.

¹³⁴ See Peter Lowe ‘A comparative analysis of Australian and Canadian approaches to the defence of due diligence’ (1997) *Environmental and Planning LJ* 102.

¹³⁵ Tier three offences are also strict liability offences but these are imposed by way of ‘penalty notices’ rather than by means of prosecution in court.

¹³⁶ [1989] VR 323.

¹³⁷ *SPCC v Tiger Nominees Pty Ltd* (1991) 72 LGRA 337 at 342. See also Zada Lipman & Lachlan Roots ‘Protecting the environment through criminal sanctions: The Environmental Offences and Penalties Act 1989 (NSW)’ (1995) 12 *Environment and Planning LJ* 16 at 22-3. Although both the case and the article deal with the 1989 Act, the principle applies equally to the 1997 Act.

9 Strict Liability in New Zealand

New Zealand's approach to strict liability follows that set out in the Canadian case of *Sault Ste. Marie*.¹³⁸ The New Zealand Court of Appeal followed this approach first in *Civil Aviation Department v MacKenzie*¹³⁹ and then in *Millar v Minister of Transport*.¹⁴⁰ Following *Millar*, the strict liability position in New Zealand would appear to be that there are two very similar approaches. The first may be called the *Strawbridge* approach, after the decision in *R v Strawbridge*.¹⁴¹ This entails an assumption of mens rea in the absence of any evidence to the contrary, but allows the accused to raise the defence of honest belief in facts that would make the act lawful plus some evidence or basis for thinking that it was on reasonable grounds.¹⁴² If such evidence is raised, then the onus falls on the prosecution to disprove honest belief on reasonable grounds. This, therefore, amounts to an evidentiary burden.

The second approach is similar except that it admits of the defence of 'total absence of fault',¹⁴³ proof of which rests on the accused on a balance of probabilities. The onus of proof is more burdensome (as far as the accused is concerned) than in the *Strawbridge* approach.

The New Zealand courts have also recognised the possibility of absolute liability offences, where proof beyond reasonable doubt is sufficient to convict the accused and even absence of fault is no defence.¹⁴⁴ The court in *Millar* expressed its doubts about the usefulness of absolute liability, but did not abolish it.¹⁴⁵

¹³⁸ AP Simester & Warren J Brookbanks *Principles of Criminal Law* (1998) at 125.

¹³⁹ [1983] NZLR 78.

¹⁴⁰ [1986] 1 NZLR 660.

¹⁴¹ [1970] NZLR 909 (CA).

¹⁴² *Millar* at 665 (judgment of Cooke P, Richardson J concurring).

¹⁴³ At 668.

¹⁴⁴ Simester & Brookbanks op cit at 130. See *Millar* at 666.

¹⁴⁵ At 668, Cooke P stated, 'there is a good deal less room for ... absolute liability, once it is accepted that [strict liability] is an available alternative under which onus is on the defendant or proving total absence of fault'.

Strict liability cases, according to the Court of Appeal, would arise in those cases where the provision creating the offence is ‘directed at conduct having a tendency to endanger the public or sections of the public’.¹⁴⁶ The court expressly gives as an example the discharging of waste into natural water.

New Zealand environmental legislation contains several strict liability offences. Firstly, in the Conservation Act of 1987, which provides for the conservation of New Zealand's natural and historic resources and the establishment of a Department of Conservation, strict liability for offences is imposed, but a defendant may be relieved of liability upon proof, on a balance of probabilities, that there was no intention to commit the offence and reasonable steps were taken to avoid its commission.¹⁴⁷ This accords with the approach set out in *Millar*.

Then, in terms of the Resource Management Act of 1991, there is a penal regime providing for a maximum penalty of two years’ imprisonment or a fine not exceeding \$ 200,000, with an additional maximum daily fine of \$ 10,000 possible for continuing offences.¹⁴⁸ Section 338(1) provides that every person commits an offence against the Resource Management Act who contravenes, or permits a contravention of, the provisions imposing duties and restrictions in relation to land, subdivision, the coastal marine area, the beds of certain rivers and lakes, water, and discharges of contaminants. Under section 339(1), unauthorized development, contrary to a district plan or a resource consent, as described in section 338(1), will trigger the maximum penalties specified by the Act. Section 341 provides that section 338(1) offences (relating to the development of land contrary to a district plan or a resource consent) are strict liability offences. The Act provides that the defendant can escape liability by establishing, on a balance of probabilities, –

(a) That –

¹⁴⁶ At 669.

¹⁴⁷ John R Billington ‘Developments in criminal law and criminal justice: Recent New Zealand efforts to combat environmental crime’ (1995) 6 *Criminal Law Forum* 389 at 398.

¹⁴⁸ Resource Management Act (1991) s 339(1).

- (i) The action or event to which the prosecution relates was necessary for the purposes of saving or protecting life or health, or preventing serious damage to property or avoiding an actual or likely adverse effect on the environment; and
 - (ii) The conduct of the defendant was reasonable in the circumstances; and
 - (iii) The effects of the action or event were adequately mitigated or remedied by the defendant after it occurred; or
- (b) That the action or event to which the prosecution relates was due to an event beyond the control of the defendant, including natural disaster, mechanical failure, or sabotage, and in each case either –
- (i) The action or event could not reasonably have been foreseen or been provided against by the defendant; and
 - (ii) The effects of the action or event were adequately mitigated or remedied by the defendant after it occurred.¹⁴⁹

The explicit provision for these defences in the Act suggest that the specified defences replace the ‘no fault’ defence established in *Millar*, rendering those acts subject to s 341 more in the nature of absolute liability offences, except for the defences provided for.¹⁵⁰ Offences other than those referred to in s 341 are, according to Grinlinton,¹⁵¹ ‘in the nature of traditional strict liability public regulatory offences’, thus attracting the ‘absence of fault’ defence in *Millar*. This is apparently true even of the offences for which imprisonment can be imposed under the Act.¹⁵²

In *McKnight v NZ Biogas Industries Ltd*,¹⁵³ the Court of Appeal held that section 341 did not require proof of mens rea. Also of interest, on remission of the case back to the District Court,¹⁵⁴ was the latter Court’s decision in respect of the defence in section 341(2)(b). Not only did the Court affirm that all three elements must be satisfied for the defence to be successful, the unsuccessful application of the defence to the facts of the

¹⁴⁹ Section 341(2).

¹⁵⁰ See David Grinlinton ‘Liability for environmental harm in New Zealand’ (1997) 5 *Environmental Liability* 106 at 110.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ (1994) 2 NZLR 664.

¹⁵⁴ *Auckland Regional Authority v NZ Biogas Industries Ltd* unreported District Court CRN 2048024848-49, 6 July 1994.

case illustrates the limited circumstances in which the defences will be available. According to Phillipson –

‘These decisions are important because they operate to exclude the availability of any common law notions of due diligence. ... Given the fact that all three elements of the defence need to be satisfied it is clear that the mere exercise of what is traditionally understood as “due diligence” will not be sufficient to avoid prosecution’.¹⁵⁵

10 Assessment

What can be seen from the above analysis is that, although there is broad similarity in the approaches of the countries considered, the detail differs, often significantly. There are differences in how the courts decide that offences are strict liability offences (and, in this respect, the United States courts’ approach in deciding that statutes creating ‘knowing’ offences do not allow the defence of mistake of law is unique in the countries examined); in the defences available, and in how the burden of proof is situated. Interestingly, South Africa probably has the strictest approach to strict liability offences, particularly in respect of the reversal of the onus.

In order to consider the proper role of strict liability in environmental offences, let us consider some examples of environmental offences and how strict liability would improve the chances of conviction. These examples are based on South Africa’s National Water Act.¹⁵⁶ Note that the wording of the National Water Act, particularly in the general pollution prohibition in section 151(1), clearly requires mens rea and cannot be interpreted as allowing strict liability. It is used in the examples simply to illustrate what the consequences could be if it did provide for strict liability.

Example 1. The facts are similar to those in the US case of *Weitzenhoff*. The manager of a sewage works instructs certain employees to pump untreated waste directly into a river under cover of darkness, to disconnect and put away the pumps before morning, and not

¹⁵⁵ Martin Phillipson ‘Enforcement of environmental law: New Zealand’s statutory model’ (1995) 12 *Environmental and Planning LJ* 308 at 314.

¹⁵⁶ Act 36 of 1998.

to tell anybody about what they are doing. This is the classic ‘midnight dumper’ scenario.

According to the National Water Act, no person may (i) unlawfully and intentionally or negligently commit any act or omission which pollutes or is likely to pollute a water resource; and/or (ii) unlawfully and intentionally or negligently commit any act or omission which detrimentally affects or is likely to affect a water resource.¹⁵⁷ Assuming that the facts can be proven, a court would have no difficulty in inferring intention from the facts. Any suggestion that the accused was ignorant of the law would be regarded as highly unlikely due to the fact that the accused took steps to conceal what was being done. It would not be necessary to rely on strict liability in such a situation.

Moreover, given that the maximum penalty for such an offence can be severe¹⁵⁸ (and ought to be severe in such a case), the South African courts would have difficulty in accepting strict liability in this case. It would not fall within the type of cases the Constitutional Court considered might be suitable for strict liability in *Manamela*.¹⁵⁹

Example 2. A factory openly disposes of a large amount of untreated effluent into a stormwater drain. This drain feeds into a stream and aquatic life in the stream is harmed by the discharge. The factory manager claims to be ignorant of the prohibited nature of the act. This differs from the first example in that there is no attempt to conceal the act, which (concealment) would strongly suggest knowledge of the law.

Once again, it is submitted, strict liability would be unnecessary in prosecuting this offence. The Act provides for negligence as sufficient mens rea and, measured against the reasonable factory manager, the manager in this example would probably be found to be negligent. Given the highly-regulated nature of factory operations, it would not be reasonable for the manager to assume that there was no regulation of effluent disposal.

¹⁵⁷ Section 151(1)(i) and (j) of the National Water Act 36 of 1998.

¹⁵⁸ According to Section 151(2), any person who contravenes any provision of s 151(1) is guilty of an offence and liable, on the first conviction, to a fine or imprisonment for a period not exceeding five years, or to both a fine and such imprisonment and, in the case of a second or subsequent conviction, to a fine or imprisonment for a period not exceeding ten years or to both a fine and such imprisonment.

¹⁵⁹ 2000 (3) SA 1 (CC). See discussion above at 54.

This also accords with the rule in *De Blom* relating to mistake of law. It is only where ignorance of the law is *reasonable* that a person may avail himself or herself of that defence and, in the circumstances of this example, ignorance would not be reasonable.

Example 3. A factory discharges effluent that is treated on its premises into a municipal sewer, which it has the necessary authority to do. The level of a certain substance in the effluent discharged on a particular occasion slightly exceeds the maximum level allowed in terms of the relevant municipal by-laws. A variation of this example is that the effluent is discharged directly into a river and the level exceeds the permissible level provided for by the general authorisation under section 39 of the National Water Act.¹⁶⁰ In neither example is any immediate harm caused by the discharge.

In such a case, it would be difficult for the prosecution to prove fault, particularly in the case where there is continuous emission and the factory does its own monitoring on a random sampling basis. This would be the typical ‘public welfare’ offence and strict liability might well be argued as a necessary device for the prosecution to secure a conviction for contravention of the law. But this begs the question – is it necessary to use the criminal law for this type of non-compliance? It is difficult to disagree with the view expressed by Findlay et al, when talking about absolute liability offences, but equally apposite to strict liability offences, that such offences ‘are (or should be) confined to trivial harms [yet] the criminal law should not be used to control such minor mischiefs’.¹⁶¹

The law does not completely prohibit emissions of waste water. This may be done, into sewers or into a water resource, provided that certain standards are met. The standards are absolute – there is no grey area. Enforcement of the law under such circumstances could effectively be exercised by means of some type of abatement notice

¹⁶⁰ GN R1191 GG 20526 8 October 1999: the general authorisation in question allows discharge of waste or water containing waste into a water resource (which includes a river) provided that the effluent meets the quality standards set out in the general authorisation. Any person who contravenes any provision of this authorisation is guilty of an offence and is subject to the penalty set out in section 151(2) of the National Water Act.

¹⁶¹ Mark Findlay, Stephen Odgers & Stanley Yeo *Australian Criminal Justice* 2 ed (1999) at 20.

procedure, whereby the offender is put on notice that there is non-compliance and that repetition (or repetition within a certain period of time) may well lead to criminal prosecution. In the event of another non-complying discharge, the inference of negligence on the part of the discharger would be difficult to rebut and a criminal prosecution would be possible on this basis.

Alternatively, given that criminal prosecution is unlikely to result in anything other than a relatively small fine, the same result could be achieved by means of imposition of some kind of administrative penalty, liability for which could be strict.¹⁶²

The point that these examples are supposed to illustrate is this. In the case of serious pollution offences, the facts would usually be such that proof of intention or negligence would not prove especially difficult. In any event, the possibility of imposition of severe penalties in such cases would almost certainly present constitutional impediments to the use of strict criminal liability. As far as less serious cases are concerned, where proof of fault may be more difficult, it is argued that there is no need to use criminal sanctions for such breaches. Alternatives to the criminal law can be used and strict civil liability can be used as the basis for the use of some alternatives.¹⁶³

On this point, Geneva Richardson has indicated that enforcement officers tend to reject strict liability 'in practice',¹⁶⁴ deciding to prosecute only those whom they regard as having fault. Nevertheless, according to Richardson, they favour the retention of strict liability since 'although the field staff may themselves be convinced that fault exists, they are happy to avoid having to establish it at trial'.¹⁶⁵ This argument in itself, however, cannot justify the use of strict liability, particularly where there is the suggested option of using alternative enforcement methods in borderline cases.

Finally, other than the considerations outlined above, there is another reason for the rejection of strict criminal liability. It is well expressed by Lazarus thus:

¹⁶² See discussion above, Chapter 8.

¹⁶³ *Prinsloo v van der Linde* 1997 (3) SA 1012 (CC).

¹⁶⁴ Geneva Richardson 'Strict liability for regulatory crime: The empirical research' (1987) *Criminal LR* 295 at 303.

¹⁶⁵ *Ibid.*

‘Environmental standards, unlike most traditional crimes, present questions of degree rather than kind. Murder, burglary, assault and embezzlement are simply unlawful. There is no threshold level below which such conduct is acceptable. In contrast, pollution is not unlawful per se: in many circumstances, some pollution is acceptable. It is only pollution that exceeds certain prescribed levels that is unlawful. But, for that very reason, the mens rea element should arguably be a more, not less, critical element in the prosecution of an environmental offence’.¹⁶⁶

11 Negligence v Strict Liability

One of the points argued in the preceding discussion is that negligence can be used as an alternative to strict liability (and is explicitly provided for as the requisite fault in several statutes, including the National Water Act, mentioned above). At first glance, there does not seem to be much difference between requiring fault in the form of negligence and strict liability allowing the defence of due diligence. In both cases, the crux of the matter will be whether the accused has taken reasonable steps to avoid the harm (or the commission of the offence). Strict liability allowing due diligence and negligence are not, however, the same thing. A significant difference is that the accused is required to prove due diligence under a strict liability provision,¹⁶⁷ whereas the state bears the onus, in proving negligence, of proving that the accused did not take the steps that were reasonable in the circumstances. Although this would sometimes be more difficult for the prosecution to discharge, it would be difficult to foresee the South African courts countenancing the reverse onus aspects of the due diligence defence in cases for which penalties could be severe. It might be allowed in cases where the penalties are minor (and where the infringements are relatively minor), but in such cases strict liability could be used in a non-criminal law context, as has been argued above.

¹⁶⁶ Richard Lazarus ‘Assimilating environmental protection into legal rules and the problem with environmental crime’ (1994) 27 *Loyola LA LR* 867 at 882.

¹⁶⁷ This is an issue of some controversy in Canada as to the extent of the onus borne by the defendant: see above at 320.

12 Conclusion

There is strong opposition from several quarters to the use of strict criminal liability.¹⁶⁸ In this Chapter, it has been argued that there is no need for the use of strict criminal liability in the prosecution of environmental offences. In serious offences, it ought not to be too difficult for the prosecution to prove fault, particularly where negligence is sufficient, as it often is in South African environmental statutes. In any event, the classic public welfare doctrine frowns upon the use of strict liability in cases where serious penalties may be applied. On the other hand, in less serious contraventions of the law, it has been argued that there is no compelling reason to use the criminal law and more imaginative use should be made of other modes of enforcement. There is no reason why there cannot be strict civil liability imposed by environmental statutes where fault would be difficult to prove.

South African environmental legislation currently does not make much use of strict criminal liability. At the same time, South African environmental legislation is currently very infrequently enforced by means of criminal sanctions, despite the fact that for most environmental statutes this is the primary mode of enforcement that is provided for. Many South African environmental statutes are currently being reformed, or new legislation is being designed to replace legislation that is regarded as being outdated. The temptation may arise, given the current weak enforcement of environmental statutes, to introduce strict criminal liability. The purpose of this Chapter is to recommend that this temptation be resisted.

¹⁶⁸ Burchell & Milton op cit 371-6; CR Snyman *Criminal Law* 2 ed (1989) at 248; Smith & Hogan (1992) op cit Chapter 6 esp at 122; Findlay, Rodgers & Yeo op cit at 20; Simester & Brookbanks op cit at 128-9; Graham Hughes 'Concept of crime' in Sanford H Kadish (ed) *Encyclopedia of Crime and Justice* Vol 1 (1983) at 299-300; Alan Norrie *Crime, Reason and History: A Critical Introduction to Criminal Law* (1993) at 94-5; Ontario Law Reform Commission *Report on the Basis of Liability for Provincial Offences* (1990) at 57-8, quoted in Stuart op cit at 244; Viljoen Commission *Report on the Penal System of the Republic of South Africa* (1976) at para 5.1.2.82.

Chapter 10

Vicarious Liability for Environmental Offences

Although vicarious liability has an important role to play in delict/tort, most commentators are unanimous in criticising the use of vicarious criminal liability, for essentially the same reasons as strict liability is criticised – that an individual may be held liable without fault. Nevertheless, vicarious liability is often used in public welfare legislation (including environmental legislation) in order to ensure that the implementation of such legislation is not ‘hindered by masters or employers evading their duties and responsibilities by hiding behind the sins and omissions of their servants or employees’.¹

The position as regards vicarious liability for environmental offences in the various countries under examination in this Chapter is as follows.

1 South Africa

The general common law rule is that no person is liable for the crime of another unless he or she authorised or procured its commission or took part in it.² Vicarious liability, however, may be imposed by statute.

In environmental legislation, the analysis in Chapters 4-6 reveals that express vicarious liability is provided for in a number of statutes.³ The provisions are all relatively similar, so it will not be necessary to examine all in detail. Two recent

¹ JM Burchell & JRL Milton *Principles of Criminal Law* 2 ed (1997) at 380.

² Ibid.

³ Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947 s 22; Hazardous Substances Act 15 of 1973 s 16; Dumping at Sea Control Act 73 of 1980 s 2(3); Occupational Health and Safety Act 85 of 1993 s 37; Water Services Act 108 of 1997 s 82(3); National Water Act 36 of 1998 s 154; National Environmental Management Act 107 of 1998 s 34(5)-(6).

provisions, somewhat different from each other, will be considered as typical examples of statutory vicarious liability provisions.

In the National Water Act, section 154(a) provides whenever an act or omission by an employee or agent constitutes an offence in terms of the Act, and takes place with the express or implied permission of the employer or principal, as the case may be, the employer or principal, as the case may be, is, in addition to the employee or agent, liable to conviction for that offence. For this provision, it is incumbent on the prosecution to prove express or implied permission of the employer or principal, so the vicarious liability imposed under this statute does require some degree of fault on the part of the principal. This does not seem to be an unreasonable invasion of the rights of the employer or principal. Moreover, since the accused does not bear the onus of proving anything (in other words, there is no reverse onus provision), the provision does not raise the constitutionally unacceptable spectre of conviction despite reasonable doubt.

The vicarious liability imposed by the National Environmental Management Act, however, is probably also safe from constitutional challenge. Section 34(5) provides –

Whenever any manager, agent or employee does or omits to do an act which it had been his or her task to do or to refrain from doing on behalf of the employer and which would be an offence under any provision listed in Schedule 3 for the employer to do or omit to do, and the act or omission of the manager, agent or employee occurred because the employer failed to take all reasonable steps to prevent the act or omission in question, then the employer shall be guilty of the said offence and, save that no penalty other than a fine may be imposed if a conviction is based on this sub-section, liable on conviction to the penalty specified in the relevant law, ... and proof of such act or omission by a manager, agent or employee shall constitute *prima facie* evidence that the employer is guilty under this subsection.

This provision, which relates to a number of environmental offences under various statutes,⁴ provides for vicarious liability of an employer if the latter failed to take all reasonable steps to prevent the act or omission in question. The accused employer will be required to raise evidence that he or she did take steps to prevent the offence in order to rebut the provision's evidential burden, following which it will be required of the state to prove, beyond reasonable doubt, that the steps taken were not all the reasonable steps

⁴ All those listed in Schedule 3 to the Act.

that could have been taken. This means that the accused employer will not be convicted despite there being reasonable doubt, so the right to a fair trial will not be contravened. Since the provision provides only for punishment of the employer by means of fine, the question of infringement of the right to freedom does not arise.

Despite the probable constitutional acceptability of these provisions, there are two issues that should be considered concerning the imposition of vicarious criminal liability. The first is whether it is necessary. The second, related to the first, is whether the objectives of the provisions discussed above are adequately served by the way these provisions have been drafted. These issues will be considered in the evaluation of vicarious liability carried out after consideration of the approaches adopted in other countries.

2 United Kingdom

Under common law, vicarious liability did not apply since the guiding principle was that a master could not be liable for the criminal acts of his or her servant.⁵ There were two exceptions: public nuisance and criminal libel. Vicarious liability may, however, be imposed expressly or impliedly by statute. Vicarious liability will usually be implied where the duty in question is one which is carried out by a servant or other person having responsibility.

In terms of the 'delegation principle', a person may be held vicariously liable where he or she has delegated the performance of statutory duties to that person. This principle applies in cases requiring mens rea. In *Vane v Yiannopoulos*,⁶ the court held, on the facts, that there was no delegation and the accused (a restaurant licensee) was acquitted because he had no knowledge of the offence. In contrast, the decision in *Allen v Whitehead*⁷ was that the accused, the occupier of a café, was liable because he had delegated managerial responsibility for the café to a manager.

⁵ *R v Huggins* (1730) 2 Stra 883.

⁶ [1965] AC 486 (HL).

⁷ [1930] 1 KB 211.

It has been suggested, correctly it is submitted, that the difference between the two cases suggests that vicarious liability will depend on the ‘real and effective delegation of powers and the corresponding duties, such that the activity delegated is under the exclusive control of the delegate, free from the principal’s supervision’.⁸

3 Australia

Australia shares the English common law position, so the discussion above is applicable also to Australia.

In the environmental sphere, several decisions in New South Wales have supported the imposition of vicarious liability for environmental offences. Although these cases deal with repealed legislation,⁹ it is submitted that the decisions will be relevant to the current legislation¹⁰ due to the similarity in the relevant provisions. Despite an early decision¹¹ against vicarious liability for Tier Two offences,¹² in *Tiger Nominees Pty Ltd v SPCC*,¹³ the Court of Criminal Appeal decided that vicarious liability did apply to section 16 of the Clean Water Act (a Tier Two offence, the current equivalent of which is section 120 of the Protection of the Environment Operations Act 1997), provided that the employee was acting within the course of his or her employment.¹⁴

A closely related issue which has also had judicial consideration in New South Wales is whether vicarious liability can be imposed for the acts of independent contractors and their employees. In *SPCC v Australian Iron & Steel Ltd*,¹⁵ the Court decided that the defendant company was vicariously liable for the acts of the employees of an independent contractor as the defendant ‘exercised or purported to exercise detailed control over the

⁸ AP Simester & Warren J Brookbanks *Principles of Criminal Law* (1998) at 181.

⁹ Environmental Offences and Penalties Act 1989.

¹⁰ Protection of the Environment Operations Act 1997.

¹¹ *SPCC v Blue Mountains City Council (No 2)* (1991) 73 LGRA 337.

¹² These are offences for which a strict liability standard applies: see discussion above at 330.

¹³ (1992) 25 NSWLR 715.

¹⁴ At 720.

¹⁵ (1992) 74 LGRA 387.

manner of the doing of the work' by the employees of the contractor.¹⁶ In a second case, although the defendant was acquitted, the Court in *EPA v Snowy Mountains Engineering Corp Ltd*¹⁷ held that the acts of independent contractors would make persons who contract with them vicariously criminally liable, provided that the element of 'sufficient control' could be established. Despite these decisions, however, it has been suggested that, in most cases, it is unlikely that the test of sufficient control will be satisfied, since this will usually be excluded by the terms of the contract.¹⁸

4 New Zealand

The common law relating to vicarious liability is the English law. Vicarious liability may be established either by the 'delegation' principle or the 'scope of employment principle'. In the case of the former, the principles outlined above apply.

In the case of the 'scope of employment' principle, this applies to strict and absolute liability offences. Under this principle, the principal is liable for the conduct of a person who has been authorised to do the type of act involved in the offence. The reason for liability is that the servant's physical acts are regarded in law as the principal's acts. This principle applies only where the servant acts within the scope of his or her employment and the authority conferred.

Vicarious liability in New Zealand environmental law is imposed by the same section which imposes corporate liability.¹⁹ s 340 provides that where an offence is committed by an agent or employee, the principal is *prima facie* liable as if it had 'personally committed the offence'. Liability may be avoided if the principal can show that he or she did not know or could not reasonably have been expected to know that the offence was to be or

¹⁶ At 394.

¹⁷ (1994) 83 LGERA 51.

¹⁸ Zada Lipman & Lachlan Roots 'Protecting the environment through criminal sanctions: The Environmental Offences and Penalties Act 1989 (NSW)' (1995) 12 *Environmental and Planning LJ* 16 at 24.

¹⁹ Section 340. See Chapter 11 §1.4.

had been committed or that they took reasonable steps to prevent its commission.²⁰ In addition, the defendant must have taken all reasonable steps to remedy the effects of the offence.²¹

5 Canada

In short, the position in Canada is that vicarious liability is found in some legislative provisions, but the courts 'are becoming increasingly resistant to the doctrine even when it is resorted to by a legislature'.²² The reason for this is the fact that vicarious liability militates against the fundamental principles of criminal law requiring an individual act and individual fault.

In *R v Canadian Dredge & Dock Co Ltd*,²³ the Canadian Supreme Court expressly rejected a vicarious liability alternative to the 'directing mind and will' theory of corporate liability which was confirmed in the case. The Court, per Estey J, stated –

'In the criminal law, a natural person is responsible only for those crimes in which he is the primary actor either actually or by express or implied authorization. There is no vicarious liability in the pure sense in the case of the natural person. That is to say that the doctrine of *respondeat superior* is unknown in the criminal law where the defendant is an individual'.²⁴

In another important decision, the Ontario Court of Appeal rejected vicarious criminal liability in *R v Stevanovich*,²⁵ indicating that 'statutory intervention' is required to attach vicarious criminal liability.

Although the Supreme Court has yet to rule on the constitutionality of vicarious criminal liability, it is unlikely that it would survive. In two state Courts of Appeal,²⁶ vicarious liability provisions have been struck down as contrary to the principle of

²⁰ Section 340(2)(a) and (b).

²¹ Section 340(2)(c).

²² Don Stuart *Canadian Criminal Law* 3 ed (1995) at 575.

²³ (1985) 45 CR (3d) 289 (CC).

²⁴ At 311.

²⁵ (1983) 36 CR (3d) 174 (Ont CA).

²⁶ *R v Burt* (1987) 60 CR (3d) 372 (Sask CA); *R v Pellerin* (1989) 67 CR (3d) 305 (Ont CA).

fundamental justice in section 7 of the Charter.²⁷ According to Stuart, although it is conceivable that some forms of statutory vicarious liability could be saved as a reasonable limitation of Charter rights, ‘most instances of statutory vicarious liability are potentially unjust and should be struck down’.²⁸

6 United States of America

In the United States, vicarious criminal liability can be imposed by statute, but seemingly not in cases where imprisonment could be imposed.²⁹ The Supreme Court has not expressly considered the issue of vicarious criminal liability, but in *United States v Park*,³⁰ the Court upheld the conviction of the president of a corporation who had a ‘responsible relation’ to the corporate conduct and who did not show that he was ‘powerless’ to prevent the violation. This, however, is not true vicarious liability and does involve a measure of fault on the part of the defendant.

7 Evaluation

In considering the necessity of criminal vicarious liability provisions in environmental legislation, it must first be pointed out that the idea under consideration here is vicarious liability other than that which may be imposed on a corporation for the acts of its officers or agents. That is discussed in the following Chapter. The concept relevant to this analysis is the liability of an employer for the acts of his or her employee, manager or agent. Related to this, and something which should also be considered here, is whether there should be vicarious criminal liability for the acts of independent contractors and their employees.

²⁷ This provision reads: ‘Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice’.

²⁸ Stuart op cit at 574.

²⁹ *Commonwealth v Koczvara* 397 Pa 575, 155 A 2d 825 (1959).

³⁰ 421 US 658 (1975).

As a starting point, it should be stressed that vicarious criminal liability is universally rejected from a common law position due to the perceived injustice of visiting an employee's sins onto the employer where the latter has not done anything wrong. In the legislation that imposes vicarious liability in several jurisdictions, the type of liability imposed is something less than vicarious liability that applies automatically if the employee is acting in the course and scope of employment, because it requires some sort of control or absence of due diligence on the part of the employer. In determining the desirability of vicarious liability and how best to provide for it in environmental legislation if it is desirable, it is first necessary to consider what its objective is.

As pointed out at the beginning of this Chapter, vicarious liability is aimed at ensuring that the implementation of legislation is not 'hindered by masters or employers evading their duties and responsibilities by hiding behind the sins and omissions of their servants or employees'.³¹ This, it is submitted, is a legitimate aim. But can it be secured by means other than vicarious liability?

In answering this question, let us return to consideration of section 34(5) of the (South African) National Environmental Management Act. It has been argued that this provision is probably free from constitutional doubt, but it is difficult to express that view with certainty and the possibility of constitutional challenge cannot be absolutely discounted. Another comment is that the way the provision has been worded, requiring the prosecution to show that 'the act or omission of the manager, agent or employee occurred *because* the employer failed to take all reasonable steps to prevent the act or omission in question' may present difficulties of proof for the state, thereby undermining the objective of the provision, which is that outlined above.

The overall impression created by section 34(5) is that it is somewhat 'messy', and it is suggested that the same objective could be achieved by using *primary* liability instead of vicarious liability. The Ontario (Canada) Environmental Protection Act provides in section 194:

- (1) Every director or officer of a corporation that engages in an activity that may result in the discharge of a contaminant into the natural environment contrary to this Act or the regulations

³¹ JM Burchell & JRL Milton *Principles of Criminal Law* 2 ed (1997) at 380.

has a duty to take all reasonable care to prevent the corporation from causing or permitting such unlawful discharge.

(2) Every person who has a duty under subsection (1) and who fails to carry out that duty is guilty of an offence.

(3) A director or officer of a corporation is liable to conviction under this section whether or not the corporation has been prosecuted or convicted.³²

The idea behind this provision could be adapted to cater for the vicarious liability scenario in section 34(5), as follows:

(1) Where an employer is bound by any provision listed in Schedule 3, he or she has a duty to take all reasonable care to prevent any manager, agent or employee from contravening such provision.

(2) Every person who has a duty under subsection (1) and who fails to carry out that duty is guilty of an offence.

(3) An employer is liable to conviction under this section whether or not his or her manager, agent or employee has been prosecuted or convicted for the contravention of the provision referred to in subsection (1).

It is submitted that this has the same effect as section 34(5), without some of the possible drawbacks of that section. First, since it imposes primary liability there is no question of constitutional invalidity. In *S v Coetzee*,³³ Langa J indicated that the 'Legislature is, in my view, fully entitled to place a positive duty on directors and to make the omission to discharge the duty an offence'.³⁴ There is no reason why the same would not apply for employers. The second benefit of this approach is that the onus of proof rests firmly on the state throughout, so there is no problem with infringement of the right to a fair trial. Third, it is probably easier for the state to prove contravention of the suggested provision rather than the requirement of showing that 'the act or omission of the manager, agent or employee occurred *because* the employer failed to take all reasonable steps to prevent the act or omission in question'.

³² See also the Ontario Water Resources Act RSO 1990 s 116 which is similar.

³³ 1997 (3) SA 527 (CC).

³⁴ At para [46].

Another benefit of the provision is that the duty can cover the acts of independent contractors. It is important for environmental legislation to take into account the potential involvement of independent contractors in environmental harm. Burchell and Milton's comments about employers hiding behind the sins of their employees³⁵ are equally apposite to the situation involving principal and agent in the independent contractor scenario. In New South Wales, Australia, vicarious liability has been imposed in cases where there has been sufficient control by a principal over the activities of the independent contractors. The provision proposed does not necessitate showing such control, but merely that the principal should have taken reasonable care to ensure that the contractor does not infringe the law.

In conclusion, while the objective of vicarious criminal liability in the context of environmental legislation is sound, these objectives can be adequately achieved by means of primary liability. Since there are problems with vicarious liability, the alternative of primary liability is to be preferred.

³⁵ JM Burchell & JRL Milton *Principles of Criminal Law* 2 ed (1997) at 380.

Chapter 11

Corporate Liability for Environmental Offences

Corporate entities¹ are a major focus of environmental law and discussion about environmental liability for a number of reasons:

- ‘(a) they are major sources of environmental degradation, although by no means the only sources;
- (b) they wield extensive economic and political power;
- (c) larger corporations commit a disproportionate number of violations of the law;
- (d) corporations handle the most dangerous types of pollutants – individuals rarely have the resources or the need to handle heavy metals, radioactive waste or chemical residues;
- (e) the environmental degradation which corporations cause is relatively concentrates and large in scale compared to the activities of individuals; as a result, corporate activity is more likely to overwhelm natural equilibria;
- (f) corporations have very extensive resources with which to reduce pollution, resources which they have accumulated in part by using up clean air, clean water and other public goods; and
- (g) the localization and scale of corporate pollution typically make it easier to control than the equivalent amount of pollution from individuals’.²

Although some of these factors may differ in degree in different parts of the world, overall they show that any approach to enforcement of environmental law needs to encompass an approach to dealing with corporate offenders. Corporate criminal liability entails two interrelated ideas: first, the liability of the corporation itself and, second, the liability of the individual persons (directors, managers or similar) who are responsible for the activities of the corporation. These persons will be referred to in this Chapter as ‘controlling officers’.³

There is one further issue that will be dealt with in this Chapter. This is the question of the use of environmental audit data collected by the corporation itself in criminal

¹ In this chapter, the term ‘corporations’ will be used to denote all types of corporate entities unless the context suggests otherwise.

² Diane Saxe *Environmental Offences: Corporate Responsibility and Executive Liability* (1990) at 21.

³ This is the term used in the English draft Criminal Code Bill. See JC Smith *Smith & Hogan Criminal Law: Cases and Materials* 7 ed (1999) at 2.

prosecutions of the company for environmental violations. This raises important questions relating to the right against self-incrimination, and is an issue that has received significant judicial and academic attention in the environmental sphere in other countries.

The question of effective sanctions for corporate offenders is also one that has received considerable attention. This is not discussed in this Chapter, however, but is covered in Chapter 12.

Each of these issues will now be dealt with in turn.

1 Corporate Liability for Environmental Offences

Historically, criminal law has been concerned with the unlawful conduct of individual humans, and, in general, this is reflected in the current general principles of criminal law. However, since corporations in the modern era are capable of causing (and do in fact cause) significant social harm (including harm to the environment, as discussed above) it has been seen to become necessary to impose criminal liability on corporate bodies for acts ‘carried out’ by those bodies. This has not been an easy task, since the general principles of criminal law do not fit easily with the concept of corporate crime. As Alan Norrie correctly suggests, consideration of how the criminal law ought to deal with corporate criminality

‘immediately faces two inherent problems ... The first is that the criminal law was *in its form* developed to deal with individuals, not forms of social organisation such as the corporation, so that its categories are unadapted to the particular ways in which corporations arrange their activities. The second, tied to the first, is that the criminal law ideologically was never thought to be an appropriate mechanism for dealing with “respectable” corporate criminals. On both a political-ideological and a formal juridical level, corporate criminality and the standard categories of the criminal law do not fit. Yet, measured in the same scales, the wrongs that corporations do are every bit as deadly, and often more so, than those done by individuals, and there appears to be an increase in social awareness of this. The law’s responses to corporate deviance are caught in this tension between a need to act and a historical and ideological tendency, instantiated through the legal categories themselves, not to’.⁴

⁴ Alan Norrie *Crime, Reason and History: A Critical Introduction to Criminal Law* (1993) at 85.

Although Norrie's observation applies particularly to corporate crime (ie crime committed by the corporation), it is apposite too to the concept of imposing liability on controlling officers, who do not comply with society's criminal stereotype. Such liability, the liability of the 'white collar' criminal, is discussed later. What is of immediate concern is how the law responds to offences carried out by corporate organisations, which Reasons has defined as –

'illegal acts of omission or commission engaged in by corporate organisations themselves as social or legal entities, or by officials or employees of the corporation acting in accordance with the operative goals, or standard operating procedures and cultural norms of the organisation intended to benefit the corporation itself'.⁵

The dilemmas with using criminal law principles designed for individual wrongdoers to hold corporations liable have led to different approaches being adopted to corporate criminal liability as indicated by the ensuing comparative analysis.

1.1 *South Africa*

Criminal liability of corporations and controlling officers in South Africa is governed by legislation rather than common law. Section 332(1) of the Criminal Procedure Act⁶ provides as follows –

'for the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law –

- (a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and
- (b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body, in the exercise of his powers or in the performance of his duties as such director or servant, or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body, or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body'.

⁵ C Reasons 'Crimes against the environment: Some theoretical and practical concerns' (1991) 34 *Criminal LQ* 86 at 88.

⁶ Act 51 of 1977.

This subsection imputes the fault of its directors or servants on the corporation, rather than making the company vicariously liable for the crimes of its directors or servants.⁷ The principal distinction between the liability imposed by s 332(1) and vicarious liability is that this section imposes liability in cases where the director or servant acts beyond his or her powers or duties but while ‘furthering or endeavouring to further the interests of’ the corporation. Vicarious liability applies only to cases where the servant is acting within the course and scope of his or her employment.

A feature of this provision worthy of note, when compared with the position in other countries discussed below, is that the acts of individual persons attributed to the corporation are not only those of the ‘controlling officers’ of the corporation, but include the acts of servants as well. While ‘servants’ is not defined in the Act, ‘director’ is defined in s 332 in relation to a corporate body as ‘any person who controls or governs that corporate body or who is a member of a body or group of persons which controls or governs that corporate body or, where there is no such body or group, who is a member of that corporate body’.⁸

Finally, it remains to consider whether section 332(1) is constitutional.⁹ Clearly, if it related to individuals it would not be, since it imputes liability to the corporation without giving the latter any opportunity of raising a defence. This would probably be an infringement of the right to freedom in the Constitution if applied to an individual.¹⁰

But is the situation different as regards corporations? According to the Constitution, a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.¹¹ Whether the fact that a corporation cannot be imprisoned would be material to the question of infringement of the right to freedom in section 12 of the Bill of Right is not clear. What is clear, however, is that section 332(1) permits conviction of the corporation without fault

⁷ See JM Burchell & JRL Milton *Principles of Criminal law* 2 ed (1997) at 386.

⁸ Section 332(10).

⁹ See MP Larkin & Julia Boltar ‘Company Law’ in (1997) *Annual Survey of South African Law* 403 at 435.

¹⁰ See *S v Coetzee* 1997 (3) SA 527 (CC) at 551, 567-574, 592-599.

¹¹ Section 8(4) of Act 108 of 1996.

(whatever that might be in the corporate context) since imputation of the agent's act falls automatically upon the corporation. There is, therefore, a real possibility that section 332(1) might be regarded as infringing section 12 of the Constitution if challenged. That would mean that it would have to rely on the limitations clause for its salvation. In the light of the fact that corporate liability could be provided for by other means (see the proposal mooted below),¹² it is quite possible that this section could fail the limitations test and consequently be declared invalid.

1.2 *United Kingdom*

In the United Kingdom, the position is similar to that in South Africa. A corporation is liable on the basis of an act in the corporation's business by those officers who control the affairs of the corporation ('controlling officers') and the intention with which the act was done. The act and the intention are deemed to be the act and intention of the company itself.¹³ This is different from vicarious liability, where the corporation is not deemed to have committed the act but is held liable for the acts of its employee. To look at the situation somewhat differently, the controlling officer is regarded *as being* the company for purposes of criminal liability. This is known as the 'identification' or 'alter ego' theory.¹⁴

Probably the most difficult matter to establish for purposes of corporate criminal liability is which officers' acts can be deemed to be the acts of the corporation itself. The test is whether the person who did the relevant acts is the 'directing mind and will of the company'.¹⁵ If so, then the corporation will be liable for his or her acts. According to

¹² §1.7 (infra).

¹³ Smith *op cit* at 275.

¹⁴ But, cf Lord Reid in *Tesco Supermarkets v Natrass* [1972] AC 153 (HL) at 171, who claims that the phrase 'alter ego' is misleading in this context because the individual is not 'alter', but is identified with the company.

¹⁵ *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 at 713 per Viscount Haldane LC.

Smith, if he or she 'is not, there may be a question whether the company should nevertheless be held liable for them'.¹⁶

The reason for this is that, if corporate liability was reserved for situations where an act or decision was made by a member of the 'higher management' of the corporation or by a director identified as the 'guiding will' of the corporation, then the corporation could conceivably avoid liability when employees did something illegal after having been forbidden to do so by a member of the higher management.¹⁷ Consequently, what is needed is some sort of 'test' in order to determine when the corporation will be liable for acts carried out by persons who do not qualify as the 'directing mind and will' of the corporation.

In the well-known and until recently leading case of *Tesco Supermarkets Ltd v Natrass*,¹⁸ the House of Lords decided that the manager of one particular store in a large chain of stores was not a person of sufficiently high stature within the corporate structure to be identified as the company for the purpose of criminal liability in the case in question. It would appear as though many subsequent courts have applied *Tesco* relatively rigidly –as excluding managers from qualifying as the 'directing mind and will' of the corporation.¹⁹

The *Tesco* 'precedent' has been refined in *Meridian Global Funds Management Asia Ltd v Securities Commission*,²⁰ where the Privy Council held that, in casu, the acts of the chief investment officer and a senior portfolio manager of an investment company, unknown to the board of directors or managing director, were to be attributed to the company. The Court was at pains to point out, however, that-

'... their Lordships would wish to guard themselves against being understood to mean that whenever a servant of a company has authority to do an act on its behalf, knowledge of that act will for all purposes be attributed to the company. It is a question of construction in each case as to whether the

¹⁶ Smith op cit at 275.

¹⁷ See *In Re Supply of Ready Mixed Concrete (No 2)* [1995] 1 AC 456 at 465.

¹⁸ (Supra).

¹⁹ Matthew Goode 'Corporate criminal liability' in Neil Gunningham, Jennifer Norberry & Sandra McKillop *Environmental Crime* (1995) 97 at 100.

²⁰ [1995] 3 WLR 413 (PC).

particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company'.²¹

There is no 'general rule', then, but the issue will be resolved on the basis of the individual circumstances (including the construction of the relevant statute, if relevant) of each case. There must still be some doubt, however, as to whether this decision has significantly clarified a tricky question.

1.3 *Australia*

The Australian common law on the matter is the English common law. Perceived shortcomings in the common law position, as discussed above when considering the English law, has led to a plethora of statutory provisions designed to overcome these shortcomings, but in an inconsistent manner. In response to this, the Gibbs Committee²² came to the conclusion that –

'the common law, largely because of the emergence of large corporations in modern times, does not make appropriate provision for the criminal liability of corporations. Further, the change required in the law to accommodate this development is of such dimensions that legislative action, rather than reliance on evolution of the common law, is required'.

Environmental legislation often provides for corporate liability. Two examples will be examined by illustration. In New South Wales, s 169 (4) of the Protection of the Environment Operations Act 1997 provides that, without limiting any other law or practice regarding the admissibility of evidence, evidence that an officer, employee or agent of a corporation (while acting in his or her capacity as such) had, at any particular time, a particular intention, is evidence that the corporation had that intention. Note that this provision refers to any 'employee' of the corporation which means that the attribution to the corporation of a person's mens rea is not confined to the 'directing mind and will' of the corporation.

²¹ At 423E-F (per Lord Hoffmann).

²² Review of Commonwealth General Law *Interim Report: Principles of Criminal Responsibility and Other Matters* (1990) at 305.

Similarly, the Victorian Environmental Protection Act of 1970 provides that, when in any proceedings under the Act it is necessary to establish the intention of a corporation, it is sufficient to show that a servant or agent of the corporation had that intention.²³

1.4 New Zealand

In New Zealand, as in Australia, the common law position is as in England. The leading English case of *Meridian Global Funds Management Asia Ltd v Securities Commission*,²⁴ is a New Zealand case that was taken on appeal to the Privy Council. The principles set out in *Meridian*, therefore, apply in the New Zealand common law.

In the Resource Management Act, New Zealand's primary environmental legislation, section 340 provides that where an offence is committed by an agent or employee, the corporation is prima facie liable as if it had 'personally committed the offence'. Liability may be avoided if the corporation is able to show that the director or persons involved in the management of the corporation did not know or could not reasonably have been expected to know that the offence was to be or had been committed or that they took reasonable steps to prevent its commission.²⁵ In addition, the defendant must have taken all reasonable steps to remedy the effects of the offence.²⁶ It has been held that the corporation is liable for an employee's offence even where such employee cannot be said to represent the directing mind and will of the corporation.²⁷

1.5 Canada

The leading Canadian case on corporate liability is *R v Canadian Dredge & Dock Co Ltd*.²⁸ This case is authority for the following main principles of corporate liability. First,

²³ Section 66B(2).

²⁴ (Supra).

²⁵ Section 340(2)(a) and (b).

²⁶ Section 340(2)(c).

²⁷ *Auckland Regional Council v Bitumix Ltd* (1993) 1B ELRNZ 57.

²⁸ (1985) 19 DLR (4th) 314, 19 CCC (3d) 1 (SCC).

the mental state of servants and agents of the corporation will not be attributed to the corporation unless the individual in question ‘represents the *de facto* directing mind, will, center, brain area or ego’ of the corporation.²⁹ In casu, the presidents, vice-presidents and general managers were held to be directing minds. It has been held that employees at a lower level without a measure of discretion and control are not directing minds,³⁰ although various types of employees have been held to be directing minds:

- ❑ director and superintendent;³¹
- ❑ vice-president of sales;³²
- ❑ experienced company salesman;³³
- ❑ office supervisor and auditor;³⁴ and
- ❑ drilling foreman.³⁵

This approach is similar to the English approach in *Tesco* (or, at least, to what has been perceived to be the *Tesco* approach) but the line separating ‘directing minds’ from lower-level employees has often been drawn lower down the corporate hierarchy.³⁶ A 1993 Supreme Court case,³⁷ however, has moved the line back towards higher levels, albeit in a civil context. The Court was concerned with whether a negligent tug captain, responsible for a collision, was the directing mind of the company. The captain in question was the master of the flotilla of four tugs, a ‘trouble-shooter’ for the other tugs and was subject to little control by his superiors, but the Court found that he was not a directing mind. According to Iacobucci J, delivering the Court’s judgment –

²⁹ At 324.

³⁰ *R v Kimco Steel Sales Ltd* (1988) 43 CCC (3d) 104 (Ont Dist Ct). See Saxe op cit at 101.

³¹ *R v JJ Beamish Construction Co Ltd* (1966) 59 DLR (2d) 6.

³² *R v St Lawrence Corporation Ltd* (1969) 5 DLR (3d) 263.

³³ *R v PG Marketplace* (1979) 51 CCC (2d) 185 (BCCA).

³⁴ *R v Spot Supermarket Inc* (1979) 50 CCC (2d) 239 (Que CA).

³⁵ *R v Panarctic Oils Ltd* [1983] NWTR 47.

³⁶ Goode op cit at 100.

³⁷ *The “Rhone” v The “Peter AB Widener”* [1993] 1 SCR 497.

‘The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision making authority on matters of corporate policy, rather than merely give effect to such policy on an operational basis whether at head office or across the sea’.³⁸

As far as mens rea is concerned, the important point here is the classification of offences made in the case of *R v Sault Ste. Marie*³⁹. If the offence is one for which mens rea is necessary (a so-called ‘true crime’), the corporation will be regarded as having mens rea if –

- (a) any of the corporation’s directing minds committed the offence deliberately or recklessly; and
- (b) that individual was acting
 - (i) within the field of responsibility assigned to him or her, and
 - (ii) by design or result, at least partly for the benefit of the corporation.⁴⁰

In strict liability offences, although mens rea is not an element of the offence, it is relevant to a possible defence since a corporation may avoid liability if it can be shown that a directing mind reasonably believed in a mistaken set of facts which would render the act or omission innocent, or had used all due diligence to prevent the offence.⁴¹ Most environmental offences in Canada are strict liability offences.⁴²

In the case of absolute liability offences, corporate liability arises without proof of mens rea,⁴³ and is primary (as opposed to vicarious), arising as a result of the servant’s act being attributed to the corporation.

³⁸ At 526.

³⁹ (1978) 85 DLR (3d) 161, discussed in the previous Chapter.

⁴⁰ *Canadian Dredge & Dock Co Ltd* (supra).

⁴¹ See discussion in previous Chapter.

⁴² Saxe op cit at 101.

⁴³ *Canadian Dredge & Dock Co Ltd* (supra) at 322.

1.6 *United States of America*

Corporate liability in the USA common law is based on the imputation of agents' conduct to a corporation, which is justified usually by the doctrine of respondeat superior.⁴⁴ This doctrine has three requirements for corporate liability.

First, a corporate agent must have committed an actus reus with mens rea, which can be imputed to the corporation regardless of the rank, status or position of the agent in the corporation.⁴⁵ In addition to the respondeat superior doctrine, mens rea can be shown 'on the basis of the "collective knowledge" of the employees as a group, even though no single employee possessed sufficient information to know that the crime was being committed'.⁴⁶ In the *Bank of New England* case, the Court took into account the complexities of modern corporate operations in upholding the following jury construction concerning knowledge:

'You have to look at the bank as an institution. As such, its knowledge is the sum of the knowledge of all the employees. That is, the bank's knowledge is the totality of what all of the employees know within the scope of their employment'.⁴⁷

Second, the agent must have acted within the scope of his or her employment,⁴⁸ which includes any act that 'occurred while the offending employee was carrying out a job-

⁴⁴ *New York Central & Hudson River Railroad v United States* 212 US 481 at 494-5 (1909), 'Developments in the law – Corporate crime: Regulating corporate behaviour through criminal sanctions' (1979) 92 *Harvard LR* 1227 at 1247 (hereafter referred to as 'Developments'); VS Khanna 'Corporate criminal liability: What purpose does it serve?' (1996) 109 *Harvard LR* 1477 at 1489.

⁴⁵ *United States v Basic Constr Co* 711 F 2d 570 (4th Cir 1983) at 573; *United States v Koppers Co* 652 F 2d 290 (2d Cir 1981) at 298; Developments at 1247-8.

⁴⁶ Developments at 1248; see *United States v Farm & Home Savings Association* 932 F 2d 1256 (8th Cir 1991) at 1259; *United States v Penagaricano-Soler* 911 F 2d 833 (1st Cir 1990) at 843; *United States v Bank of New England NA* 821 F 2d 844 (1st Cir 1987) at 855.

⁴⁷ *United States v Bank of New England NA* (supra) at 855

⁴⁸ *New York Cent. & Hudson River RR v United States* (supra) at 491-5; *United States v Route 2, Box 472* 60 F 3d 1523 (11th Cir 1995) at 1527; *United States v Bank of New England NA* 821 F 2d 844 (1st Cir 1987) at 856; *United States v Automated Medical Labs Inc* 770 F 2d 399 (4th Cir 1985) at 406.

related activity’.⁴⁹ In *Domar Ocean Transport Ltd v Independent Ref Co*,⁵⁰ the Court stated that –

‘Acts committed by a servant are considered within the scope of employment when they are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of employment’.

Corporations have been held to be liable even in cases where they have implemented policies expressly forbidding the behaviour.⁵¹

The third requirement is that the agent must have intended to benefit the corporation.⁵² This is satisfied even if the employee did not act with the exclusive purpose of benefiting the corporation,⁵³ and the corporation does not have, in fact, to receive the benefits, since the mere intention to bestow a benefit suffices.⁵⁴

Certain states have adopted statutory provisions requiring criminal acts to be committed by agents high up in the managerial structure (as opposed to any agent) for such acts to be imputed to the corporation.⁵⁵ Also imposing a stricter standard than the common law is the Model Penal Code,⁵⁶ which provides that the commission of the offence be ‘authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment’.⁵⁷ Moreover, a corporation can raise the

⁴⁹ Developments at 1250.

⁵⁰ 783 F 2d 1185 (5th Cir 1986) at 1190.

⁵¹ *United States v Portac Inc* 869 F 2d 1288 (9th Cir 1989) at 1293; *United States v Automated Medical Labs Inc* (supra) at 407; *United States v Basic Constr Co* (supra) at 573.

⁵² *United States v 7326 Hwy 45 North* 965 F 2d 311 (7th Cir 1992) at 316; *United States v Basic Constr Co* (supra) at 573; Developments at 1250.

⁵³ *United States v American Radiator & Standard Sanitary Corp* 433 F 2d 174 at 204 (3d Cir 1970) cert denied 401 US 94 (1971); *United States v Gold* 743 F 2d 800 (11th Cir 1984) at 822-3; *United States v Automated Medical Labs Inc* (supra) at 407.

⁵⁴ *United States v Automated Medical Labs Inc* (supra) at 407; Developments at 1250.

⁵⁵ See examples cited in Cynthia E Carrasco & Michael K Dupee ‘Corporate criminal liability’ (1999) 36 *American Criminal LR* 445 at 450.

⁵⁶ (1962).

⁵⁷ § 2.07(1)(c).

defence that supervisory agents⁵⁸ with power over the area in which the offence took place acted with due diligence to prevent the commission of the offence.⁵⁹ It has been suggested that the existence of a corporate environmental compliance programme should serve as a defence to corporate liability under environmental statutes, which would serve to mitigate some of the harshness of the current approach, but this is merely a suggestion, not reflective of current practice.⁶⁰

1.7 Evaluation

The above analysis reveals that there is a broad similarity in the approach to corporate liability in the jurisdictions analysed. In South Africa, the United Kingdom, Australia and New Zealand, the approaches are similar in that the identification theory of corporate liability applies – the act and mens rea of an agent is imputed to the corporation. Where there are differences is in determining where to draw the line between those members of the corporation whose acts will be imputed to the corporation and those whose will not, and this certainly appears to be an issue which is somewhat vexing in all the jurisdictions studied.

The approaches in Canada and the United States are somewhat more complex than those in the other countries considered. As far as offences involving mens rea are concerned, both systems require three elements: (i) mens rea; (ii) that the agent was acting in the course and scope of his or her employment or field of responsibility and (iii) that he or she was acting for the benefit of the corporation.

In assessing what the best approach should be for corporate liability for environmental offences, in the light of the above analysis, the first question that requires consideration is

⁵⁸ Defined by the Code as ‘having duties of such responsibility that [their] conduct may be fairly assumed to represent the policy of the corporation’: § 2.07(4)(c).

⁵⁹ Model Penal Code § 2.07(5).

⁶⁰ Charles J Walsh & Alissa Pyrich ‘Corporate compliance programs as a defense to criminal liability: Can a corporation save its soul?’ (1995) 47 *Rutgers LR* 605.

whether there is a need for corporate liability at all.⁶¹ If not, then the matter need be taken no further and attention should be diverted to the issue of individual liability. If, on the other hand, corporate liability is seen to be necessary, the second question is how best to make provision for it.

First, then, do we need corporate criminal liability? In Chapter 2, when considering the aims of environmental criminal law, it was suggested that, other than for those environmental offences which give rise to society's moral condemnation or disapproval, and for which retribution may be regarded as a legitimate justification for invoking the criminal law, criminal sanctions are used in response to all other environmental offences as a deterrent.⁶² Most 'regulatory' type environmental offences would not attract societal condemnation or disapproval, and these offences would be justified only on the basis of deterrence. It would only be a handful of serious offences for which retribution would be applicable.

With this in mind, it is instructive to consider what various commentators have thought about the necessity for corporate criminal law. First, there are some critics of corporate criminal liability who feel that the institution is unnecessary.⁶³ This approach is founded on the premise that punishing corporations is done for purposes of deterrence and that this can be done equally well (if not better) by means of civil measures.

Khanna asks what purpose is served by corporate criminal liability and answers 'almost none'.⁶⁴ He suggests that 'corporate criminal liability would only be socially desirable in the rarest of circumstances'.⁶⁵ In other circumstances, because of the costs involved in using criminal law (the 'higher sanctioning costs' and the costs created by

⁶¹ See MP Larkin & Julia Boltar 'Company Law' in (1997) *Annual Survey of South African Law* 403 at 435 (discussion of *S v Coetzee* 1997 (3) SA 527 (CC)).

⁶² See above, at 18.

⁶³ VS Khanna "Corporate criminal liability: What purpose does it serve?" (1996) 109 *Harvard LR* 1477; Daniel R Fischel & Alan O Sykes 'Corporate crime' (1996) 25 *Jnl of. Legal Studies* 319.

⁶⁴ Khanna op cit at 1534.

⁶⁵ Khanna op cit at 1533.

criminal procedural protection), civil liability alternatives should be used, which will have the same overall deterrent effect.⁶⁶

Fischel and Sykes posit that economic arguments for corporate liability can be adequately served by civil liability measures and that criminal liability, which in the United States can be (and often is) imposed on top of civil penalties, is ‘not merely redundant but often harmful’.⁶⁷ The effect of corporate criminal liability is overdeterrence, which has socially harmful repercussions. For example,

‘... even in cases of clear injury, the doctrine of corporate criminal liability still serves no purpose. The Exxon Valdez oil spill, for example, caused substantial harm. But nothing was gained by prosecuting Exxon criminally. Civil penalties against Exxon levied through the tort system were sufficient to achieve optimal deterrence. Nor was there any basis of the punitive damage award since there was no underdetection problem. The probability that a large oil spill will be detected is one. The imposition of additional criminal penalties, coupled with punitive damage awards, will overdeter and distort the incentives to engage in the socially optimal level of oil shipping in the future’.⁶⁸

The premise of the authors very much depends on the existence of an operational and adequate civil penalties regime, which is the case in the United States, but where, as in South Africa, alternatives to the criminal sanction are few and far between, their thesis has less resonance.

Fisse,⁶⁹ on the other hand, argues that deterrence is not the only goal of corporate liability and that retribution is also relevant –

‘... retributive justice as fairness, through corporate criminal cost internalization, seems not only legitimate but also significant as a general justification for punishing corporations. Indeed, retributive justice as fairness emerges as a basic foundation of corporate criminal law, free from the flaws that make retribution so dubious a platform in individual criminal law’.⁷⁰

⁶⁶ Ibid.

⁶⁷ Fischel & Sykes op cit at 322.

⁶⁸ Fischel & Sykes op cit at 342-3 (footnotes omitted).

⁶⁹ Brent Fisse ‘Reconstructing corporate criminal law: Deterrence, retribution, fault, and sanctions’ (1983) 56 *Southern California LR* 1141.

⁷⁰ Fisse op cit at 1183. ‘Justice as fairness’ posits the idea that one who benefits from a criminal act at society’s expense must make restitution for the social losses that he or she brought about: Fisse at 1218 n371.

Hence, he argues, there is a need for both criminal and civil corporate liability.

Friedman⁷¹ is in agreement concerning the retributive justification for criminal liability of corporations, but he takes the argument further. Even in the corporate context, he argues, moral condemnation is a valid aim of the criminal law.⁷² Moreover, criminal law is also concerned with expressive retribution, by which he means that the moral condemnation attached to the criminal sanction has reference to the valuation of the goods or persons affected by the crime. In the absence of criminal liability, civil liability will be seen simply as a cost of doing business and the proper valuation of the goods or persons concerned would not be attested to. If the corporation were only subject to civil liability, the effect would be that the corporation would be, in effect, purchasing exemption from moral condemnation and this would dilute the overall impact of criminal law –

‘The value of human health and safety, for example, would be regarded as less sacrosanct when denied by corporations as opposed to individuals. Thus corporate exemption from criminal liability would tend to undermine the condemnatory effect of criminal liability on individuals in respect to similar conduct - and, ultimately, to diminish the moral authority of the criminal law as a guide to rational behavior’.⁷³

In similar vein, certainly from a practical perspective if not in theory, Smith, in pondering the purpose of corporate criminal liability, suggests that ‘the conviction of the company has an effect on the public mind that the conviction of individual officers does not’.⁷⁴ Moreover, he proposes that victims of corporate wrongdoing may have a ‘powerful urge’ that the corporation be punished, pointing out that ‘[t]he satisfaction of the demand for retribution by those injured by crime has long been recognised as a proper ground for the imposition of punishment’.⁷⁵

⁷¹ Lawrence Friedman ‘In defense of corporate criminal liability’ (2000) 23 *Harvard Jnl of Law & Public Policy* 833.

⁷² Friedman op cit at 834.

⁷³ Friedman op cit at 858.

⁷⁴ Smith op cit at 283. See also Nicholas Reville ‘Corporate manslaughter revisited’ (1993) 1 *International Jnl of Regulatory Law and Practice* 245 at 252, who says, ‘Relatives may well be more concerned that corporate, rather than individual human, liability should be established’.

⁷⁵ Smith *ibid*.

The notion of public moral condemnation of corporate wrongdoing seems to be an important consideration that is ignored by opponents of corporate criminal liability. But, it is submitted, there are other reasons, particularly in the South African context, why corporate liability is necessary. The reasons in question relate to the suitability of alternatives to corporate liability.

The two alternatives would appear to be individual corporate officer liability and utilisation of civil (or administrative) instruments. As far as the former is concerned, there is the real practical problem that a criminal system based on personal fault often has difficulties identifying and successfully prosecuting the individual persons responsible. Moreover, argues Heine, 'dependence of the criminal system upon personal fault, means that the corporation escapes other indirect sanctions – such as damage to corporate image, which might have operated to influence future conduct'.⁷⁶ The notion of influence on future corporate conduct is an important one, which may be undermined by focusing exclusively on individual officer liability. Punishment of the corporation stimulates reform of the corporation's practice and procedures, whereas punishment of the corporate officer has the effect of terminating liability once he or she has been dealt with due to the 'organisational divorce of responsibility for past offences from responsibility for future compliance'.⁷⁷ Once the officer has been punished, in other words, there is no incentive for the corporation to reform its practice.⁷⁸

Then, as far as the alternative of civil penalties is concerned, opponents of corporate criminal liability like Khanna, Fischel and Sykes rely on the existence of a system of civil penalties that is capable of imposing heavy punitive sanctions as a viable alternative to criminal liability. This may well be true in the United States, where the system of civil penalties is well-developed and the penalties themselves can be very severe. In South Africa, on the other hand, there is currently no adequate alternative to criminal sanctions.

⁷⁶ Günther Heine 'Environment protection and criminal law' in Owen Lomas (ed) *Frontiers of Environmental Law* (1991) 75 at 89.

⁷⁷ Brent Fisse & John Braithwaite 'The allocation of responsibility for corporate crime: Individualism, collectivism and accountability' (1988) 11 *Sydney LR* 468 at 497.

⁷⁸ See Nicola Pain 'Criminal law and environment protection – Overview of issues and themes' in Neil Gunningham, Jennifer Norberry & Sandra McKillop *Environmental Crime* (1995) 19 at 26.

It has been argued that alternative measures, such as administrative monetary penalties, ought to be used as an alternative to criminal sanctions, but such measures would not be suitable for the type of serious offence for which the public would want to see the imposition of criminal penalties. It is extremely unlikely that a system of civil penalties involving the heavy sanctions prevalent in the United States would find favour here. What this means, then, is that in South Africa the only option for the imposition of penalties on corporations for serious offences is the criminal sanction.

Having established the necessity of corporate criminal liability in the South African context, that leads to the question of how best to provide for it. The problem faced by most approaches to corporate liability considered above is distinguishing between those officers or servants of the corporation whose actions should be imputed to the corporation, and those whose should not. If the line is drawn too high, the approach will suffer from the fact that, in many corporations, higher-level officers are far removed from the 'scene of the crime', so to speak. If, on the other hand, the line is drawn too low, the results may be unjust. As Laufer reflects, '[o]ne is hard pressed to find something genuine about "corporate fault" where a rogue employee, under the scope of her authority, acts to benefit the corporation by violating express corporate policy, no less the criminal law'.⁷⁹

In the approach adopted by the South African Criminal Procedure Act, any servant's offence may be attributed to the corporation, which means that the provision suffers from the problem observed by Laufer. Also, from a theoretical perspective, section 332(1) does not adequately reflect the principle of corporate blameworthiness. A further problem, which could be fatal to section 332(1), is that there is a possibility that the section might fall foul of the Constitution.

A compelling approach to the issue of corporate criminal liability, free of the problems observed above, is proposed by Fisse,⁸⁰ with reference to the Australian Ozone Protection

⁷⁹ William Laufer 'Corporate bodies and guilty minds' (1994) 43 *Emory LJ* 648 at 663-4.

⁸⁰ Brent Fisse 'Corporate criminal responsibility' (1991) 15 *Criminal LJ* 166 at 173-4.

Act.⁸¹ Fisse proposes the adoption of section 65(2) of the Ozone Protection Act, which provides –

Any conduct engaged in on behalf of a body corporate by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority shall be taken, for the purposes of a prosecution for an offence against this Act, to have been engaged in also by the body corporate unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct.

He goes further to suggest that a better approach is to refine this section by adopting the ‘following two-condition test of corporate criminal responsibility’:

- ‘(1) the external elements of the offence have been committed by a person for whose conduct the corporate defendant is vicariously responsible; and
- (2) the corporation has been at fault in one or other of the following ways:
 - (a) by having a policy that expressly or impliedly authorises or permits the commission of the offence or an offence of the same type;
 - (b) by failing to take reasonable precautions or to exercise due precautions to prevent the commission of the offence or an offence of the same type;
 - (c) by having a policy of failing to comply with a reactive duty to take preventive measures in response to having committed the external elements of the offence; or
 - (d) by failing to take reasonable precautions or to exercise due diligence to comply with a reactive duty to take preventive measures in response to having committed the external elements of the offence’.⁸²

Following Fisse’s advice gives us a provision that could look like this:

Any conduct engaged in on behalf of a corporation by a director, servant or agent of the corporation within the scope of his or her actual or apparent authority shall be deemed, for the purposes of a prosecution for an offence against this Act, to have been engaged in also by the corporation if the State can prove corporate mens rea in any of the following forms:

- (a) the corporation has a policy that expressly or impliedly authorises or permits the commission of the offence or an offence of the same type;
- (b) the corporation failed to take reasonable precautions or to exercise due precautions to prevent the commission of the offence or an offence of the same type;
- (c) the corporation has a policy of failing to comply with a reactive duty to take preventive measures in response to having committed the external elements of the offence; or

⁸¹ 1989 (Cth).

⁸² Fisse op cit at 173-4.

- (d) the corporation failed to take reasonable precautions or to exercise due diligence to comply with a reactive duty to take preventive measures in response to having committed the external elements of the offence.

The advantages of this approach are several:

- ❑ It allows for corporate liability arising from the conduct of a director, agent or servant, obviating the need to draw a line between those officers whose conduct can render the corporation liable and those who cannot.
- ❑ At the same time, it allows the corporation to avoid liability if it has preventive policies in place, and in fact complies with those policies. This reduces the risk of a corporation being subjected to criminal liability by a rogue employee. This also reduces the risk of the provision falling foul of section 12 of the Constitution (the right to freedom).
- ❑ From a theoretical perspective, it reflects the principle of corporate blameworthiness, in that corporate policy is the corporate equivalent of intention.⁸³

A further observation is that the Ozone Protection Act places the onus on the defendant to prove due diligence, whereas the suggested provision requires proof of all the necessary elements by the prosecution. This is to ensure that the provision would not fall foul of the South African Constitution. It may be felt that the onus on the state imposed by this provision is too onerous, yet, as is frequently the case with individual mens rea, the courts will be fully justified in inferring the necessary mens rea from the facts of the case in question. It would be possible, however, to adjust the situation as regards onus slightly by imposing an evidential burden to raise evidence showing the absence of corporate mens rea (by showing the existence of the necessary policy, for example). This would make it less onerous for the state to prove mens rea while still remaining within the bounds of the Constitution.

Having thus dealt with corporate liability, attention now turns to the liability of controlling officers.

⁸³ Fisse op cit at 173 n7.

2 Liability of controlling officers

Controlling officers may be criminally liable in four different ways.⁸⁴ First and most obvious, the officer may be liable as a principal to the offence, where the officer commits the unlawful act personally. This may arise in circumstances where the officer has influence and control over an activity and fails to take reasonable steps to prevent the occurrence of the offence. Second, the officer may be liable as an accomplice if he or she is a party to the offence committed by the corporation or another person, for example, in the case of an officer assisting a subordinate to break the law. Similarly, the third type of liability would arise from conspiracy to commit the offence. For example, members of a board of directors who voted to carry out illegal activities would qualify.

The fourth way in which officers could be liable, and the manner which concerns us most here, is by means of statutory provisions which impose liability on corporate officers. The reason for these provisions, as Lipman says, is that –

‘Corporate policy is determined by an organised collectivity of individuals. Thus any effective response to environmental problems must target the decision dynamics within the corporation. For this reason, in most jurisdictions, legislation imposing personal criminal liability on corporate officials has been introduced to complement sanctions against the corporations themselves’.

The situation as regards corporate officer liability for environmental offences in various jurisdictions is as follows:

2.1 *South Africa*

As far as directors’ liability is concerned, the common law provides for a director to be liable for the crime committed by another director if he or she participated in the other director’s crime or on the basis of vicarious liability or agency.⁸⁵ Section 332(5) of the Criminal Procedure Act, however, provided for vicarious liability of a director or servant of a corporation for a crime by that corporation (which means, in effect, the crime of another director or servant), unless he or she could show that he or she did not take part in

⁸⁴ Saxe op cit at 102-3.

⁸⁵ Burchell & Milton op cit at 387.

that crime and that he or she could not have prevented it. This provision, however, was declared unconstitutional and consequently invalid in *S v Coetzee*.⁸⁶ This means that the issue of director's liability is now governed by the common law position outlined above.

The most important provision in South African environmental legislation that provides for vicarious liability of controlling officers of corporations is s 34(7) of the National Environmental Management Act. This provision is important since it applies to prosecution of any of the offences listed in Schedule 3 of the Act.⁸⁷ It provides –

Any person who is or was a director of a firm at the time of the commission by that firm of an offence under any provision listed in Schedule 3 shall himself or herself be guilty of the said offence and liable on conviction to the penalty specified in the relevant law, ... if the offence in question resulted from the failure of the director to take all reasonable steps that were necessary under the circumstances to prevent the commission of the offence: Provided that proof of the said offence by the firm shall constitute prima facie evidence that the director is guilty under this subsection.

In a prosecution under this section, the state would need to show that the 'firm'⁸⁸ committed the offence and the effect of the proviso would be to place an evidential burden on the accused director⁸⁹ of raising evidence that the offence did not result from the failure of the director to take all reasonable steps that were necessary under the circumstances to prevent the commission of the offence. If there were evidence of this, it would be upon the state to discharge the burden, beyond reasonable doubt, of proving that the offence did result from the director's failure to take reasonable steps.

This provision is similar to section 34(5) of the same Act, which was discussed in the previous Chapter. For the same reasons set out there, it is suggested that this provision, although unlikely to run the risk of constitutional invalidity due to the use of the evidential burden rather than a reverse onus, is somewhat clumsy and may well present problems of proof for the prosecution in showing that the offence 'resulted from' the director's failure to take the requisite steps.

⁸⁶ 1997 (3) SA 527 (CC). See full discussion of this case in Chapter 3 (supra).

⁸⁷ See above at 192-4.

⁸⁸ A body incorporated by or in terms of any law as well as a partnership: s 37(9).

⁸⁹ A member of the board, executive committee, or other managing body of a corporate body and, in the case of a close corporation, a member of that close corporation or in the case of a partnership, a member of that partnership: s 37(9).

Whether it is possible to provide for a better alternative to section 34(7) is discussed below.⁹⁰

2.2 *United Kingdom*

There is no common law position on the liability of controlling officers which means that, in the absence of any statutory provision to the contrary, it would be necessary to prove liability on the basis of general principles of criminal law relating to actus reus and mens rea. There are, however, statutory provisions providing for controlling officer liability in cases where the corporation has committed an offence through the consent, connivance or neglect of the officer concerned.⁹¹

Section 157 of the Environmental Protection Act of 1990, for example,⁹² provides –

Where an offence under any provision of this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

In *Huckerby v Elliott*,⁹³ the Court was concerned with the meaning of the terms ‘consent’ and ‘connivance’. The Court held that ‘consent’ arises ‘where a director consents to the commission of an offence by his company, [and] he is well aware of what is going on and agreed to it’. ‘Connivance’ involves the following: - ‘(the director) connives at the offence committed by the company, he is equally aware of what is going

⁹⁰ § 2.7 (infra).

⁹¹ For example, Water Industry Act 1991 s 210; Control of Pollution Act 1974 s 87; Environmental Protection Act 1990 s 157; Water Resources Act 1991 s 217; Radioactive Substances Act 1993 s 36. See JC Smith & Brian Hogan *Criminal Law* 7 ed (1992) at 185; Penny Jewkes ‘The personal liability of directors in the United Kingdom for environmental offences’ (1996) 4 *Environmental Liability* 87 at 88. See also Andrew Waite ‘Criminal and civil liability of company directors’ (1991) 3 *Land Management and Environmental Law Report* 74.

⁹² The wording of s 217(1) of the Water Resources Act 1991 is almost identical.

⁹³ [1970] 1 All ER 189 at 194.

on but his agreement is tacit, not actively encouraging what happens but letting it continue and saying nothing about it’.

It has been suggested that the terms ‘consent’ and ‘connivance’ do not significantly add to the common law, since a corporate officer who consents or connives at the commission of an offence would be liable as a secondary party (accomplice).⁹⁴ The reference to ‘neglect’, however, imposes wider liability in making an officer liable for his or her negligence in failing to prevent the offence.⁹⁵

2.3 *Australia*

Corporate officer liability is often provided by statute. For example, section 169 of the Protection of the Environment Operations Act 1997 (New South Wales) provides-

- (1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision, unless the person satisfies the court that:
 - (a) the corporation contravened the provision without the knowledge actual, imputed or constructive of the person, or
 - (b) the person was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or
 - (c) the person, if in such a position, used all due diligence to prevent the contravention by the corporation.
- (2) A person may be proceeded against and convicted under a provision pursuant to this section whether or not the corporation has been proceeded against or been convicted under that provision.
- (3) Nothing in this section affects any liability imposed on a corporation for an offence committed by the corporation against this Act or the regulations.
- (4) Without limiting any other law or practice regarding the admissibility of evidence, evidence that an officer, employee or agent of a corporation (while acting in his or her capacity as such) had, at any particular time, a particular intention, is evidence that the corporation had that intention.

⁹⁴ Smith & Hogan op cit at 185.

⁹⁵ Ibid.

This is a very similar provision to the provision in the Act's precursor, the Environmental Offences and Penalties Act of 1989.⁹⁶ There are some comments that can be made on the defences available under subsection (1). First, as far as knowledge is concerned, it is likely that the courts will regard 'wilful blindness' as satisfying the requirements for actual knowledge.⁹⁷ Then, in the only cases decided under s 10 of the Environmental Offences and Penalties Act 1989,⁹⁸ *SPCC v Kelly*,⁹⁹ the scope of the due diligence defence was considered. Since the provision refers to 'all' due diligence, the Court held that the defendant must prove –

'not only due diligence, but all due diligence. This requires that everything properly regarded as due diligence should be done'.

The Court (Hemmings J) qualified this by stressing that this did not require a standard of perfection, but that emphasis should be given to both the words 'all' and 'due'. The learned judge then continued–

'Due diligence ... depends on the circumstances of the case, but contemplates a mind concentrated on the likely risks. The requirements are not satisfied by precautions merely as a general matter in the business of the corporation, unless also designed "to prevent the contravention".'

Whether a defendant took the precautions that ought to have been taken must always be a question of fact and, in my opinion, must be decided objectively according to the standard of a reasonable man in the circumstances. It would be no answer for such person to say that he did his best given his particular abilities, resources and circumstances'.¹⁰⁰

The absence of a definition of due diligence in the legislation, and the paucity of judicial opinion on the concept, make it difficult to express any further opinion on the scope of the defence in Australia. It has been pointed out that the defence is one which does not often succeed, as was the case in *Kelly*.¹⁰¹

⁹⁶ Section 10.

⁹⁷ Zada Lipman & Lachlan Roots 'Protecting the environment through criminal sanctions: The Environmental Offences and Penalties Act 1989 (NSW)' (1995) 12 *Environmental and Planning LJ* 16 at 27.

⁹⁸ There have been no cases dealing with s 169 of the Protection of the Environment Operations Act 1997.

⁹⁹ (1991) 5 ACSR 607.

¹⁰⁰ At 608-9.

¹⁰¹ Peter Lowe 'A comparative analysis of Australian and Canadian approaches to due diligence' (1997) 14 *Environment and Planning LJ* 102.

Overall, then, corporate officer liability is something to be found in statute, which also provides for the defences, which are not well developed in Australia at the moment.¹⁰²

2.4 New Zealand

The Resource Management Act provides for liability of corporate officers in s 340(3) –

Where any body corporate is convicted of an offence against this Act, every director and every person concerned in the management of the body corporate shall be guilty of the like offence if it is proved –

- (a) That the act that constituted the offence took place with his or her authority, permission, or consent; and
- (b) That he or she knew or could reasonably be expected to have known that the offence was to be or was being committed and failed to take all reasonable steps to prevent or stop it.

This provision relates to both directors and persons ‘concerned in the management’ of the corporation. The New Zealand courts have not yet decided what the ambit of the term ‘management’ is, but it has been suggested that this could be extended as far as including mortgagees and other secured financiers,¹⁰³ to say nothing of the people more directly involved in the corporation’s management.

At first glance, the provision appears to encompass only those individuals who have allowed the offence to take place, but it should be noted that there is judicial authority to the effect that the words such as ‘permit’ do not require full mens rea.¹⁰⁴ Moreover, the requirement of knowledge on the part of the controlling officer can be satisfied by constructive knowledge – if he or she should have known in the circumstances, this requirement will be met. Despite the relatively wide (or potentially wide) ambit of this provision, however, the proof of all the elements rests on the prosecution, hence

¹⁰² Cf. Sharon Christensen ‘Criminal liability of directors and the role of due diligence in their exculpation’ (1993) *Company and Securities LJ* 340.

¹⁰³ David Grinlinton ‘Liability for environmental harm in New Zealand’ (1997) 5 *Environmental Liability* 106 at 111.

¹⁰⁴ *Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong* [1984] 2 All ER 503 (PC) at 511-2; *McKnight v New Zealand Biogas Industries Ltd* [1994] 2 NZLR 664.

differentiating it from the provisions found in other jurisdictions which reverse the onus onto the accused.

2.5 Canada

In Canada, there is considerable jurisprudence relating to corporate officer liability, not only under statutory provisions providing for such liability, but often in the case of officers being held liable as principals. This is most often not as a result of the officer personally committing the act, but through being held to have ‘caused or permitted’ the offence or as a result of their ‘influence and control’.

Several Canadian environmental statutes prohibit any person from discharging a contaminant or ‘causing or permitting’ such discharge.¹⁰⁵ A corporate officer will be held to have caused or permitted an offence when he or she was in a position of influence and control in the sense that the officer had the power and authority to prevent the commission of the offence and failed to do so.¹⁰⁶ In *Sault Ste Marie*, the Court held that ‘cause or permit’ did not require actual knowledge but that the offence ‘would be committed by those who undertake the collection and disposal of garbage, who are in a position to exercise continued control of this activity and prevent the pollution from occurring, but fail to do so’.¹⁰⁷ In the same case, the Court emphasised at several points in the judgment that the notion of control is the basis of liability for public welfare offences of the type under scrutiny in that case.¹⁰⁸

In addition to liability as a principal, and in keeping with the trend observed in other jurisdictions, there are also several statutory provisions providing for corporate officer liability in environmental legislation. For example, the Canadian Environmental Protection Act provides –

Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of

¹⁰⁵ Saxe op cit gives several examples at 107 n52.

¹⁰⁶ *R v Sault Ste Marie* (1978) 85 DLR (3d) 161.

¹⁰⁷ At 184-5.

¹⁰⁸ At 178-9 in particular.

the offence is a party to and guilty of the offence, and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted.¹⁰⁹

Some of the features of this provision, which is fairly typical,¹¹⁰ that are worthy of comment are as follows. First, liability extends beyond only officers and directors to agents as well. Second, according to Saxe, the words ‘directed, authorized, assented to, acquiesced in or participated in’ have ‘usually been held to connote influence or control plus knowledge of the relevant facts’.¹¹¹ Knowledge has been held to include ‘wilful blindness’, which is something more than the contention that the officer ought to have known the relevant facts.¹¹² Finally, for present purposes, it is noteworthy that the provision does not reverse the onus of proof in any way – it is up to the prosecution to prove that the officer directed, authorized, assented to, acquiesced in or participated in the commission of the offence. Interestingly, and maybe because the onus is on the prosecution to prove this, more directors and officers in Canada, according to Saxe, ‘have been convicted under the general provisions of environmental statutes than under those which mention them by name’.¹¹³

A different basis for corporate officer liability is provided by the Ontario Environmental Protection Act, section 194 of which provides –

- (1) Every director or officer of a corporation that engages in an activity that may result in the discharge of a contaminant into the natural environment contrary to this Act or the regulations has a duty to take all reasonable care to prevent the corporation from causing or permitting such unlawful discharge.
- (2) Every person who has a duty under subsection (1) and who fails to carry out that duty is guilty of an offence.
- (3) A director or officer of a corporation is liable to conviction under this section whether or not the corporation has been prosecuted or convicted.¹¹⁴

¹⁰⁹ Section 122.

¹¹⁰ Saxe op cit at 131.

¹¹¹ Saxe op cit at 132.

¹¹² *R v Wilansky* (1983) 41 Nfld & PEIR 29 (Nfld Dist Ct).

¹¹³ Saxe op cit at 131.

¹¹⁴ See also the Ontario Water Resources Act RSO 1990 s 116 which is similar.

The effect of this section is that officers are open to liability on the basis of a direct duty, rather than on the basis of their office. The mens rea required is akin to that in negligence, as the officer must show that he or she took ‘all reasonable care’ to prevent the offence. What this amounts to is that the officer must show due diligence. The reverse onus in Canada has been held to be constitutional.¹¹⁵

2.6 *United States of America*

The criminal liability of corporate officers in the United States is governed by the ‘responsible corporate officer’ doctrine, which was established by the US Supreme Court cases of *United States v Dotterweich*¹¹⁶ and *United States v Park*.¹¹⁷ In *Dotterweich*, the legislation in question did not require mens rea, so knowledge on the part of the corporate officer was not necessary. The majority of the Court, holding that the president of the company (Dotterweich) was himself criminally liable, was concerned to circumscribe the scope of the liability as far as the range of individuals held to be liable was concerned. To this end, it held that the ‘offense is committed by all who have such a responsible share in the furtherance of the transaction which the statute outlaws’.¹¹⁸ The Court did not, however, specify the class of employees who would be liable, leaving this task, perhaps somewhat ambitiously, to ‘the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries’.¹¹⁹

The defendant in *Park* was the CEO of a large retail food operation. He was held to be personally liable, despite his not being involved in the wrongful conduct, of breaching a statute that, as was the case in *Dotterweich*, did not require mens rea. The Court held that it was not necessary for the prosecution to prove wrongful conduct on the part of the defendant, but that it could establish liability by showing that ‘the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in

¹¹⁵ *R v Wholesale Travel Group Inc* (1991) 8 CR (4th) 145 (SCC).

¹¹⁶ 320 US 277 (1943).

¹¹⁷ 421 US 658 (1975).

¹¹⁸ 320 US 277 at 284.

¹¹⁹ At 285.

the first instance, or promptly to correct, the violation complained of, and that he failed to do so'.¹²⁰

The principle that can be derived from these cases is that any corporate officer bearing a responsible relationship to conduct proscribed by what can be called 'health and welfare statutes', who is not powerless to prevent others from committing the conduct in question, can be held personally liable for the crime provided by that statute.¹²¹ It is important to note, however, that this principle applies to offences which are strict liability offences.¹²²

The responsible corporate officer doctrine has been extended to cases requiring knowledge. In *United States v International Minerals & Chemical Corp*,¹²³ the Court held that the word 'knowingly' referred to knowledge of the facts, not of the regulation or to violation of the regulation. According to the Court, when dangerous materials are involved, 'the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation'.¹²⁴ This means that knowledge of the violation may be imputed to the corporate officer through his or her knowledge of the facts.

In the environmental context, two important environmental statutes, the Clean Water Act¹²⁵ and the Clean Air Act¹²⁶ expressly include the term 'responsible corporate officer' in the definition of persons who can be held liable. These statutes differ from the legislation¹²⁷ at issue in *Dotterweich* and *Park* since they require proof of criminal knowledge, which is the case with all federal environmental statutes in the United States.

¹²⁰ 421 US 658 (1975) at 673-4.

¹²¹ Joseph G Block & Nancy A Voisin 'The responsible corporate officer doctrine – Can you go to jail for what you *don't* know?' (1992) 22 *Environmental Law* 1347 at 1354-5.

¹²² See discussion in Chapter 9 of strict liability in the USA, involving discussion of both these cases.

¹²³ 402 US 558 (1971).

¹²⁴ At 565.

¹²⁵ 33 USC § 1319(c)(6) (1988).

¹²⁶ 42 USCA § 7413(c)(6) (1991).

¹²⁷ The Food and Drug Act.

This means that the responsible corporate officer doctrine should not be imported into environmental jurisprudence without taking into account the knowledge requirement of the environmental statutes. There has been some lack of consensus in the cases that have attempted to do so. There have been several cases involving offences under the Resource Conservation and Recovery Act (RCRA) which by and large dilute the knowledge requirement significantly.¹²⁸ In *United States v Johnson & Towers Inc.*,¹²⁹ it was held that knowledge both of the regulation and of the violation is required.¹³⁰ Although this appears to be more stringent than the position adopted in *International Minerals*, the Court held that knowledge might be inferred as to 'those individuals who hold the requisite responsible positions with the corporate defendant'.¹³¹ It has thus been suggested that the burden imposed on the prosecution by the *Johnson & Towers* decision 'is not significantly greater' than in terms of *International Minerals*.¹³²

Other Courts dealing with the RCRA have declined to follow *Johnson & Towers* and made the prosecution burden even lighter. *United States v Hayes International Corp*¹³³ held that a conviction required knowledge that there was no permit for the activity in question and of the facts relating to the substance used.¹³⁴ It was not open to the defendant to raise the defence of ignorance of the hazardous nature of the waste, or ignorance of the requirement of a permit.¹³⁵ *United States v Hoflin*¹³⁶ did not even go so far as requiring knowledge of the absence of a permit. Defendants were held to have 'knowingly' contravened RCRA even where they were unaware that violation of the Act was a crime or that regulations existed identifying wastes as hazardous in *United States v*

¹²⁸ 42 USC.

¹²⁹ 741 F 2d 662 (3d Cir 1984) cert denied 469 US 1208 (1985).

¹³⁰ At 669.

¹³¹ At 670.

¹³² Lisa Ann Harig 'Ignorance is not bliss: Responsible corporate officers convicted of environmental crimes and the federal sentencing guidelines' (1992) 42 *Duke LJ* 145 at 153.

¹³³ 786 F 2d 1499 (11th Cir 1986).

¹³⁴ At 1505.

¹³⁵ At 1503.

¹³⁶ 880 F 2d 1033 (9th Cir 1989) cert denied 493 US 1083 (1990).

Dee.¹³⁷ *Dee* and *Hoflin* were followed by *United States v Baytank (Houston) Inc*,¹³⁸ which held that ‘knowingly’ only means that the defendant must know factually what he or she is doing.¹³⁹

In *United States v Brittain*¹⁴⁰ the court stated, in what was apparently an obiter dictum,¹⁴¹ that the responsible corporate officer doctrine may be used as a substitute for proof of criminal knowledge. In other words, criminal knowledge of the conduct may be imputed to the corporate officer solely by reason of his or her position. In *United States v White*,¹⁴² on the other hand, held that the responsible corporate officer doctrine in casu did not render the officer liable purely on the basis of the office held, but that the intention required by the statute¹⁴³ had to be proved. The *White* position was supported in *United States v MacDonald & Watson Waste Oil Co*,¹⁴⁴ also a case involving RCRA, where the Court held that responsible corporate officer doctrine is an inferential doctrine – ‘while corporate position may not act as a substitute means of proof, it may raise the inference of criminal knowledge’.¹⁴⁵ This case, therefore, did not follow the other RCRA cases discussed above.

The *Brittain* approach should be rejected since it ignores the statutory requirement of knowledge. Not only is the burden of proof substantially lowered, but equally if not more troubling is the strong possibility that the defendant could be sentenced to imprisonment.¹⁴⁶ In contrast, the inferential doctrine raised in *MacDonald & Watson* is both sensible and preferable – corporate rank may raise an *inference* that the corporate

¹³⁷ 912 F 2d 741 (4th Cir 1990) cert denied 111 S Ct 1307 (1991).

¹³⁸ 934 F 2d 599 (5th Cir 1991).

¹³⁹ At 613.

¹⁴⁰ 931 F 2d 1413 (10th Cir 1991).

¹⁴¹ See Block & Voisin op cit at 1369.

¹⁴² 766 F Supp 873 (ED Wash 1991).

¹⁴³ The Resource Conservation and Recovery Act and the Federal Insecticide, Fungicide and Rodenticide Act.

¹⁴⁴ 933 F 2d 35 (1st Cir 1991).

¹⁴⁵ Block & Voisin op cit at 1372.

¹⁴⁶ Harig op cit at 156.

officer in question had the requisite knowledge of subordinates committing statutory violations, but it is not a substitute for actual knowledge.

More recently, the Ninth Circuit delivered a somewhat inscrutable judgment concerning criminal liability under the Clean Water Act in *United States v Iverson*.¹⁴⁷ The Court decided that ‘responsible corporate officer’ in the context of the Act meant any corporate officer who is ‘answerable’ or ‘accountable’ for the unlawful discharge.¹⁴⁸ Liability therefore rested on the officer’s authority and ability to control his or her subordinate’s conduct. That part of the decision is clear, but the clarity is muddled somewhat by the Court’s reference to the charge in the trial court that the defendant had actual knowledge of the discharges.¹⁴⁹ If the knowledge aspect is ignored, then the decision in *Iverson* follows essentially the same tack as that in *Brittain*.

The knowledge requirement may also be satisfied by use of the ‘wilful blindness’ doctrine, which arises when a corporate officer becomes suspicious of a criminal violation, but takes no further action to investigate or mitigate – in effect, closing his or her eyes to what is occurring. In *United States v Jewell*,¹⁵⁰ the Court stated that –

‘The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law... A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness’.

2.7 Evaluation

The general thread running through the controlling officer jurisprudence examined above is that officers are not automatically vicariously liable for the offences of the corporation, but must be shown to have had some involvement in the offence, through the exercise of

¹⁴⁷ 162 F 3d 1015 (9th Cir 1998).

¹⁴⁸ At 1023.

¹⁴⁹ Michael Dore & Rosemary E Ramsay ‘Limiting the designated felon rule: The proper role of the responsible corporate officer doctrine in the criminal enforcement of New Jersey’s environmental laws’ (2000) 53 *Rutgers LR* 181 at 196.

¹⁵⁰ 532 F 2d 697 (9th Cir 1976) at 700.

some sort of control or some sort of acquiescence or neglect. Some maverick decisions in the United States have severely diluted the knowledge requirement of federal environmental statutes in imputing liability to controlling officers, but these have been argued to be unsupportable.

In the South African context, two important considerations are that there be some form of mens rea on the part of the officer for liability to ensue, and the onus of proving any part of the offence (including absence of mens rea) should not be placed onto the accused. The latter aspect was the cause of the demise of section 332(5) of the Criminal Procedure Act, which provided for general controlling officer liability in South African law. With the striking down of that provision, the focus shifts onto provision for controlling officer liability in individual sectoral statutes.

The National Environmental Management Act does provide for liability of controlling officers in section 34(7) and it would seem that the provision does not run the risk of constitutional invalidity. However, as pointed out above, it may be a difficult provision to use in practice and might present difficulties in proving that the offence ‘resulted from’ the director’s failure to take the requisite steps.

Along similar lines to the alternative vicarious liability provision suggested in the previous Chapter, it is suggested that a better alternative to section 34(7) would be to provide for primary liability of the type provided for in section 194 of the Ontario Environmental Protection Act¹⁵¹ – a slightly adapted version of which could read:

- (1) Every director or officer of a corporation that engages in an activity that may result in the contravention of any law concerned with the protection of the environment has a duty to take all reasonable care to prevent the corporation from causing or permitting such contravention.
- (2) Every person who has a duty under subsection (1) and who fails to carry out that duty is guilty of an offence.
- (3) A director or officer of a corporation is liable to conviction under this section whether or not the corporation has been prosecuted or convicted.¹⁵²

The benefits of this approach are that, first, it imposes primary liability so there is no question of constitutional invalidity. As indicated in the previous Chapter, in *S v*

¹⁵¹ Set out above at 177.

¹⁵² See also the Ontario Water Resources Act RSO 1990 s 116 which is similar.

Coetzee,¹⁵³ Langa J indicated that the ‘Legislature is, in my view, fully entitled to place a positive duty on directors and to make the omission to discharge the duty an offence’.¹⁵⁴ The second benefit of this approach is that the onus of proof rests firmly on the state throughout, so there is no problem with infringement of the right to a fair trial. Third, it is probably easier for the state to prove contravention of the suggested provision rather than the requirement of showing that ‘the offence in question resulted from the failure of the director to take all reasonable steps that were necessary under the circumstances to prevent the commission of the offence’, as required by section 34(7).

3 Environmental audits and self-incrimination

A third issue relating to corporate liability that requires discussion is the question of environmental audits and self-incrimination. Today, more and more corporations are introducing their own environmental management systems, often reaching ‘beyond compliance’ with legislation by aiming for higher standards than that required by the law. A good example of this is the ISO 14000 standards. In following such systems, corporations usually collect data about their environmental performance, including information about emissions. This gives rise to the issue under scrutiny here: should the state be able to rely upon this information as evidence of contravention of environmental legislation in prosecuting the corporation or controlling officers? There is much that has been written on this topic¹⁵⁵ and several important cases in foreign jurisdictions, although it has not yet been considered judicially or academically in South Africa.

¹⁵³ 1997 (3) SA 527 (CC).

¹⁵⁴ At para [46].

¹⁵⁵ See (in alphabetical order), for example, Stan Berger ‘The Supreme Court addresses statutorily compelled information and self-incrimination: Case Comment - *R v. Fitzpatrick* (1995) 18 CELR (NS) 237’ 18 CELR (NS) 283; MA Bowden and T Quigley ‘Pinstripes or prison stripes? The liability of corporations and directors for environmental offences’ (1995) 5 *Journal of Environmental Law and Practice* 209; Robert W Darnell ‘Environmental criminal enforcement and environmental auditing: Time for a compromise’ (1993) 31 *American Criminal LR* 123; John P Kaisersatt ‘Criminal enforcement as a disincentive to environmental compliance: Is a federal environmental audit privilege the right answer?’

Given that there is both academic and judicial opinion on the issue in three of the jurisdictions studied in this work – Australia, Canada and the United States – let us consider the respective approaches in turn.

3.1 *Australia*

The leading authority in Australia is the High Court decision in *Environment Protection Authority v Caltex Refining Co Pty Ltd*.¹⁵⁶ In order to appreciate the finding of the Court, it is useful to examine the journey of the case on the way to the High Court. The facts were that an authorised officer of the Environment Protection Authority (EPA - at the time called the State Pollution Control Commission (SPCC)) requested Caltex to produce certain documents – books and records used by the corporation in its self-monitoring programme concerned with the emission of effluent from its refinery approximately sixteen months previously – in terms of section 29(2)(a) of the Clean Water Act.¹⁵⁷ This request was made at the time criminal proceedings were pending against the corporation for pollution of waters under the same Act.

(1996) 23 *American Journal of Criminal Law* 405; Zada Lipman & Lachlan Roots 'Protecting the environment through criminal sanctions: The Environmental Offences and Penalties Act 1989 (NSW)' (1995) 12 *Environmental and Planning LJ* 16 at 28-9; 'Eilis S Magner 'Case note on *Caltex* case' (1992) 16 *Crim LJ* 120; Vincent J Marella 'The Department of Justice prosecutive guidelines in environmental cases involving voluntary disclosure – a leap forward or a leap of faith?' (1992) 29 *American Criminal LR* 1179; Jan McDonald 'Confidentiality of environmental audit documents' in Gunningham et al op cit 203; Joshua Puls 'Corporate privilege – Do directors really have a right to silence since *Caltex* and *Abbeo Iceworks*?' (1996) 13 *Environmental & Planning LJ* 364.

¹⁵⁶ (1993) 178 CLR 477.

¹⁵⁷ This section provides: 'An authorised officer may, by notice in writing, require:

(a) the occupier of any premises from which pollutants are being or are usually discharged into any waters to produce to that authorised officer any reports, books, plans, maps or documents relating to the discharge, from the premises of pollutants into the waters or relating to any manufacturing, industrial or trade process carried on on those premises'.

The issues which arose for decision at first instance in the Land and Environment Court¹⁵⁸ were whether the privilege against self-incrimination extended to corporations and, if so, the effect of section 29(2)(a) on that privilege. Stein J held that the privilege did not extend to corporations, rendering answer of the second question unnecessary.

The matter was taken on appeal to the Court of Criminal Appeal,¹⁵⁹ where the Court decided that corporations were entitled to the privilege against self-incrimination at common law.¹⁶⁰ As far as the issue of section 29(2)(a)'s impact on the privilege was concerned, the Court decided that this provision abrogated the privilege against self-incrimination insofar as it applied to corporations, provided that the section was used for a proper purpose.¹⁶¹ The use of section 29(2)(a) for the sole purpose of gathering evidence for use in pending criminal proceedings, it was held, was not a proper purpose, and the section had therefore been improperly used.

This decision was criticised as unduly hampering the authorities, which rely significantly on industry self-monitoring.¹⁶² This was not the end of the matter, however, as the matter was taken further to the High Court. In the High Court, a four-three majority decided that the privilege was not available to corporations, based on an analysis of the common law and the historical and current rationale for the privilege.¹⁶³ This position is reflected in legislation as well – the New South Wales Evidence Act provides that corporations do not enjoy the privilege against self-incrimination.¹⁶⁴

¹⁵⁸ *SPCC v Caltex Refining Co Pty Ltd* (1991) 72 LGRA 212.

¹⁵⁹ *SPCC v Caltex Refining Co Pty Ltd* (1991) 25 NSWLR 118.

¹⁶⁰ At 128.

¹⁶¹ At 132.

¹⁶² Lipman & Roots op cit at 29; Magner op cit at 121-2.

¹⁶³ Mason CJ, Toohey J, Brennan J & McHugh J upheld the appeal, whilst Deane J, Dawson J & Gaudron J dismissed it.

¹⁶⁴ Section 187 provides –

(1) This section applies if, under a law of the State or in a proceeding, a body corporate is required to:

- (a) answer a question or give information, or
- (b) produce a document or any other thing, or
- (c) do any other act whatever.

In *Caltex*, one of the majority judges, Brennan J, distinguished between the privilege against self-incrimination and the privilege against self-exposure to penalty. He held that the latter was available to corporations, which made the situation as regards that privilege somewhat unclear.

This matter was subsequently resolved by the Federal Court in *Trade Practices Commission v Abbco Iceworks Pty Ltd.*¹⁶⁵ The Court decided that the two privileges were both ‘reflections of the same fundamental principle’,¹⁶⁶ and this linkage led to the conclusion that, if the privilege against self-incrimination were not available to corporations, nor should the privilege against self-exposure to a penalty.

As far as the availability of the privilege to corporate officers is concerned, the High Court in *Caltex* did hold that the privilege in respect of natural persons was not affected by their decision in respect of corporations.¹⁶⁷ McHugh J indicated that: ‘Members of a corporation may be adversely affected by the conviction of a corporation, but they are not convicted’.¹⁶⁸ It would seem, therefore, that the distinction between the position as regards corporations and the privilege remaining available to individuals (including controlling officers) is clear, but Puls has pointed out that this is a somewhat unrealistic view.¹⁶⁹ Since corporations and their officers may be prosecuted in the same trial for the same offences, he argues, anything that self-incriminates the corporation or makes it expose itself to a penalty ‘will almost certainly make it easier to convict or penalise the officers of that corporation’.

The solution to this problem is either to accept that directors will sometimes be denied the privilege, in the interests of the administration of justice or, alternatively, to recognise that the privilege does apply to corporations in cases where individual persons may be

(2) The body corporate is not entitled to refuse or fail to comply with the requirement on the ground that answering the question, giving the information, producing the document or other thing or doing that other act, as the case may be, might tend to incriminate the body or make the body liable to a penalty.

¹⁶⁵ (1994) 52 FCR 96.

¹⁶⁶ At 129.

¹⁶⁷ *Caltex* (supra) at 505.

¹⁶⁸ At 549.

¹⁶⁹ Puls op cit at 367.

self-incriminated by the production of that evidence. This corresponds with the Canadian position to which our attention now turns.

3.2 Canada

Section 11(c) of the Canadian Charter of Rights and Freedoms provides that ‘no accused person be required to act as a witness’, which is effectively the privilege against self-incrimination. At first glance, it would seem that this cannot apply to corporations since a corporation cannot act as a witness. This is confirmed by the Canadian courts, which have held that corporations do not possess the privilege against self-incrimination, either during investigation¹⁷⁰ or at trial.¹⁷¹ This was reaffirmed by the Supreme Court in *British Columbia (Securities Commission) v Branch*.¹⁷²

However, the courts have also held that section 7 of the Charter, providing for the ‘right to life, liberty and security of person and the right not to be deprived of that except in accordance with the principles of fundamental justice’, provides a privilege against self-incrimination. This does not apply to corporations except in circumstances where the privilege is invoked in order to protect the section 7 rights of a human being. This was the import of the decision (on this point) in *R v Bata Industries Ltd (No 1)*.¹⁷³ In other words, the privilege under section 7 applies in cases where denial thereof to a corporation would effectively deny it to individual corporate officers.

The twin protection of sections 7 and 11 of the Charter would suggest that individuals enjoy a blanket privilege against self-incrimination, but this is not the case, as was held by the Supreme Court in *R v Fitzpatrick*.¹⁷⁴ Although this decision does not (directly) concern corporations, it is of immense potential importance to corporate controlling officers, given its sphere of operation.

¹⁷⁰ *Thomson Newspapers Inc v Canada (Director of Investigation & Research, Restrictive Trade Practices)* (1990) 54 CCC (3d) 417 (SCC).

¹⁷¹ *R v Amway Corp* [1989] 1 SCR 21.

¹⁷² [1995] 2 SCR 3.

¹⁷³ (1992) 70 CCC (3d) 391 at 392.

¹⁷⁴ (1996) 129 DLR (4th) 129.

The issue in *Fitzpatrick* was whether records kept by the defendant as required by legislation (in this case section 61 of the Fisheries Act) was admissible in a trial of the defendant for contravention of that legislation. At first instance, the trial judge ruled the records inadmissible because the use of documents produced under compulsion of statute which incriminated the person who produced them was a violation of section 7 of the Charter.¹⁷⁵ The British Columbia Court of Appeal overruled this decision,¹⁷⁶ holding by two-to-one majority that the records were admissible, on the basis essentially that invocation of the privilege would undermine the efficacy of enforcement of the statute.

The Supreme Court decided that the privilege against self-incrimination did not prevent the Crown from relying on the documents, because –

‘It is not contrary to fundamental justice for an individual to be convicted of a regulatory offence on the basis of a record or return that he or she is required to submit as one of the terms and conditions of his or her participation in the regulatory sphere’.¹⁷⁷

This is an important decision for corporate controlling officers in situations where they (or their corporations) are required to keep records by legislation, which is the case with much environmental legislation in Canada. It is important in evaluating this decision that a distinction be drawn between information that is required by legislation and information that the defendant has voluntarily collected, which will probably be protected by the privilege against self-incrimination (when applied to an individual). This issue is canvassed in more detail below.

3.3 *United States of America*

In *Campbell Painting Corp v Reid*, the Supreme Court said – ‘It has long been settled in federal jurisprudence that the constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals’.¹⁷⁸ Moreover, *Bellis v United States* is authority for the principle that ‘an individual cannot rely upon the

¹⁷⁵ See Berger op cit.

¹⁷⁶ (1994) 90 CCC (3d) 161.

¹⁷⁷ (1996) 129 DLR (4th) 129 at 151.

¹⁷⁸ 392 US 286 (1968) at 288 per Fortas J.

privilege [against self-incrimination] to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him'.¹⁷⁹

More recently, in *Braswell v United States*,¹⁸⁰ Braswell claimed personal privilege in a situation apparently governed by *Bellis*. He had been subpoenaed to produce corporate documents that he claimed would incriminate him. He relied for his position on two Supreme Court decisions¹⁸¹ that distinguished between the contents of business documents, which are not privileged, and the act of producing the documents (which may be privileged). The basis of the distinction is that testimony is protected. Production of documents is testimonial in nature so it is protected, whereas corporate documents are not regarded as testimony. The Court, by bare majority, dismissed Braswell's claim.

Since a corporation does not have the privilege against self-incrimination, the corporation could not claim the privilege in respect of production of the documents. As far as an individual is concerned, the majority of the Court distinguished between the production of documents, where the individual may not claim a personal privilege, and oral testimony, which does offer personal privilege. The majority felt that allowance of the personal privilege in respect of production of documents would undermine the prosecution of white-collar crime, in respect of both corporations and controlling officers.¹⁸² The Court indicated that, despite enjoying no privilege in respect of production of corporate documents, the fact of the production by the individual (the testimonial aspect of compliance with the subpoena) could not be used against the individual. The contents of the documents, however, and their production by the corporation could be used against the individual in question.

The overall effect of the American jurisprudence is that the privilege against self-incrimination is severely circumscribed in the United States. With this in mind, there is some disquiet about the issue of voluntary environmental audits and the potential for use

¹⁷⁹ 417 US 85 (1974) at 88.

¹⁸⁰ 487 US 99 (1988).

¹⁸¹ *Fisher v United States* 425 US 391 (1976) and *United States v Doe* 465 US 605 (1984).

¹⁸² *Braswell* at 115-6.

of such information in prosecutions against corporations and their officers.¹⁸³ As a result, several states have enacted statutes providing for degrees of evidentiary privilege for environmental audits and immunity for voluntary disclosure of environmental infringements.¹⁸⁴ Although there are variations amongst the states, generally the privilege protects voluntary environmental audits from discovery and admissibility in legal actions. Typically, conditions applied are as follows: first, the information must have originated from the voluntary audit. Second, the audit must be kept confidential. The privilege will be lost in circumstances where the court determines that it is asserted for a fraudulent purpose, that the information is not covered by the privilege statute (for example, information required to be gathered and kept by statute, as opposed to that voluntarily collected) or where the party asserting the privilege is held not to have taken appropriate, reasonable and prompt actions to achieve compliance. There are also often provisions relating to the non-applicability of the privilege in compelling circumstances.

Many states also provide for immunity from administrative or legal action for parties who voluntarily disclose violations. These laws, it need hardly be said, apply only in the states where they have been enacted but this means that evidentiary privilege and immunity do not apply at the federal level. That said, however, there are Department of Justice guidelines and Environmental Protection Agency policy that address these issues.¹⁸⁵

Despite the fact that the adequacy of safeguards at the federal level may be regarded as less than watertight, the spectre of defendants being subjected to criminal liability by their own records seems to be more apparent than real: according to Darnell, by 1993 there had not been one case in which a company had been prosecuted using voluntarily disclosed audit information, and only two in which such information had been used in a criminal enforcement context.¹⁸⁶

¹⁸³ See Darnell, Kaisersatt and Marella *op cit*.

¹⁸⁴ See Kaisersatt *op cit* at 415-8.

¹⁸⁵ See Darnell, Kaisersatt and Marella *op cit*.

¹⁸⁶ Darnell *op cit* at 133-4, 142.

3.4 Evaluation

Many South African firms are engaged in voluntary environmental management systems and carrying out voluntary environmental audits. In addition, some legislation requires parties to carry out their own monitoring and record-keeping. An example is regulation 3.9 of the General Authorisations in terms of the National Water Act.¹⁸⁷ This suggests the need for an approach to the question of self-incrimination in the context of audit information. It must be borne in mind that any system adopted must be in compliance with the Constitution, which provides that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.¹⁸⁸ The privilege against self-incrimination as regards an individual has been confirmed by the Constitutional Court in *Ferreira v Levin NO*.¹⁸⁹

With this in mind, what lessons does this comparative analysis offer for South Africa? First, although all the countries considered in the above analysis withhold the privilege from corporations, there is a strong possibility that South African courts would not, given section 8(4) of the Constitution. Even if this were not the case, it seems reasonably certain that the privilege would be asserted in cases where there exists a possibility of an individual being incriminated by information demanded from the corporation, as was the case in the Canadian case of *Bata*.

The Canadian Supreme Court, in *Fitzpatrick*, has held that the privilege against self-incrimination is not absolute and that there are circumstances where it does not apply, even for individuals. Would such a principle apply in South Africa? It is submitted that, in the present context, it is not necessary to decide this, for reasons which will become apparent from the discussion below.

In considering an appropriate approach for the South African context, it may be instructive first to consider whether the issue has been addressed, and how, in legislation

¹⁸⁷ GN 1191 of 8 October 1999.

¹⁸⁸ Section 8(4) of Act 108 of 1996.

¹⁸⁹ *Ferreira v Levin NO & others; Vryenhoek v Powell NO & others* 1996 (1) SA 984 (CC). See discussion in Chapter 3 §4.4 (supra).

other than environmental. In the Basic Conditions of Employment Act,¹⁹⁰ there is a provision excluding self-incriminating evidence as follows:

No answer by any person to a question by a person conducting an investigation in terms of section 53 or by a labour inspector in terms of section 66 may be used against that person in any criminal proceedings except proceedings in respect of a charge of perjury or making a false statement.¹⁹¹

Section 66 deals with powers to question and inspect and provides, *inter alia*, for questioning of persons as well as production of documents and records. Section 53 concerns investigations relating to sectoral determinations and also provides for both questioning and the production of records. The wording of section 91 seems to cover only answers to questions put under the two sections specified and not records or documents furnished under those provisions, which suggests that the latter are not privileged. This provision is not very helpful as a precedent since it has a very limited scope.

What is required in the environmental sphere is an approach that does not discourage parties from conducting voluntary environmental audits but which does not hinder enforcement efforts, especially in respect of records required by legislation. In making a proposal, suggestions already made for the role of criminal law in enforcement of environmental legislation must be borne in mind. It has been recommended that criminal sanctions be reserved for serious contraventions of environmental law, where there is intention, repetition of offences, or serious harm. For other violations, non-criminal measures, for instance administrative penalties, could be used.

In the case of serious offences of the type described above, it is unlikely that the state would need to rely on records or data that had been kept by the accused. In the case of repeat violations, the state could use records produced by the regulated party to place the authorities 'on notice' that repeat violations were taking place. This would enable the state to carry out its own monitoring and gather its own data for prosecution purposes, which would obviate the need to rely on any potential self-incriminating evidence.

A 'use immunity', that is, immunity on the use of records in criminal proceedings, could be provided for without hindering enforcement, for the reasons set out above. The

¹⁹⁰ Act 75 of 1997.

¹⁹¹ Section 91.

documentation, however, could be used in administrative or civil proceedings without infringing the self-incrimination privilege. For example, there should be no constitutional problem with the imposition of relatively low administrative monetary penalties for the contravention of emission standards revealed by records produced by the polluter.

There does, however, need to be a qualification on this, which distinguishes between records and data voluntarily collected by the party and that which is compelled by statute.¹⁹² It is suggested that information from voluntary environmental audits and monitoring should be excluded from use in any enforcement action against the party, whether criminal or otherwise. Information compelled by statute, however, should be excluded only from criminal proceedings. This privilege should fall away, however, in cases where the audit or monitoring is carried out for a fraudulent purpose or where the audit or monitoring reveals an infringement that is not remediated by the party in question.

It may be asked why information compelled by state should be privileged in criminal proceedings, given the approach of the Canadian Supreme Court in *Fitzpatrick*. The reason is that the South African Constitutional Court, in decisions like *Manamela*,¹⁹³ has placed the bar very high for successful use of the limitations clause. Factors relating to the practicalities of law enforcement and administration of justice have consistently been sacrificed on the altar of protection of civil liberties. While this is not to suggest that this approach is wrong or ill-advised, it does suggest that our courts will likely take a dim view of the utilisation of self-incriminating evidence in circumstances where such use is not necessary, especially considering the possibility of alternative means to achieve the same result. It has been suggested here that use of self-incriminating evidence is most likely not necessary for the types of violations for which criminal law should be reserved.

With these considerations in mind, how should the approach to environmental audits and self-incrimination in South Africa be structured? In the United States, the seminal state environmental audit privilege provision is that of Oregon. Some guidance could be obtained from the Oregon statute and amendments suggested for the South African

¹⁹² See McDonald *op cit* at 217.

¹⁹³ 2000 (3) SA 1 (CC). See discussion above in Chapter 3.

context. The Oregon provision ‘Environmental audit privilege; exceptions; burden of proving privilege; waiver; disclosure after in camera review’,¹⁹⁴ provides –

- (1) In order to encourage owners and operators of facilities and persons conducting other activities regulated under [specified environmental legislation], both to conduct voluntary internal environmental audits of their compliance programs and management systems and to assess and improve compliance with such statutes, an environmental audit privilege is recognized to protect the confidentiality of communications relating to such voluntary internal environmental audits.
- (2) An Environmental Audit Report shall be privileged and shall not be admissible as evidence in any legal action in any civil, criminal or administrative proceeding, except as provided in subsections (3) and (4) of this section.
- (3)(a) The privilege described in subsection (2) of this section does not apply to the extent that it is waived expressly or by implication by the owner or operator of a facility or persons conducting an activity that prepared or caused to be prepared the Environmental Audit Report. The release of an Environmental Audit Report by the owner or operator of a facility to any party or to any public body for purposes of negotiating, arranging or facilitating the sale, lease or financing of a property or a facility, or a portion of a property or facility:
 - (A) Is not a waiver of the privilege; and
 - (B) Does not create a right for a public body to require the release of an Environmental Audit Report.
- (b) In a civil or administrative proceeding, a court of record, after in camera review consistent with the Oregon Rules of Civil Procedure, shall require disclosure of material for which the privilege described in subsection (2) of this section is asserted, if such court determines that:
 - (A) The privilege is asserted for a fraudulent purpose;
 - (B) The material is not subject to the privilege; or
 - (C) Even if subject to the privilege, the material shows evidence of noncompliance with [specified environmental legislation], appropriate efforts to achieve compliance with which were not promptly initiated and pursued with reasonable diligence.
- (c) In a criminal proceeding, a court of record, after in camera review as described in subsection (4) of this section, shall require disclosure of material for which the privilege described in subsection (2) of this section is asserted, if the court determines that:
 - (A) The privilege is asserted for a fraudulent purpose;
 - (B) The material is not subject to the privilege;

¹⁹⁴ Oregon Revised Statutes § 468.963. Some of the subsections relating to procedure have been omitted.

- (C) Even if subject to the privilege, the material shows evidence of noncompliance with [specified environmental legislation], appropriate efforts to achieve compliance with which were not promptly initiated and pursued with reasonable diligence; or
 - (D) The material contains evidence relevant to commission of an offense under [specified provisions of the ORS] the district attorney or Attorney General has a compelling need for the information, the information is not otherwise available and the district attorney or Attorney General is unable to obtain the substantial equivalent of the information by any means without incurring unreasonable cost and delay.
- (d) A party asserting the environmental audit privilege described in subsection (2) of this section has the burden of proving the privilege, including, if there is evidence of noncompliance with [specified environmental legislation], proof that appropriate efforts to achieve compliance were promptly initiated and pursued with reasonable diligence. A party seeking disclosure under subsection (3)(b)(A) of this section has the burden of proving that the privilege is asserted for a fraudulent purpose. A district attorney or the Attorney General seeking disclosure under subsection (3)(c)(D) of this section has the burden of proving the conditions for disclosure set forth in subsection (3)(c)(D) of this section.
- (4)(a) A district attorney or the Attorney General, having probable cause to believe an offense has been committed under [specified provisions of the ORS] based upon information obtained from a source independent of an Environmental Audit Report, may obtain an Environmental Audit Report for which a privilege is asserted under subsection (2) of this section pursuant to search warrant, criminal subpoena or discovery The district attorney or Attorney General shall immediately place the report under seal and shall not review or disclose its contents.
- ...
- (5) The privilege described in subsection (2) of this section shall not extend to:
- (a) Documents, communications, data, reports or other information required to be collected, developed, maintained, reported or otherwise made available to a regulatory agency pursuant to [specified environmental legislation];
 - (b) Information obtained by observation, sampling or monitoring by any regulatory agency; or
 - (c) Information obtained from a source independent of the environmental audit.
- (6) As used in this section:
- (a) “Environmental audit” means a voluntary, internal and comprehensive evaluation of one or more facilities or an activity at one or more facilities regulated under [specified environmental legislation], or of management systems related to such facility or activity, that is designed to identify and prevent noncompliance and to improve compliance with such statutes. An environmental audit may be conducted by the owner or operator, by the owner’s or operator’s employees or by independent contractors.

- (b) “Environmental Audit Report” means a set of documents, each labeled “Environmental Audit Report: Privileged Document” and prepared as a result of an environmental audit. An Environmental Audit Report may include field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs and surveys, provided such supporting information is collected or developed for the primary purpose and in the course of an environmental audit. An Environmental Audit Report, when completed, may have three components:
- (A) An audit report prepared by the auditor, which may include the scope of the audit, the information gained in the audit, conclusions and recommendations, together with exhibits and appendices;
 - (B) Memoranda and documents analyzing portions or all of the audit report and potentially discussing implementation issues; and
 - (C) An implementation plan that addresses correcting past noncompliance, improving current compliance and preventing future noncompliance.
- (7) Nothing in this section shall limit, waive or abrogate the scope or nature of any statutory or common law privilege, including the work product doctrine and the attorney-client privilege.

The Oregon provision could be adapted as follows to give effect to the considerations relevant to South Africa outlined above, using the same definitions of ‘environmental audit’ and ‘environmental audit report’ used in the Oregon statute:

Section A: Privilege of voluntary environmental audit reports

- (1) An Environmental Audit Report shall be privileged and shall not be admissible as evidence in any legal action in any civil, criminal or administrative proceeding, except as provided in subsections (2) and (3) of this section.
- (2)(a) The privilege described in subsection (1) of this section does not apply to the extent that it is waived expressly or by implication by the owner or operator of a facility or persons conducting an activity that prepared or caused to be prepared the Environmental Audit Report: Provided that the release of an Environmental Audit Report by the owner or operator of a facility to any party or to any organ of state for purposes of negotiating, arranging or facilitating the sale, lease or financing of a property or a facility, or a portion of a property or facility:
- (i) is not a waiver of the privilege; and
 - (ii) does not create a right for an organ of state to require the release of an Environmental Audit Report.
- (b) In a civil or administrative proceeding, disclosure of material for which the privilege described in subsection (2) of this section is asserted, shall be required if the competent authority or court, as the case may be, determines that:

- (i) the privilege is asserted for a fraudulent purpose;
 - (ii) the material is material contemplated by subsection (3); or
 - (iii) even if subject to the privilege, the material shows evidence of noncompliance with [specified environmental legislation], appropriate efforts to achieve compliance with which were not promptly initiated and pursued with reasonable diligence.
- (c) A party asserting the environmental audit privilege described in subsection (1) of this section has the burden of proving the privilege, including, if there is evidence of noncompliance with [specified environmental legislation], proof that appropriate efforts to achieve compliance were promptly initiated and pursued with reasonable diligence. A party seeking disclosure under subsection (2)(b)(i) of this section has the burden of proving that the privilege is asserted for a fraudulent purpose.
- (3) The privilege described in subsection (2) of this section shall not extend to:
- (a) Documents, communications, data, reports or other information required to be collected, developed, maintained, reported or otherwise made available to an organ of state pursuant to [specified environmental legislation];
 - (b) Information obtained by observation, sampling or monitoring by any organ of state; or
 - (c) Information obtained from a source independent of the environmental audit.
- (4) Nothing in this section shall limit, waive or abrogate the scope or nature of any statutory or common law privilege.

Section B. Privilege of environmental audits required by legislation.

- (1) Any documents, communications, data, reports or other information required to be collected, developed, maintained, reported or otherwise made available to an organ of state pursuant to [specified environmental legislation] shall be privileged and shall not be admissible as evidence in any criminal proceeding, except as provided in subsection (2) of this section.
- (2) In a criminal proceeding, a court shall require disclosure of material for which the privilege described in subsection (1) of this section is asserted, only if the court determines that:
- (a) the privilege is asserted for a fraudulent purpose; or
 - (b) even if subject to the privilege, the material shows evidence of noncompliance with [specified environmental legislation], appropriate efforts to achieve compliance with which were not promptly initiated and pursued with reasonable diligence.

These provisions, it is submitted, will adequately cater for the privilege against self-incrimination in the context of voluntary environmental audits and audits and monitoring carried out as required by legislation, without unduly hampering enforcement efforts. It is important to note that the provisions do not prohibit the state from demanding production of the material, which may be important for enforcement purposes, but only that such

material may not be used as evidence in the circumstances mentioned in the provisions. The fact that this issue has not yet been addressed in South African legislation, given the increasing use of voluntary environmental management systems, and the requirement of self-monitoring in the National Water Act, is cause for concern.

4 Conclusion

Nowadays, corporations are responsible (or, at least, potentially responsible) for much environmental harm and certainly most of the serious environmental harm. Where there is corporate blameworthiness, corporations should not be able to avoid the imposition of criminal sanctions, despite the fact that they have ‘no soul to damn and no body to kick’.¹⁹⁵ Unfortunately, lawyers have almost universally found that the field of corporate criminal liability, as well as liability of controlling officers, is somewhat of a legal minefield. This general difficulty is exacerbated in the South African context by the need to take into account constitutional protections. The suggestions made in this Chapter, it is submitted, ought to make chartering the path of environmental corporate criminal liability in South Africa a less challenging task.

¹⁹⁵ John C Coffee Jr “‘No soul to damn: No body to kick’: An unsandalized inquiry into the problem of corporate punishment’ (1981) 79 *Michigan LR* 386. Coffee ascribes the phrase to Edward, First Baron Thurlow 1731-1806, who is quoted as saying, ‘Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?’

Chapter 12

Sentencing environmental crimes

In 1989, a Sappi-owned paper mill in what is now Mpumalanga province at Ngodwana emitted a large quantity of toxic pollutant, which polluted the Elands and Crocodile rivers, important watercourses in the area, causing significant environmental damage and death of numerous fish. In a criminal prosecution in the Nelspruit Magistrates' Court,¹ there was a guilty plea, which was taken into account as a mitigating circumstance, as was the fact that the company immediately took remedial steps upon the occurrence of the spill, which was held not to be deliberate. The sentence was a fine of R6 000. For a company the size of Sappi, the fine was, therefore, clearly just a cost of doing business for SAPPI, since it was a drop in the ocean compared with the scale of the company's financial worth.² Even the maximum fine of R50 000 under the Water Act (the prevailing legislation at the time) would hardly make a dent in the company's profits.

By comparison, in the United States of America, in the 1999 *Guide Corporation* case,³ the corporation, an Indiana company, negligently released about 1.6 million gallons of contaminated wastewater to the sewer system in Anderson, Indiana, which went through the public treatment works and into the White River. The wastewater contained excessive amounts of a treatment chemical that resulted in the formation of various toxic residues and byproducts. This release caused the death of 127 tons of fish and other aquatic creatures in the White River. The corporation pleaded guilty to criminal negligence charges. The corporation was fined \$1,956,000 and ordered to pay \$275,000

¹ Case Sh 158/190 (unreported).

² In 2000, Sappi's net profit was R2 377 million. Although the 1989 financial results were not available, even if the net profit of Sappi in 1989 was one-hundredth of the 2000 figure, a fine of R6 000 would still have been trivial.

³ The case was decided by plea bargain, so there was no reported judgment. Information on the case supplied by Tim Chapman, United States Environmental Protection Agency, Chicago, personal communication.

in restitution. They also forfeited an additional \$1,956,000 based upon a law that provides for forfeiture of gains/avoided costs in environmental crimes cases.⁴

There are admittedly differences between the two cases mentioned above, but they share sufficient similarities for the disparity in sentences imposed to be startling. Why is this the case? Due in part to the different public and judicial mindset to environmental offences in the United States, environmental law in the United States provides for serious penalties for environmental offences. Is it the case in South Africa that penalties provided for are not adequate? The perception in South Africa is that penalties are inadequate,⁵ which, if true, would serve to undermine these goals. The purpose of this Chapter is to assess, first, whether this perception is correct. This will be followed by an evaluation of the existing sentencing measures that are currently available in South Africa. Innovative modes of sentencing used or suggested in other jurisdictions will then be examined, which apply mainly in the context of corporate offenders. Finally, suggestions will be made as to how to improve the options available in South Africa.

1 The adequacy of penalties for environmental offences in South Africa

This analysis is proceeding on the premise that environmental harms are serious harms and that deliberate contraventions of environmental law and those that cause significant harm *ought to* be punished with serious penalties. This is in order to meet both the deterrent and retributive goals of environmental criminal law. Are penalties for contravention of environmental legislation sufficient to meet these goals? There is a paucity of information in South Africa of penalties that have been imposed by the Courts, but information that there is, supported by anecdotal evidence, suggests that penalties (fines) imposed have been on the low side.⁶ There are no reported cases dealing with

⁴ 18 USC § 981(a)(1)(C) read with § 1956(c)(7). In addition, Guide paid \$10 million in civil settlements: Reuters report reported by Environmental News Network 19 June 2001.

⁵ RF Fuggle & MA Rabie *Environmental Management in South Africa* (1992) at 130, Cheryl Loots 'Making environmental law effective' (1994) 1 *SAJELP* 17 at 18.

⁶ Information has been received from the Department of Water Affairs and Forestry dealing with sentences imposed in certain cases involving water pollution. These appear to be a selection, rather than a

sentences of imprisonment (other than as an alternative to a fine) for environmental offences.⁷ Attempts at obtaining information and statistics relating to convictions and sentences imposed in South Africa for environmental offences have proved largely fruitless,⁸ hence the rather vague comments made about actual sentencing practices in South Africa.

The second aspect concerning sentencing of environmental crimes is the provision for penalties in legislation. Are penalties provided for in environmental statutes inadequate? This is certainly the perception,⁹ but careful analysis does not really support this view. The analysis in Chapters 4-6 suggest that, other than in the case of a few glaring exceptions, penalties provided for are generally satisfactory, and, in several cases, rather severe (although, on the whole, less stringent than those in the United States, for example). The example often given to illustrate the inadequacy of penalties is the Atmospheric Pollution Prevention Act,¹⁰ which provides for a maximum penalty of a R500 fine for a first contravention of the Act,¹¹ but this seems to be the exception rather than the rule. The problem, where there is one, may be exacerbated by the fact that sometimes conduct may be an offence under several different pieces of legislation and the

comprehensive list. No detailed statistics are kept. Information received from the Gauteng Nature Conservation Department suggests that the vast majority of contraventions of the Nature Conservation Ordinance are addressed by means of admission of guilt fines of less than R1 000. Attempts to obtain statistics or information from other government departments, both national and provincial, were unsuccessful, mainly because, it seems, these statistics are not kept. All documents are on file with the author.

⁷ A press report in August 1998 reported that a woman from Empangeni, KwaZulu-Natal, had been handed down 'the stiffest sentence yet for illegal trade in rhino horn'. The Regional Court sentenced Nomsa Mkhwanazi, who tried to sell a 1,2kg horn, to four years' imprisonment or a R60 000 fine (Independent Newspapers, obtained from Independent Online website www.iol.co.za [original site of article no longer available]).

⁸ See n 6 (supra).

⁹ See n2 (supra).

¹⁰ Act 45 of 1965.

¹¹ It does also provided for the alternative of imprisonment, to be fair. The maximum jail term is six months: section 46.

one chosen to use in the prosecution provides a limited penalty. For example, water pollution offences have sometimes been prosecuted under local by-laws, which often suffer from inadequate penalties, instead of national legislation which offers far more realistic penalty options.

Most legislation, however, does provide for realistic penalties, particularly more recent (post 1994) statutes which do not specify a maximum fine. Several statutes provide for terms of imprisonment of up to ten years,¹² and the Marine Living Resources Act¹³ provides for fines of up to five million rand. As regards the older statutes that do specify an amount, however, if this is inadequate, the situation may be addressed by means of the Adjustment of Fines Act.¹⁴ This Act provides for calculation of the maximum fine on the basis of a ratio between the maximum fine and the maximum period of imprisonment provided for by the Magistrates' Courts Act.¹⁵ This applies both to instances where a maximum fine is not provided for,¹⁶ and in those cases where there is a prescribed maximum fine,¹⁷ which suggests that the Act can be used to 'update' inadequate provision for fines in legislation. The Act can best be understood by means of an illustration, rather than by analysing its provisions. Let us use the much-maligned maximum fine in the Atmospheric Pollution Prevention Act as an example. Section 46 of that Act provides for a maximum fine of R500 or maximum imprisonment of six months. The maximum penal jurisdiction of a Magistrates' Court in terms of section 92 of the Magistrates' Court Act and regulations made thereunder is a R60 000 fine or three years imprisonment.¹⁸ The ratio between fine (in thousands of rand) and years imprisonment is

¹² National Water Act 36 of 1998; Nuclear Energy Act 46 of 1999; National Nuclear Energy Regulator Act 47 of 1999.

¹³ Act 8 of 1998.

¹⁴ Act 101 of 1991.

¹⁵ Act 32 of 1944.

¹⁶ Section 1(a) of Act 101 of 1991.

¹⁷ Section 1(b).

¹⁸ Section 92(1) and GN 1411 in GG 19435 of 30 October 1998. This is the amount for the district court – the jurisdiction for the regional court is R300 000 or fifteen years. The ratio between fine and years imprisonment is the same for both: 20-1.

20 to 1. This ratio is then used to calculate the maximum amount of the fine for the legislation in question. The Atmospheric Pollution Prevention Act provides for six months imprisonment. Multiplying this (half a year) by 20 gives a fine of R10 000, considerably higher than the current R500 (but probably still inadequate in the circumstances).

In summary, then, the penalties provided for in most case are probably adequate in most cases, but as regards the imposition of penalties, the available evidence suggests that most offenders receive no more than a slap on the wrist. This trend, however, may be changing. In a recent nature conservation case in the Western Cape,¹⁹ two foreigners convicted of illegally collecting 113 angulate tortoises were each sentenced to R168 000 fines. This was made up of a R10 000 fine for collecting wildlife without a permit, R5 000 for possessing wildlife without a permit, R3 000 for transporting wildlife without a permit, and R150 000 relating to the value of the tortoises. Despite the important deterrent message this sentence sends, it was possible for the Court concerned to impose a higher sentence in relation to the value of the tortoises. The legislation allows imposition of a fine equal to three times the value of the market value of the tortoises.²⁰ The tortoises, according to evidence in the case, could be sold for between US\$300 and \$800 per animal, depending on size and condition. Taking the lower value, and exchange rate at the time (approximately 10 to 1), this means that the value of each animal is at least R3000, the total collection being worth R339 000. Three times this amount is over one million rand, which could have been imposed under the relevant section.

Even allowing for severe fines provisions, however, there are corporate accused for whom even fines in the region of one million rand may be considered a cost of doing business. For this reason, it will be useful to consider alternative penalties, those already in existence in South Africa and then those sentencing practices that are not currently provided for by our law, for both individual and corporate offenders.

¹⁹ Unreported, media report in 13 December *Natal Witness* at 2.

²⁰ Section 86(1)(a)-(d) of the Cape Nature and Environmental Conservation Ordinance 19 of 1974.

2 Types of penalties provided for in South African law

The 'default' penalties usually provided for in South African legislation are fines and imprisonment. These penalties will not be discussed here but rather other penalties that are provided for by environmental legislation. These alternative penalties are usually supplementary to the primary penalty of fine or imprisonment, as is indicated below.

2.1 *Fine for continuing offence*

A useful provision is one which provides for the imposition of a specified fine per day that the offence continues. This would give the offender ample incentive to put a stop to the contravention as soon as possible. This device is used in the Environment Conservation Act,²¹ the National Heritage Resources Act,²² and the Western Cape Planning and Development Act;²³ and the noise regulations made under the Environment Conservation Act.²⁴ This type of measure is frequently used in United States environmental legislation, often in the context of civil penalties.²⁵

2.2 *Compensation Order*

Statutes often provide for a criminal court, having convicted the accused, to have the power to enquire into loss or harm suffered by the victim and to order compensation.²⁶ The advantage of this is that it obviates the need for a second civil trial aimed at compensation. In the environmental context, probably the most important provision in

²¹ Section 29 of Act 73 of 1989.

²² Section 51(3) of Act 25 of 1999.

²³ Section 64(2) of Act 7 of 1999

²⁴ GN R154 GG 13717 of 10 January 1992.

²⁵ See, for example, § 1319(b) of USC Title 33 (Clean Water Act) and § 7413(b) of USC Title 42 (Clean Air Act).

²⁶ See section 300 of the Criminal Procedure Act 51 of 1977.

this regard is section 34(1) and (2) of the National Environmental Management Act.²⁷ This applies in respect of any offence listed in Schedule 3 to the Act.²⁸ The provisions read as follows:

- (1) Whenever any person is convicted of an offence under any provision listed in Schedule 3 and it appears that such person has by that offence caused loss or damage to any organ of state or other person, including the cost incurred or likely to be incurred by an organ of state in rehabilitating the environment or preventing damage to the environment, the court may in the same proceedings at the written request of the Minister or other organ of state or other person concerned, and in the presence of the convicted person, inquire summarily and without pleadings into the amount of the loss or damage so caused.
- (2) Upon proof of such amount, the court may give judgement therefor in favour of the organ of state or other person concerned against the convicted person, and such judgement shall be of the same force and effect and be executable in the same manner as if it had been given in a civil action duly instituted before a competent court.

Similar provisions are found in the National Water Act,²⁹ the National Forests Act,³⁰ National Heritage Resources Act,³¹ and, although in a rather limited manner, in the Orange Free State Nature Conservation Ordinance.³²

Such provisions are important in that they are aimed (at least in part) at the remediation of environmental damage, which is in keeping with the general aims of environmental law.

2.3 Reparation order

Similar to the order for compensation discussed above, certainly as far as the aims are concerned, but using a slightly different method, is what can be called a reparation order. Instead of a court ordering the convicted person to pay monetary compensation, this order requires the individual to carry out the reparations himself or herself. This device is used

²⁷ Act 107 of 1998.

²⁸ Detailed above at 192-4.

²⁹ Section 152 of Act 36 of 1998.

³⁰ Section 59 of Act 84 of 1998.

³¹ Section 51(8) of Act 25 of 1999.

³² Section 40(2)(a) of Ordinance 8 of 1969.

in the Sea-Shore Act,³³ and in the National Heritage Resources Act, in conjunction with an order for compensation provision in the case of default of the reparation order.³⁴ A good way of providing for this type of device is to link it to the power of the authorities concerned to take the necessary steps in default of the offender and then to claim the costs. Section 29 of the Environment Conservation Act provides that, in the event of a conviction in terms of the Act the court may order that any damage to the environment resulting from the offence be repaired by the person so convicted, to the satisfaction of the Minister concerned.³⁵ Failure to comply with such an order entitles the authority in question to take the necessary steps itself and to recover the costs from the defaulting party.³⁶

The reparation order is a good measure for the same reasons given in favour of the compensation order above. It could well be combined with a compensation order by the provision of a reparation order that has to be complied with within a specified time, failing which a compensation order will take effect. Section 51(8) of the National Heritage Resources Act³⁷ essentially does this and is a good model for this type of provision.

2.4 *Fine equivalent to value*

This device is currently used only in some nature conservation legislation. The National Parks Act³⁸ provides for the fine not exceeding three times the commercial value of the animal in respect of which the offence of unlawful hunting³⁹ was committed.⁴⁰ The Cape

³³ Section 12A of Act 21 of 1935.

³⁴ Section 51(8) of Act 25 of 1999.

³⁵ Section 29(7).

³⁶ Section 29(8).

³⁷ Act 25 of 1999. The provision is set out in full at 200 (*supra*).

³⁸ Act 57 of 1976.

³⁹ Section 21(1)(c).

⁴⁰ Section 24(1)(b)(aa).

Nature and Environmental Conservation Ordinance⁴¹ has a similar provision, as discussed above in the introduction to this Chapter.

This measure is an important deterrent in cases involving crime motivated by profits, for example poaching of wildlife. The provisions could be improved by providing for the compensation to the owner of the animal (if there is an owner) of the value of the animal, which amount could be extracted from the fine paid.

2.5 Fine equivalent to advantage gained

A similar provision is the imposition of a fine equivalent to the advantage gained by the offender in failing to comply with the law. The National Environmental Management⁴² Act provides:⁴³

Whenever any person is convicted of an offence under any provision listed in Schedule 3 the court convicting such person may summarily enquire into and assess the monetary value of any advantage gained or likely to be gained by such person in consequence of that offence, and, in addition to any other punishment imposed in respect of that offence, the court may order the award of damages or compensation or a fine equal to the amount so assessed.

In the United States, legislation provides for similar forfeiture of proceeds of an offence. 18 USC § 981(a)(1)(C) provides for forfeiture to the state of any property which constitutes or is derived from proceeds traceable to any offence constituting ‘specified unlawful activity’⁴⁴ or a conspiracy to commit such offence. The federal money laundering statute, 18 USC § 1956, makes it illegal to place the funds of illegal activity into legitimate bank accounts (and similar), if the funds are derived from certain types of criminal behaviour, which are called ‘specified unlawful activity’ (SUA). The statute lists all of the SUA’s - among the crimes listed are felony violations of the Clean Water Act and the Resource Conservation and Recovery Act. Thus, any profit realized from the crime, which might include profit realized by virtue of not properly disposing of

⁴¹ Section 86(1)(a)-(d) of Ordinance 19 of 1974.

⁴² Act 107 of 1998.

⁴³ Section 34(3).

⁴⁴ As defined in 18 USC § 1956(c)(7).

the waste, can be considered ‘proceeds traceable to’ a felony violation of the Clean Water Act and the Resource Conservation and Recovery Act.

In addition to this measure, the United States Sentencing Guidelines for Organisations require what is called disgorgement as follows: ‘The court shall add to the [basic fine determined under the Guidelines] any gain to the organization from the offense that has not and will not be paid as restitution or by way of other remedial measures.’⁴⁵

It is submitted that this kind of penalty is one which can legitimately be used against environmental offenders, particularly those who deliberately flout the law in order to pursue profits. Examples of such offenders would be persons who infringe nature conservation and endangered species legislation to smuggle animals out of the country in order to sell for significant profits overseas,⁴⁶ and those who illegally dispose of hazardous waste in order to avoid having to pay for its correct disposal.

2.6 Forfeiture

Several statutes provide for forfeiture of items upon conviction of an offence. Such items include the ‘contraband’ objects (illegally hunted animals, or unlicensed dangerous substances, for example),⁴⁷ the ‘instrumentalities’ of the offence,⁴⁸ or objects directly

⁴⁵ United States Sentencing Guidelines § 8C2.9.

⁴⁶ See tortoise example referred to in the introduction.

⁴⁷ Section 18(2) of the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947; s 21 of the Hazardous Substances Act 15 of 1973, s 215B of the Natal Nature Conservation Ordinance 15 of 1974, s 47A and 87(1)(c)(ii) of the Cape Nature and Environmental Conservation Ordinance 19 of 1974, s 41 of the Orange Free State Nature Conservation Ordinance 8 of 1969, s 112 of the Transvaal Nature Conservation Ordinance 12 of 1983, s 101 of the Mpumalanga Nature Conservation Act 10 of 1998.

⁴⁸ Section 24(9) of the National Parks Act 57 of 1976; s 30(1) of the Environment Conservation Act 73 of 1989, s 68 of the Marine Living Resources Act 18 of 1998, s 51(14) of the National Heritage Resources Act 25 of 1999, s 215B of the Natal Nature Conservation Ordinance 15 of 1974, s 87(1)(c)(ii) of the Cape Nature and Environmental Conservation Ordinance 19 of 1974, s 41 of the Orange Free State Nature Conservation Ordinance 8 of 1969, s 112 of the Transvaal Nature Conservation Ordinance 12 of 1983, s 101 of the Mpumalanga Nature Conservation Act 10 of 1998.

used in the commission of the offence (weapons used to hunt animals illegally, for example) and certain other items. Some provisions are mandatory,⁴⁹ compelling the court to declare the items forfeit, whereas others are permissive,⁵⁰ giving the court a discretion to do so.

There would seem to be good sense behind the forfeiture of contraband items and items used in the commission of the offence. It has been suggested that the only real problem with forfeiture of instrumentalities is that the forfeiture must not constitute unfair and excessive punishment (in addition to the basic sentence).⁵¹ In such cases, according to van der Walt, 'proportionality jurisprudence can be employed to indicate whether it is reasonable and justifiable to forfeit the property in question, given the court's findings on the facts, the nature of the property forfeited, the guilt of the defendant and the sentence already imposed'.⁵² In addition, there must be a necessary connection between the use of the instrumentality in question and the commission of the offence. If something is used only incidentally to the commission of the offence, then forfeiture of that item will not be countenanced.⁵³

Certain forfeiture provisions in South African law could be seen as overly punitive in nature and consequently may infringe the Constitution. The Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act⁵⁴ provides for forfeiture, not only of substances in respect of which an offence has been committed, but also all substances of a similar nature. This provision targets neither the 'contraband' nor the instrumentalities of the offence, and, consequently, could be contended to be a breach of the right to property in the Constitution.⁵⁵ Since it does not have any apparent compelling purpose, it is unlikely to be regarded as a justifiable limitation. Also, several statutes provide for the

⁴⁹ For example, s 215B of the Natal Nature Conservation ordinance (supra).

⁵⁰ For example, s 68 of the Marine Living Resources Act (supra).

⁵¹ André van der Walt 'Civil forfeiture of instrumentalities and proceeds of crime and the Constitutional property clause' (2000) 16 *SAJHR* 1 at 7.

⁵² *Ibid.*

⁵³ *S v Vermeulen* 1995 (2) SACR 439 (T). See discussion above, 85 ff.

⁵⁴ Act 36 of 1947.

⁵⁵ Section 25 of Act 108 of 1996.

forfeiture of vehicles or vessels used ‘in connection’ with an offence.⁵⁶ Where this connection is not sufficiently direct, there may be problems with the forfeiture of such items, as was the case in *S v Vermeulen*.⁵⁷

2.7 Community Service

In terms of the National Forests Act,⁵⁸ any person guilty of a ‘fourth category’ offence referred to in sections 63 and 64 (for instance, dropping litter in a forest), may be sentenced on a first conviction for that offence to a fine or community service for a period of up to six months or to both a fine and such service. A court which sentences any person to community service for an offence in terms of this Act must impose a form of community service which benefits the environment if it is possible for the offender to serve such a sentence in the circumstances.⁵⁹ Similarly, in the National Heritage Resources Act, it is provided that, in any case involving vandalism, and whenever else a court deems it appropriate, community service involving conservation of heritage resources may be substituted for, or instituted in addition to, a fine or imprisonment.⁶⁰

Community service is a particularly useful sanction in the case of impecunious offenders.⁶¹ This sentencing option will be discussed in more detail in respect of its application to corporate offenders below.

⁵⁶ Section 24(9)(b) of the National Parks Act 57 of 1976 (see discussion of section and relevant cases above at 99-101), s 30(1) of the Environment Conservation Act 73 of 1989, s 68 of the Marine Living Resources Act 18 of 1998, s 215B of the Natal Nature Conservation Ordinance 15 of 1974, s 87(1)(c)(ii) of the Cape Nature and Environmental Conservation Ordinance 19 of 1974, s 41 of the Orange Free State Nature Conservation Ordinance 8 of 1969, s 112 of the Transvaal Nature Conservation Ordinance 12 of 1983, s 101 of the Mpumalanga Nature Conservation Act 10 of 1998.

⁵⁷ (Supra).

⁵⁸ Act 84 of 1998.

⁵⁹ Section 58(7)(a).

⁶⁰ Section 51(13).

⁶¹ Zada Lipman & Lachlan Roots ‘Protecting the environment through criminal sanctions: The Environmental Offences and Penalties Act 1989 (NSW)’ (1995) 12 *Environmental and Planning LJ* 16 at 31.

2.8 Revocation of licence or permit

If an offence involves contravention of the conditions of a permit or licence, it would seem reasonable for a court to be able to revoke such permit or licence as part of the sentence. Curiously, however, only one environmental Act, the National Forests Act,⁶² contains such a provision.⁶³ This should be a standard provision in statutes which provide for licensed or permitted activities, but it should be phrased permissively rather than in a mandatory fashion, since in certain cases revocation of a licence may amount, in effect, to a complete prohibition on carrying out a person's livelihood, so it is a sanction that should not be imposed lightly. That said, however, it is a sanction that will be warranted in certain cases, even if it amounts to loss of livelihood or, in extreme cases, a 'corporate death penalty'.

2.9 Prohibition of further development

A sanction that has application only in limited spheres of activity is found in the National Heritage Resources Act,⁶⁴ to the effect that, if the owner of a place has been convicted of an offence in terms of the Act involving the destruction of, or damage to, the place, the Minister on the advice of the relevant authorities, may serve on the owner an order that no development of such place may be undertaken, except making good the damage and maintaining the cultural value of the place, for a period not exceeding 10 years specified in the order.⁶⁵ This is a provision that has good deterrent value in the case of people who take the risk of incurring whatever sentence may be imposed for damaging culturally important heritage sites and demolish them in order to carry out development. Not only will such a person be liable to the usual penalty, but he or she may also be forbidden from

⁶² Act 84 of 1998.

⁶³ Section 58(8).

⁶⁴ Act 25 of 1999.

⁶⁵ Section 51(9).

carrying out the intended development for a period of time up to ten years, which removes the incentive to demolish the older building in the first place.

2.10 Evaluation

The above analysis reveals that several sanctioning methods other than fines and imprisonment are available in environmental legislation. Most of them (for example, compensation orders and forfeiture orders) are supplementary to the usual penalty of fine or imprisonment but others, such as community service, are alternatives. In most cases, the justification for using such instruments is persuasive. Several of these methods are used in other jurisdictions.

There are, in addition to those methods discussed above, several other sanctioning methods that have been used or mooted in other countries, particularly those that target corporations, which are often seen as difficult to penalise. Those methods that can be used generally will first be considered, followed by corporate penalties.

3 Other sentencing measures

It is probably not necessary for a court to have more sentencing instruments at its disposal than those that are already provided for by South African legislation. The discussion below indicates that there are problems with use of ‘traditional’ sentencing methods as far as corporate offenders are concerned, but fining or incarcerating an individual are both methods that are able adequately to serve the goals of deterrence and retribution. It would, therefore, appear to be unnecessary to discuss alternative sentencing methods here, but there is one aspect worthy of discussion that is much discussed in the United States⁶⁶ and now seemingly being mooted in South Africa, that relates to the manner in which existing penalties are imposed. This is sentencing guidelines.

⁶⁶ For example, Jane Barrett ‘Sentencing environmental crimes under the United States Sentencing Guidelines – A sentencing lottery’ (1992) 22 *Environmental Law* 1421; Patrick J Devine ‘The Draft Organizational Sentencing Guidelines for environmental crimes’ (1995) 20 *Columbia Jnl of Environmental*

3.1 Sentencing Guidelines

The South African Law Commission has recently issued a publication entitled *Report on a New Sentencing Framework*,⁶⁷ in which the Commission recommends not only the development of clearly articulated sentencing principles, but also the creation by an independent Sentencing Council of sentencing guidelines for particular categories or sub-categories of offences.⁶⁸ The Commission published in this document a Sentencing Framework Bill, which provides for sentencing guidelines as follows:⁶⁹

- (1) A sentencing guideline specified sentencing options and their severity for a particular category or sub-category of offence.
- (2) The sentencing options that may be included in a guideline are –
 - (a) imprisonment;
 - (b) a fine; and
 - (c) a community penalty.
- (3) Sentencing guidelines are determined by applying the sentencing principles in section 3 by –
 - (a) grading categories or sub-categories of offences according to their comparative seriousness and ranking them accordingly; and
 - (b) prescribing sentencing options and their severity for categories or sub-categories of offences in terms of their ranking of seriousness, which are within the capacity of the correctional system to implement.

Law 249; Martin Harrell 'Organizational environmental crime and the Sentencing Reform Act of 1984: Combining fines with restitution, remedial orders, community service, and probation to benefit the environment while punishing the guilty' (1995) 6 *Villanova Environmental LJ* 243; Lisa Ann Harig 'Ignorance is not bliss: Responsible corporate officers convicted of environmental crimes and the federal sentencing guidelines' (1992) 42 *Duke LJ* 145 at 156-160; Gary S Lincenberg 'Sentencing environmental crimes' (1992) 29 *American Criminal LR* 1235; Cynthia E Carrasco & Michael K Dupee 'Corporate criminal liability' (1999) 36 *American Criminal LR* 445 at 457-473; Charles P Bubany 'Criminal enforcement of environmental statutes' in Frank F Skillern *Environmental Protection Deskbook* 2 ed (1995) 754 at 773-7.

⁶⁷ South African Law Commission *Report: Project 82: Sentencing (A New Sentencing Framework)* (November 2000).

⁶⁸ South African Law Commission *op cit* at 28.

⁶⁹ Section 5 of the Bill at 106. See also section 6.

- (4) Sentencing guidelines apply nationally but, where the degree of harmfulness of a category or sub-category of offence varies significantly from one magisterial district to another, different sentencing guidelines may be prescribed for specified magisterial districts.
- (5) In determining the severity of a community penalty as a sentencing option sentencing guidelines must specify the number of months of correctional supervision or the number of hours of community service.
- (6) In determining the severity of a fine as a sentencing option sentencing guidelines must refer only to fine units, as the amount of a fine is calculated in terms of section 22.
- (7) A sentencing guideline may provide –
 - (a) for an increase or decrease of up to 30 percent in the severity of a sentencing option; and
 - (b) that a part of the whole of a sentence of imprisonment be suspended, if such suspension is permitted by this Act.

As far as calculation of fines is concerned, the idea proposed by the Commission is that the Sentencing Council create ‘means categories’ each of which will have a specific fine unit of specified value. Sentencing officials in deciding on sentences will then follow a two-part process. First, they will determine the number of units applicable for that type of offence in terms of the principles relating to the seriousness of the offence. The number of fine units will then be multiplied by the value of the units set for the relevant means category. This is to ensure that accused persons are not sentenced to fines that they are unable to pay.⁷⁰

Given the recommendations of the Law Commission, which are somewhat of a departure from existing practice, it will be useful to consider the experiences of the United States in the use of sentencing guidelines, with particular reference to the environmental sphere.

In 1984 Congress enacted the Sentencing Reform Act⁷¹ in response to inconsistencies in sentencing practice and perceptions of lenient parole practices. The Act created the Sentencing Commission to establish sentencing guidelines for different offences. The United States Sentencing Guidelines (USSG) apply to federal environmental law in the United States. The Guidelines comprise a set of specific offence guidelines and a set of general adjustments. There are seven guidelines for environmental offences, each dealing

⁷⁰ South African Law Commission op cit at 66.

⁷¹ 18 USC §§ 3551 et seq and 28 USC §§ 991 et seq.

with a specific set of offences. Each guideline contains a base offence level and so-called ‘guided departures’ from the base level. For example, the base level for a violation of the Clean Water Act by an individual defendant involving toxic or hazardous effluents, the base level is 8.⁷² (There are also Guidelines for corporate defendants that are discussed below). This base level is adjusted either up or down depending on the characteristics of the offence. For example, if the offence results in a substantial likelihood of death or serious bodily injury, the base level is increased by 9 levels.⁷³

Once the level has been ascertained, this is used to determine the sentence by using the Sentencing Table.⁷⁴ For each level, there are six sets of sentencing ranges depending on the criminal history of the offender. If the overall level is 10, then the range for a first offender is 6-12 months imprisonment, while, for the same level, an offender with 13 or more ‘criminal history points’ has a range of between 24-30 months. The offender will also be given a fine, also determined using a table.⁷⁵ A level of 10 will attract a fine of between \$2 000 and \$20 000.

There may also be a so-called ‘unguided departure’ which gives the Court some discretion in adjusting the otherwise rather inflexible guidelines. These are both upward and downward adjustments, but an example of a downward adjustment that would come into play in the environmental sphere on occasion relates to the provision of assistance by the offender to the authorities.⁷⁶

This is a complex system (one of the common criticisms of the Guidelines) and it may best be understood by using an example. If a person contravenes the Clean Water Act by a one-off discharge of a hazardous substance without a permit, the base level would be 8 (for ‘mishandling of hazardous or toxic substances’), to which there would be added an upward adjustment of 4 levels because the offence involved a discharge, and another 4 levels for discharge without a permit. The total offence level, then, is 16. For a first offender, this would result in a sentence of imprisonment of between 21 and 27 months

⁷² USSG § 2Q1.2.

⁷³ USSG § 2Q1.2(b)(2).

⁷⁴ § 5A.

⁷⁵ USSG § 5E1.2.

⁷⁶ USSG § 5K1.1.

plus a fine of between \$5 000 and \$50 000. This shows that, even for a relatively minor transgression of the Clean Water Act, the sentence can be severe, especially considering that probation is not possible at level 16 and only 15 percent of time served is allowed for early release for good behaviour.

Even if many South Africans would be dissatisfied with the minor penalty imposed in the Sappi Ngodwana case mentioned in the introduction to this Chapter, it is likely that the majority of the South African public would regard the penalties for environmental offences under the United States Guidelines as excessive. This seems to be a view shared by some Americans, although Susan Smith⁷⁷ has stated that the approach that treats environmental crimes as real crimes worthy of prison time is –

‘thoroughly consistent with American public values. The American public regards environmental protection as a fundamental value, considers hazardous waste to be one of the most significant environmental problems, and regards corporate pollution as immoral. In surveys, corporate polluters are regarded as worse offenders than armed robbers. Thus, the stringent federal approach to environmental criminal law reflects not just good public policy, but political necessity’.

It is highly unlikely that the South African public would share the views of the American public in this regard, especially given the high prevalence of common law crime in the country. However, many South Africans would like to see more stringent enforcement of South African law including harsher penalties than those that have been imposed in the past. There may well be scope for imprisonment of environmental offenders, but probably only those that have deliberately or repeatedly contravened the law.

In comparing the proposed South African sentencing guidelines and those of the United States, it appears that the South African approach will be less complex, although the wording of the proposed legislation is wide enough to encompass detailed grading of offences depending on a variety of factors like those taken into account by the American system. Where it is unlikely, however, that guidance will be taken from the American model is in regard to the severity of the sentences. The South African environmental

⁷⁷ Susan L Smith ‘Doing time for environmental crimes: The United States approach to criminal enforcement of environmental laws’ (1995) 12 *Environmental & Planning LJ* 168 at 176 (footnotes omitted).

ethos has not developed yet to a stage where imprisonment for a relatively small environmental infraction will be tolerated.

The South African sentencing proposals do not explicitly mention corporations and the problem of sentencing corporate offenders, although this is a topic that has been addressed by the United States Sentencing Commission and many authors. Our attention now turns to this issue.

4 Sentencing Corporations

Sentencing corporations is an issue that has vexed commentators throughout the ages. The main reason for this is that corporations have ‘no body to kick and no soul to damn’. Put in more real terms, corporations cannot be imprisoned, which means that the only alternative penalty of the ‘traditional’ criminal sanctions is the fine. Many critics have indicated that fining corporations is an inadequate penalty⁷⁸ as the corporations are likely to absorb the fine simply as a cost of doing business.⁷⁹ For example, the chairman of Exxon, after the *Exxon Valdez* disaster in Alaska, for which the company entered a plea agreement amounting to a \$100 million criminal fine and accompanying civil settlement of \$1.1 billion over ten years, is reported to have claimed that this amount ‘would not curtail any of [the company’s] plans’.⁸⁰ On the other hand, if the fine is set high enough to circumvent this possibility, there are other problems, discussed below.

The purpose of this analysis is to consider why it is that traditional forms of sentencing are problematic in respect of corporations and to evaluate innovative alternatives that have been mooted.

⁷⁸ See John D Wilson ‘Re-thinking penalties for corporate environmental offenders: A view of the Law Reform Commission of Canada’s *Sentencing in Environmental Cases*’ (1985) 31 *McGill LJ* 313 at 318-21.

⁷⁹ Steven Zipperman ‘The *Park* doctrine – Application of strict criminal liability to corporate individuals for violation of environmental crimes’ (1991) 10 *UCLA Jnl of Environmental Law & Policy* 123 at 153; Rachel Mulheron ‘Criminal enforcement of environmental law: Limitations and “flat-earth thinking” sanctions’ (1996) *Queensland Law Society Jnl* 427 at 436.

⁸⁰ Mulheron *ibid*.

4.1 *Conviction*

It can be argued that conviction alone does have a potential retributive and deterrent impact on corporate offenders. The stigma imposed by criminal conviction cannot be written off a cost of doing business. However, the stigma of criminal conviction will only be significant if there is publicisation of the conviction, which is often not the case. In practice, then, the deterrent and retributive impacts on the corporation imposed by conviction alone are unlikely to be strong.⁸¹

4.2 *Fines*

The main problem with fines is that, first, imposition of fines does not necessarily stimulate the guilty corporation to exercise adequate internal control or to revise their defective procedures. Secondly, they convey the impression that permission to commit a crime may be bought for a price.⁸² This conflicts with the goals of deterrence and retribution which are, in part, to express the view that offences are ‘socially unwanted and that money alone cannot adequately compensate’.⁸³

Fines can easily fall victim to what Coffee calls the ‘deterrence trap’,⁸⁴ which arises when the size of the fine that is necessary to bring about effective deterrence is larger than an amount that the corporation can pay. A small corporation will not be more threatened by a R5 million fine if it cannot pay one of R50 000. At least where an individual is unable to pay a fine, he or she can be deterred by the threat of imprisonment. As Coffee points out, ‘our ability to deter the corporation may be confounded by our inability to set an adequate punishment cost which does not exceed the corporation’s

⁸¹ See Brent Fisse ‘Reconstructing corporate criminal law: Deterrence, retribution, fault and sanctions’ (1983) 56 *Southern California LR* 1141 at 1221

⁸² Fisse op cit at 1217.

⁸³ Ibid.

⁸⁴ John C Coffee Jr “‘No soul to damn: No body to kick’: An unsandalized inquiry into the problem of corporate punishment’ (1981) 79 *Michigan LR* 386 at 389-93.

resources’.⁸⁵ This problem was identified by Fischel & Sykes in their analysis of the United States Organizational Sentencing Guidelines, implemented in 1991.⁸⁶ What the authors called overdeterrence characteristic of the massive monetary amounts (fines coupled with restitution), however, does not apply to environmental offences, which are excluded from the ambit of these Guidelines.⁸⁷ Although the Sentencing Commission’s Advisory Working Group released a draft set of organizational sentencing guidelines for environmental offences, which were met by much opposition,⁸⁸ mainly due to their severity, these have not been taken further.

Not only do fines suffer from the problem with deterrence in the context of corporate offenders, but there is also a ‘retribution trap’. A retributive fine based on the idea of justice as fairness⁸⁹ may also be far larger than that which the offender can pay. As Braithwaite says,⁹⁰

‘Given what we know about how disapproving the community feels toward corporate crime, there may be many situations where the deserved monetary or other punishment bankrupts the company.

The community then cuts off its nose to spite its face’.

In addition to the problems of the deterrence trap and retribution trap, fining corporations may also operate unjustly in that the cost of paying the fine falls largely on innocent shareholders, or they can be externalised by imposing the costs upon consumers or employees of the corporation.

Further problems with fining corporations are what Coffee calls the externality problem and the nullification problem. The externality problem, put simply, is that the imposition of a fine on a corporation imposes costs (externalities) on persons who are

⁸⁵ Coffee op cit at 390.

⁸⁶ Daniel R Fischel & Alan O Sykes ‘Corporate crime’ (1996) 25 *Journal of Legal Studies* 319 at 343 ff.

⁸⁷ USSG § 8C2.1. Environmental offences are excluded from the scope of the section on fines, but are subject to the requirements of restitution and probation.

⁸⁸ See Patrick J Devine ‘The Draft Organizational Sentencing Guidelines for Environmental Crimes’ (1995) 20 *Columbia Jnl of Environmental Law* 249.

⁸⁹ This idea requires that a person who benefits from a criminal act that incurs a cost on society must make restitution for the social losses he or she brought about: Fisse op cit at 1218 n371.

⁹⁰ John Braithwaite ‘Challenging just deserts: Punishing white-collar criminals’ (1982) 73 *Jnl of Criminal Law & Criminology* 723 at 757.

largely innocent (some completely innocent). This can be referred to as overspill of the costs of deterrence. Persons thus affected are stockholders (who can perhaps be regarded as not completely innocent since they have been benefiting from tainted proceeds), creditors (through a diminution of the value of their securities reflecting the increasing riskiness of the enterprise), employees (who may be affected, maybe even retrenched, as a result of cost-cutting in response to a severe fine) and consumers.⁹¹

The externality problem gives rise to the nullification problem: that judges are reluctant to impose fines approaching the maximum they can because of their perceptions of the overspill of negative impact on innocent persons. This leads to nullification of the legislation.

4.3 Managerial intervention

This penalty would entail a court order requiring internal discipline and organisation reform. Internal discipline orders would place responsibility upon the corporation for investigating the offence and bringing the appropriate individuals within the corporate structure to book. Organisational reform would involve the installation of preventive policies or procedures, or modification of existing ones, in order to prevent the repetition of offences. Fisse recommends the imposition of managerial intervention by means of a ‘punitive injunction’, as opposed to probation, due to view of probation as being a ‘soft option’ alternative to other penalties. The view may well have been valid at the time that Fisse was writing, but probation has subsequently been ‘promoted’ to a sentence in its own right, and often a supplement to other penalties,⁹² so managerial intervention could be imposed as a condition of corporate probation.

The main advantages of managerial intervention are that, in short, they are directed at managers rather than shareholders and other victims of the overspill of fines, and they encourage reform of policies and procedures within the organisation.⁹³

⁹¹ See Coffee op cit at 401-2.

⁹² See USSG § 8D.

⁹³ See Fisse 1237-8 for more detail.

4.4 *Community Service*

This penalty has been discussed above, but its focus is currently on individual offenders rather than corporate offenders. Corporate offenders could be required to carry out community service by means of undertaking socially useful work projects tailored to the offender's skills and resources and reasonably related to the offence subject to the sentence. Harrell calls such projects 'beneficial environmental projects'.⁹⁴

Community service is normally viewed as involving service 'in kind' but it can be imposed in the form of requiring offenders to pay money for charitable purposes.⁹⁵ In certain cases, courts have imposed as a condition of probation either the membership of environmental groups or payment of monetary contributions to such groups,⁹⁶ but this would appear to be a practice of somewhat dubious efficacy.

The United States Sentencing Guidelines for organisations provides for the imposition of community service for corporations, 'where such community service is reasonably designed to repair the harm caused by the damage'.⁹⁷ In the commentary to this section of the Guidelines, which is intended to provide guidance as to how to apply the section, it is stated that –

'where the convicted organization possesses knowledge, facilities, or skills that uniquely qualify it to repair damage caused by the offense, community service directed at repairing damage may provide an efficient means of remedying harm caused.

In the past, some forms of community service imposed on organizations have not been related to the purposes of sentencing. Requiring a defendant to endow a chair at a university or to contribute to a local charity would not be consistent with this section unless such community service provided a

⁹⁴ Martin Harrell 'Organizational environmental crime and the Sentencing Reform Act of 1984: Combining fines with restitution, remedial orders, community service, and probation to benefit the environment while punishing the guilty' (1995) 6 *Villanova Environmental LJ* 243.

⁹⁵ *United States v Allied Chemical Corp* 420 F Supp 122 (ED Va 1976) and *United States v Olin Corporation* Criminal No. 78-30 slip op (D Conn 1 June 1978).

⁹⁶ See Jaimy M Levine "'Join the Sierra Club!': Imposition of ideology as a condition of probation' (1994) 142 *Univ of Pennsylvania LR* 1841 especially at 1842 n7.

⁹⁷ USSG § 8B1.3.

means for preventive or corrective action directly related to the offense and therefore served one of the purposes of sentencing set forth in 18 U.S.C. § 3553(a)'.

This would suggest that those cases that view community service as involving payment of an amount of money to a worthy cause are in most cases unlikely to satisfy the goals of community service.

The advantages of community service are, first, that it serves the goals of deterrence and retribution in three ways that fines do not. First, it relates to nonmonetary values as well as monetary values in that it has the capacity to inflict loss of power and autonomy on the corporation.⁹⁸ Second, community service need not be 'subverted by the micro-goals of organizational subunits', provided that community service requires the participation of the whole organisation. Third, whereas fines give the impression that criminality can be purchased, community service has the ability to express the social undesirability of crime. These three factors apply equally to adverse publicity and redress facilitation discussed below. Further benefits of community service are that it does not fall into the deterrence and retribution traps, and it is unlikely to have negative impacts on shareholders, employees and consumers. As Fisse explains –

'Community service projects could create new employment opportunities for persons unemployed or otherwise at risk of being laid off and, although the financial costs may be passed on to consumers, there would also be a positive externality – the service rendered to the community'.⁹⁹

In the well-known Canadian case of *R v Bata Industries Ltd*,¹⁰⁰ a Bata Industries plant in Ontario, Canada, produced hazardous liquid industrial waste which was allowed to seep into the ground and contaminate groundwater. The company was prosecuted and convicted under provincial environmental legislation and fined \$60 000. In addition, the Court imposed a probation order, the conditions of which required the payment of a further \$60 000 to the establishment of a local toxic waste disposal programme.¹⁰¹ Given the views of the United States Sentencing Commission set out above, it is unlikely that this aspect of the *Bata* decision would accord with the goals of community service in the

⁹⁸ Fisse op cit at 1239.

⁹⁹ Fisse op cit at 242.

¹⁰⁰ (1992) 7 CELR (NS) 293 (Ont Prov Div).

¹⁰¹ This amount was halved on appeal: *Bata* (1993) 14 OR (3d) 354 (Gen Div).

United States. Had the corporation been required to use its skills and resources to establish the programme itself, however, that would presumably have been acceptable. Further aspects of the sentencing in the *Bata* case are discussed below.

4.5 *Adverse publicity*

Nowadays, it is recognised that corporate prestige is a significant corporate asset that is closely related to its financial success. A requirement, either instead of or in addition to, other penalties, that the corporate offender publicise its conviction and the details of the offence at its own cost (and to the satisfaction of the court, to prevent a corporation producing something that nobody will read), may be a useful sanction that rests on the stigmatisation effect of criminal conviction. It has been argued that the impact of adverse publicity is too uncertain to justify its use,¹⁰² but, as Fisse, points out all sentencing involves uncertainties of impacts and this alone does not warrant rejection of the idea.¹⁰³

The advantages of adverse publicity orders are essentially the same as those of community service.¹⁰⁴ There may be some doubt, however, as to Fisse's claim that the overspill of adverse publicity to workers or consumers as a result of the company's tarnished image would be minimised. Given the extent of environmental consciousness today in certain countries, adverse publicity may well lead to consumers avoiding the company's products, which may well have an impact on employees if loss of market share is significantly serious.

Adverse publicity orders are not just an idea – they have been used in practice. In terms of the Canadian Environmental Protection Act of 1987, a convicted offender may be ordered to publish the facts involved in the commission of the offence. In the *Bata* case,¹⁰⁵ the Court imposed, in addition to a fine, a probation order on the corporation

¹⁰² See, for example, Coffee op cit at 427-8.

¹⁰³ Fisse op cit at 1230-1.

¹⁰⁴ See Fisse op cit 1239-1243.

¹⁰⁵ (Supra).

requiring it to publicise in its newsletter the facts relating to its conviction. On appeal, the Court restricted this order to apply only within Canada.¹⁰⁶

4.6 *Redress Facilitation*

This measure envisages the offender being required to facilitate the provision of civil compensatory options to the victims of the offence. Examples given by Fisse include punitive discovery orders and requiring offenders to give notice of conviction to victims.¹⁰⁷ The likely criticism of this measure as being overly harsh can be met by the response that, as an alternative to a fine, it may not be harsh. Moreover, if reserved for offences which call for harsh sentences, it may be a necessary measure to meet the deterrent aims of punishment.

The United States Sentencing Guidelines do provide for an order requiring both an individual¹⁰⁸ and a corporate defendant¹⁰⁹ to provide notice of the offence to victims in circumstances contemplated by USC § 3555, which requires such notice in cases of ‘fraud or other intentionally deceptive practices’. This type of measure is ideal in such cases, where some victims may not know that they have been the victims of a crime, but it is difficult to think of instances where this would be relevant in the environmental sphere. Redress facilitation, therefore, is likely to be of limited use in the context of environmental crimes.

4.7 *Equity Fines*

Coffee proposes the use of equity fines,¹¹⁰ which would operate essentially as follows:

¹⁰⁶ Bata (supra n101). See Peter Bowal ‘In pursuit of original principle: Sentencing in *R v Bata Industries Ltd*’ (1994) 4 *Jnl of Environmental Law and Practice* 197.

¹⁰⁷ Fisse op cit at 1233.

¹⁰⁸ USSG § 5F1.4.

¹⁰⁹ USSG § 8B1.4.

¹¹⁰ Coffee op cit at 413-424.

‘[W]hen very severe fines need to be imposed on the corporation, they should be imposed not in cash, but in the equity securities of the corporation. The convicted corporation should be required to authorize and issue such number of shares to the state’s crime victim compensation fund as would have an expected market value equal to the cash fine necessary to deter illegal activity. The fund should then be able to liquidate the securities in whatever manner maximises its return’.

In broad terms, the justification for equity fines Coffee offers are:

- ❑ The overspill of corporate penalties onto workers and consumers is reduced, since the cost of deterrence will rest exclusively on the shareholders.¹¹¹
- ❑ As a result of the reduction of overspill, the nullification problem may be reduced.¹¹²
- ❑ Significantly higher penalties may be imposed, ‘because the market valuation of the typical corporation vastly exceeds the cash resources available to it (with which a cash fine may be paid)’.¹¹³
- ❑ It leads to better alignment of the manager’s self-interest with that of the corporation, since the decline in the stock will reduce the value of stock options and incentive compensation available to him or her.¹¹⁴
- ❑ The creation of a large marketable block of securities makes the corporation an inviting target for a takeover.¹¹⁵
- ❑ Stockholders would be inclined to take less of a short-term, profit-maximising view and would be likely to require better internal controls within their corporation.¹¹⁶

On the other hand, Fisse identifies the following shortcomings of the equity fine idea:¹¹⁷

- ❑ Managers’ self-interest may be affected only to the extent that they hold stock or stock options in their company at the time in question.

¹¹¹ Coffee op cit at 413-6.

¹¹² Ibid.

¹¹³ Coffee op cit at 413. See also 419-20.

¹¹⁴ Coffee op cit at 413-4 and 417-8.

¹¹⁵ Coffee op cit at 414 and 418.

¹¹⁶ Coffee op cit at 414 and 418-9.

¹¹⁷ Fisse op cit at 1236.

- ❑ They suffer from a similar drawback to cash fines in that they do not guarantee the overhaul of internal policies and procedures relating to discipline and compliance.
- ❑ They emphasise the price of crime rather than the social disvalue of crime. This is a drawback that is also shared by cash fines.
- ❑ They would ‘minimize the injustice of overspills to workers and consumers at the expense of maximizing the unjust distribution of costs to shareholders’.¹¹⁸

These shortcomings, coupled with the fact that as a novel idea the implementation of equity fines would require compelling argument in favour of its advantages, suggest that their time has not yet come, particularly in South Africa where corporations are not currently prosecuted widely for environmental offences.

4.8 *Prohibition of indemnification of corporate officers*

Although not really a penalty to be imposed on a corporation, an order prohibiting the corporation from indemnifying corporate officers who have been sentenced to fines, could be imposed as a condition of probation. This was done in the *Bata* case,¹¹⁹ and is prohibited in England by section 310 of the Companies Act. While the objective behind such an order is a commendable one – payment of the corporation of its officers’ fines would undermine the sentencing objectives vis-à-vis the officer – there may well be insurmountable impracticalities as far as enforcement of the order is concerned that would serve to outweigh the value of such an order.¹²⁰ While it is true that it may be very difficult for the authorities to ascertain whether, in fact, indemnification has been made in ways that are not obvious, the merit of such an order is, at the very least, to prevent blatant acts of indemnification that would serve to bring the law into disrepute.

¹¹⁸ Ibid.

¹¹⁹ (Supra).

¹²⁰ Kathleen Kwan ‘Analysis of *Bata*’ (1994) 6 *Jnl of Environmental Law* 119 at 121-2.

4.9 Disqualification from government contracts

Such a penalty could certainly have significant deterrent impact on offending corporations. According to Cohen,¹²¹ firms convicted of crimes may be debarred or suspended from federal contracting, although suspensions and debarments are generally imposed by government agencies, not directly by the courts. He reported that, in 1990, the Environmental Protection Agency had considered pursuit of such actions against firms convicted of environmental crimes, but the idea does not seem to have materialised. It could be argued that it is not the role of the court to distribute government largesse,¹²² and, in addition, this may provide severe hardship for the government in a country with a relatively small economy if the only supplier capable of serving the government's needs were so disqualified. Perhaps such a measure would be useful not as a stand-alone sanction, but a condition of probation. For example, a corporation ordered to implement a corporate compliance programme might be disqualified from government contracts until such time as the compliance programme is implemented to the satisfaction of the court.

4.10 Evaluation

Despite the criticism of corporate fines above, there is, it is submitted, still a role for corporate fines to play, but not as the sole sanction on an offending corporation. The above analysis indicates that there are several creative sentencing ideas relating to corporations, a number of which are already being used. These can be used in conjunction with fines. Most of the sentencing options mentioned above are imposed as conditions of probation, a concept which is foreign to South African law, at least under that name. It would be possible, however, to make use of (or adapt) the practice of

¹²¹ Mark A Cohen 'Criminal law: Environmental crime and punishment: Legal/Economic theory and empirical evidence on enforcement of Federal environmental statutes' (1992) 82 *Jnl of Criminal Law & Criminology* 1054 at 1082.

¹²² Mulheron *op cit* at 442.

postponed or suspended sentences, which is already provided for in the Criminal Procedure Act.¹²³ Section 297(1) provides –

Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion –

(a) postpone for a period not exceeding five years the passing of sentence and release the person concerned –

(i) on one or more conditions, whether as to –

(aa) compensation;

(bb) rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;

(cc) the performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community (in this section referred to as community service);

(ccA) submission to correctional supervision;

(dd) submission to instruction or treatment;

(ee) submission to the supervision or control (including control over the earnings or other income of the person concerned) of a probation office as defined in the Probation Services Act, 1991;

(ff) the compulsory attendance or residence at some specified centre for a specified purpose;

(gg) good conduct;

(hh) any other matter;

and order such person to appear before the court at the expiration of the relevant period; or

(ii) unconditionally, and order such person to appear before the court, if called upon before the expiration of the relevant period; or

(b) pass sentence but order the operation of the whole or any part thereof to be suspended, for a period not exceeding five years on any condition referred to in paragraph (a)(i) which the court may specify in the order...’

Although the section appears to be aimed at individual offenders, it could be easily adapted for corporate offenders to provide for the conditions imposing relevant forms of managerial intervention and adverse publicity orders. Managerial intervention could require either the institution of internal disciplinary procedures relating to the incident in

¹²³ Act 51 of 1977.

question and/or the implementation of compliance procedures or programmes to the satisfaction of the court. Failure to comply within a specified time would lead to the postponed sentence being brought into operation.

A model provision catering for these ideas (referring to the Schedule 3 offences contemplated by the National Environmental Management Act) could read as follows:

(1) Where a court convicts a corporation of any offence listed in Schedule 3, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion –

(a) postpone for a period not exceeding five years the passing of sentence on one or more conditions, whether as to –

- (aa) compensation;
- (bb) rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;
- (cc) the performance without remuneration of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community;
- (dd) the implementation by the corporation to the satisfaction of the court of disciplinary procedures within the corporation in connection with the offence for which this sentence was imposed: Provided that the corporation shall compile a report setting out the disciplinary procedures followed, the findings arising out of such procedures and any disciplinary action taken by the corporation pursuant to such findings, which report shall be submitted to the court which imposed the condition;
- (ee) the implementation by the corporation to the satisfaction of the court of policies and procedures designed to avoid non-compliance with the legislation contravened by the legislation that led to the conviction for which this sentence was imposed;
- (ff) the placing of advertisements in a publication or publications as may be specified by the court either setting out the facts leading to the conviction and the findings and sentence of the court or containing whatever text as may be ordered by the court;
- (gg) good conduct;
- (hh) any other matter;

and order such corporation to appear before the court at the expiration of the relevant period; or

(b) pass sentence but order the operation of the whole or any part thereof to be suspended, for a period not exceeding five years on any condition referred to in paragraph (a) which the court may specify in the order...’

5 Conclusion

The challenge for sentencing environmental crimes is to strike a happy medium between treating environmental offenders overly leniently, on the one hand, or too harshly, on the other. Marais JA has summed up well what the courts' attitudes should be towards white-collar criminals, and it is submitted that his comments are equally apposite to environmental offenders, many of whom are white-collar criminals, but perhaps in a slightly different context to those contemplated by the judge in his dicta in *S v Sadler*¹²⁴ –

‘So called “white collar crime” has, I regret to have to say, often been visited in South African courts with penalties which are calculated to make the game seem worth the candle. Justifications often advanced for such inadequate penalties are the classification of “white collar” crime as non-violent crime and its perpetrators (where they are first offenders) as not truly being “criminals” or “prison material” by reason of their often ostensibly respectable histories and backgrounds. Empty generalisations of that kind are of no help in assessing appropriate sentences for “white collar” crime. Their premise is that prison is only a place for those who commit crimes of violence and that it is not a place for people from “respectable” backgrounds even if their dishonesty has caused substantial loss, was resorted to for no other reason than self-enrichment, and entailed gross breaches of trust.

These are heresies. Nothing will be gained by lending credence to them. Quite the contrary. The impression that crime of that kind is not regarded by the courts as seriously beyond the pale and will probably not be visited with rigorous punishment will be fostered and more will be tempted to indulge in it’.¹²⁵

On the other hand, the approach adopted in the United States seems to be out of keeping with what may be regarded as acceptable in South Africa. Although there does seem to be a need to punish environmental offenders more severely, certainly in cases where there is deliberate wrongdoing, the sentences handed down in the United States often appear to be excessive in the circumstances.

If the South African Law Commission's proposals regarding sentencing guidelines come to fruition, the Sentencing Council will be faced sooner or later with the question of how to set guidelines for environmental offences. As pointed out above, the lessons

¹²⁴ 2000 (1) SACR 331 (SCA) at para [11]–[12].

¹²⁵ At para [11]–[12].

learned from the United States guidelines would be to avoid setting sentences as harsh as those in the United States Sentencing Guidelines. It is recommended that sentencing options such as compensation, reparations and community service should be retained and, indeed, made to apply with uniformity for all environmental offences. Other sentences such as continuing fines, fines equal to advantage gained, fines equal to multiples of the value of the damaged item or animal and forfeiture should also continue to be used where appropriate.

Furthermore, in deciding what factors to take into account in assessing the appropriate sentences under the proposed Sentencing Guidelines, the Sentencing Council could do worse than follow the factors set out by the Court in the Canadian case of *Bata*, mentioned above, which was followed by the New Zealand High Court in *Augustowicz v Machinery Movers Ltd.*¹²⁶ The four 'key issues' to be considered are:

- (1) the nature of the environment affected;
- (2) the extent of the damage caused;
- (3) the deliberate nature of the offence; and
- (4) the attitude of the accused.

When it comes to corporate offenders, five additional considerations come into play:

- (1) the size of the corporation and the nature of its wealth and power;
- (2) the extent of the corporation's attempts to comply with the law;
- (3) remorse on the defendant's part;
- (4) the profits realised by the offence; and
- (5) any criminal record or evidence of good character on the part of the corporation.

It has been argued that the commonly held perception that penalties for environmental offences in South Africa are inadequate is largely untrue as far as those provided for by legislation are concerned. There has been cause for concern, though, when it comes to sentences actually handed down, although information available on this is sketchy. There are two reasons for optimism on this score, however. First is the perception that the judicial tide against lenient penalties is turning, as evidenced by the Western Cape

¹²⁶ (1993) 2 NZRMA 202. See Martin Phillipson 'Enforcement of environmental law: New Zealand's statutory model' (1995) 12 *Environmental & Planning LJ* 308 at 311-2.

tortoise-smuggling case discussed above. The second is that the implementation of sentencing guidelines, it is hoped, will serve to ensure that environmental criminals are appropriately sentenced.

Chapter 13

Procedural Aspects

The previous four Chapters are concerned with the manner in which environmental criminal law can be improved in South Africa. The recommendations have focused on substantive issues in the criminal law, whereas the purpose of this brief Chapter is to consider some procedural aspects which would probably improve the situation relating to criminal prosecution of environmental offences. The three issues focused on are all interrelated and the legal devices concerned are all provided for to an extent in South African law. This Chapter, however, makes recommendations as to how to improve the operation of these provisions or to extend their ambit.

1 Private prosecution

Currently in South Africa, the process followed for a prosecution of an environmental offence is something like the process for prosecution of an offence under the 1956 Water Act as described by the Attorney-General of KwaZulu-Natal in an affidavit quoted in *Feedmill Developments (Pty) Ltd and another v Attorney-General, KwaZulu-Natal*:¹

‘The procedure adopted is that the Umgeni Water Corporation [which acts as an agent for the Department of Water Affairs] is responsible for taking samples and in instances where an alleged act of pollution appears to have taken place the Department of Water Affairs instructs the South African Bureau of Standards to test the samples. The Department of Water Affairs then pursues the incident ultimately referring the matter, via their legal department, to my office. An authorised member of my staff then considers the merits of the investigation, and, if it is felt that the matter deserves investigation, refers the said matter to the South African Police Services for investigation. Upon conclusion of the investigation the docket relating to the police investigation is referred to my office where an authorised member of my staff evaluates the evidence and decides whether the case merits prosecution. If it is decided that the alleged offender should be prosecuted the docket is referred to the appropriate Magistrates Court where it is given to a delegated prosecutor who instructs the

¹ [1998] 4 All SA 34 (N) at 37.

investigation officer on any outstanding issues which he/she considers relevant, drafts the charge sheet and issues summons’.

The procedure described is a very cumbersome and time-consuming procedure and cannot help but be inefficient. It is important to bear in mind that this is currently the procedure followed for *any* breach of water legislation, and is unlikely to be significantly different for breaches of other legislation outside of the water sector, other than as regards the involvement of the agent of the Department of Water Affairs, Umgeni Water.

It is apparent that the necessity for officials in various organs of state managing environmental issues to report any breaches of legislation to the South African Police Services can be problematic for various reasons. First, the lack of experience of the average police officer in respect of environmental offences can result in the matter being ineffectively investigated. Second, this is exacerbated by the fact that there is often inadequate communication between the departmental officer concerned and the police.²

It is submitted that it would be far more effective in the prosecution of offences, as well as less of a burden on state resources, for contraventions of environmental legislation to be investigated and prosecuted by legal officers of the relevant organs of state, rather than having to rely on the time-consuming process of involving the South African Police Services and public prosecutor as outlined in the above quote. In the United Kingdom, for example, the relevant environmental agencies do their own prosecutions.

Technically, there is no need for South African law to be changed or for new law to be created to do this in this country. Section 33 of the National Environmental Management Act,³ which provides for private prosecutions,⁴ can be used for these purposes. It is unlikely, it is submitted, that the average member of the public who is concerned about environmental issues and breach of environmental legislation would make use of the private prosecution provision, since his or her goals would probably be more than adequately served by interdict proceedings. In other words, there is very little to be

² These observations were supplied by Mr Nico Snyman, former enforcement officer in the KwaZulu-Natal Conservation Services, personal communication.

³ Act 107 of 1998.

⁴ This section is set out in full above at 188-9.

gained, other than some satisfaction that an environmental offender has been prosecuted, by a member of the public by bringing a private criminal prosecution.

On the other hand, this provision can be used by environmental agencies to bring ‘in-house’ prosecutions, thereby ensuring that the persons involved in both investigation and prosecution of the offence have experience in the field. With reference to the example given in the Attorney-General’s affidavit above, if the Department of Water Affairs legal office were to carry out prosecutions for breaches of water legislation after investigation by staff of that Department, the process would be far less cumbersome, less time-consuming, and, probably, more likely to result in a successful conviction due to the experience of the persons involved in that particular legislation and its application.

One of the possible counters to this suggestion is that the various organs of state do not have the resources to mount criminal prosecutions and that many environmental officers do not see themselves as enforcement officials and would be reluctant to assume this role. Dealing with the second objection first, this could be resolved by the relevant organs ensuring that they engage staff who have experience in enforcement specifically for this purpose, thus leaving the scientists and other officials to concentrate on areas for which they have the appropriate skills and experience. This would obviously also have resource implications. It is submitted, however, that ‘in-house’ prosecution of environmental offences could pay for itself if the following proposals are accepted and implemented.

2 Recovery of costs of prosecution

Several other jurisdictions have legislation allowing the recovery by means of a costs order against the defendant (accused) of the costs incurred by the prosecution in conducting the trial. There is provision for this in South African environmental legislation, but it does not yet appear to have been used. Let us consider the foreign examples before making recommendations in the South African context.

In the United Kingdom, section 18 of the Prosecution of Offences Act 1985 provides –

(1) Where –

(a) any person is convicted of an offence before a magistrates’ court;

- (b) the Crown Court dismisses an appeal against such a conviction or against the sentence imposed on that conviction; or
- (c) any person is convicted of an offence before the Crown Court the court may make such order as to the costs to be paid by the accused to the prosecutor as it considers just and reasonable.

In New Zealand, the Costs in Criminal Cases Act 1967 provides that, where any defendant is convicted by any Court of any offence, the Court may order him or her to pay such sum as it thinks just and reasonable towards the costs of the prosecution.⁵ New South Wales in Australia also allows for the recovery of costs in criminal proceedings. The Land and Environment Court Act 1979 provides –

- (1) Where a Judge:
 - (a) convicts any person of an offence punishable in the summary jurisdiction of the Court, ... the Judge may, in and by the conviction or order, order the defendant ... to pay to the prosecutor ... costs of such amount as are specified in the conviction or order or, if the conviction or order so directs, as may be determined under subsection (2).
- (2) The costs payable by a prosecutor or defendant in accordance with a direction under this section are to be determined:
 - (a) by agreement between the prosecutor and defendant, or
 - (b) if no such agreement can be reached, in accordance with the regulations.

Whereas the English and New Zealand examples are general criminal costs provisions, the New South Wales provision applies specifically to environmental offences which are within the jurisdiction of the Land And Environment Court.

In South Africa, the National Environmental Management Act⁶ provides –

Whenever any person is convicted of an offence under any provision listed in Schedule 3 the court convicting such person may, upon application by the public prosecutor or another organ of state, order such person to pay the reasonable costs incurred by the public prosecutor and the organ of state concerned in the investigation and prosecution of the offence.⁷

The scope of this provision is wide, given the offences listed in Schedule 3, and it is perhaps an indication of the paucity of environmental prosecutions in South Africa that the provision does not yet appear to have been invoked.

⁵ Section 4.

⁶ Act 107 of 1998.

⁷ Section 34(4). Schedule 3 appears above at 192-4.

The attraction of such a provision can be argued quite simply. The technical complexities of some environmental prosecutions, particularly those involving proof of breach of standards, results in costly, time-consuming trials. If these costs could be recovered from unsuccessful accused, particularly those who plead not guilty in the face of solid evidence for the state in the hope that they can trip the prosecution up on a technicality, the apparent reluctance of authorities to prosecute could be reduced. The objective of such a provision, therefore, is twofold. The first relates to resources – if the state can recover the costs, these funds can boost enforcement efforts. The second objective is to provide accused persons with an incentive to plead guilty. A guilty plea would reduce the costs of the trial and, in addition, since the provision is permissive and not mandatory, it would be possible for there to be a practice guideline providing that costs will not be requested in cases where the accused has co-operated with the authorities and/or has pleaded guilty.

There is, however, one important consideration which might militate against this provision and this is whether a measure that induces a person to plead guilty could be regarded as infringing the right to a fair trial. It is submitted that the imposition of costs of prosecution on an accused person in such circumstances is not problematic for the following reasons. First, there is, in effect, no difference between providing for payment of costs and a court's taking into account an accused's guilty plea or efforts to co-operate with the authorities as a mitigating sentencing factor, which is common practice. In a similar vein, the imposition of a costs order could be seen, in effect, as an additional fine. Were the legislature to increase sentences for environmental offences by an amount equivalent to the costs of a trial, this would not attract any adverse constitutional reaction, so why should asking the accused to pay the costs of the trial? Third, the fact that the provision is permissive and not mandatory means that the courts ought not to apply the provision automatically, but rather to impose costs on convicted person only where circumstances justify it. In this regard, the NEMA provision could be improved by including reasons for a court to impose such an order – even if the reasons are expressed in relatively vague terms like those in the United Kingdom and New Zealand legislation

set out above. Finally, the right to a fair trial in the Constitution does not provide for the right to a *free* and fair trial. Several rights come at a cost and this is one of those rights.

To conclude on this point, the existing NEMA provision could be slightly altered to provide for criteria for the exercise of judicial discretion as follows –

Whenever any person is convicted of an offence under any provision listed in Schedule 3 the court convicting such person may, upon application by the public prosecutor or another organ of state, order such person to pay the reasonable costs incurred by the public prosecutor and the organ of state concerned in the investigation and prosecution of the offence if, in the opinion of the court, it is just and reasonable to do so.

3 Payment of fines for environmental offences to organs of state managing the environment

The Natal Conservation Ordinance⁸ provides for payment to the Board of all fines or estreated bail moneys paid or recovered in respect of any contravention of the ordinance or the regulations.⁹ The extension of such a provision to all environmental offences would be advantageous in that it would ensure that the proceeds of prosecutions could be channelled into the enforcement efforts of the organ of state in question, instead of being subsumed by the gaping maw of the general fiscus. It is difficult to conceive of any objections to this from the Treasury, especially since the extent of fines received for environmental offences, on current prosecution levels, must be all but insignificant in the overall scheme of things. Since it is unlikely that there will be increased budgets for those organs of state that manage the environment for them to improve their enforcement efforts, such a measure can be invaluable in providing for the resources necessary to improve enforcement efforts.

⁸ Ordinance 15 of 1974.

⁹ Section 216.

4 Conclusion

It is not only by addressing substantive issues of South African environmental criminal law that prosecution of environmental offenders will be improved. The suggestions made in this Chapter will serve to improve the existing situation in that, first, they will provide a more efficient, less cumbersome and probably more effective alternative to the current messy procedure for prosecuting environmental offences. Second, any increased enforcement role envisaged by the use of in-house prosecutions can be offset by providing for recovery of the costs of prosecution and channelling of fines to the relevant organs of state.

Chapter 14

Conclusion

1 Summary of arguments

This thesis argues that the main aim of criminal law in the environmental regulatory context is deterrence.¹ Retribution is relevant to an extent, but only in cases where the community's condemnation and disapproval would be an issue, which would not be the case with most environmental offences, which tend to be, in themselves, relatively minor and technical in nature. Since there are alternatives to the criminal sanction that can provide for deterrence, usually more conveniently and cheaply, it would make good sense for these mechanisms to be used instead of criminal sanctions where the circumstances warrant their use.

An analysis of South Africa's environmental legislation reveals that, for the most part, there is an overwhelming reliance on the 'command and control' paradigm of law enforcement, whereby citizens are essentially coerced into compliance by the threat of criminal sanctions. With very few exceptions, the criminal sanction is the primary or default mode of enforcement in environmental legislation. Whilst there are examples of alternative modes of enforcement, in some cases innovative measures, the general tendency even in those statutes that do provide for alternatives is to look at criminal sanctions as the main enforcement tool.²

While the main strength of criminal sanctions, particularly in the South African context where civil law is not punitive in nature, is that it provides for punishment, there are a number of weaknesses in relation to the use of criminal sanctions, most of them relating to their efficiency. It is argued here that, if alternative measures to the criminal sanction can be used to deter environmental offenders with less cost and burden than criminal sanctions, then those alternatives should be used. The conclusion of the analysis

¹ Chapter 2.

² Chapters 4-6.

of the strengths and weaknesses of criminal law is that criminal law should be reserved for the following cases –

- ❑ cases where there is intentional wrongdoing;
- ❑ cases where there has been persistent wrongdoing;
- ❑ cases where an offender has caused serious harm to people or to the environment but only where there is mens rea on the part of the offender, at least in the form of negligence.³

This would be difficult to provide for in legislation, but in order to allow this system to work, it would be necessary to provide for alternatives to the criminal sanction.

A number of alternatives to the criminal sanction were mooted, including administrative measures and civil instruments. Although there are examples of some such provisions in South African environmental legislation, they are used inconsistently and certainly do not currently present a set of viable alternatives to the criminal sanction as enforcement tools in many areas of environmental regulation. The basic recommendation as regards enforcement measures is that a mix of alternatives (statutory, delict, civil, criminal, amongst others) should be used according to the nature and magnitude of the harm.⁴

This, then, is the primary argument of the thesis – various measures should be used for purposes of enforcement of environmental law with criminal law being reserved for the most serious infringements in the circumstances outlined above.

Given this first conclusion, the thesis then examines ways in which use of the criminal sanction, even in a far more reduced sphere than has been the case so far, can be improved. In this regard, the issues of strict liability, vicarious liability, corporate liability, sentencing and some procedural matters are discussed.

It is argued, first, that there is no need to use strict liability, despite the fact that is used fairly widely in other jurisdictions.⁵ The essential reason for this is that there are compelling reasons why strict liability ought not to be used in serious cases, which would

³ Chapter 7.

⁴ Chapter 8.

⁵ Chapter 9.

be the only cases in which the criminal law would be used, if the recommendation of this thesis is accepted. Less serious cases, which have been the traditional preserve of strict liability offences, would ideally be addressed by non-criminal measures.

Vicarious liability is also argued to be unnecessary because its objective, ensuring that employers do not hide behind the sins of their employees, can adequately be addressed by imaginatively-drafted primary liability provisions.⁶

As far as corporate liability is concerned, it is felt that both corporate liability and liability of directors are justified but that improvements can be made to the way that these are currently provided for in South African law.⁷ Attention is also given to the issue of corporate immunity against self-incrimination arising out of voluntary environmental auditing, which is a matter that will surely become important in the near future in South Africa. Various proposals are made in this regard which, it is hoped, strike a balance between the aims of enforcement and the rights of the corporation and directors.

The shortcomings of enforcement of environmental law in South Africa are often laid at the door of inadequate penalties, but the thesis argues that this position cannot be supported, since, at least on paper, sentences provided by environmental legislation are adequate on the whole. There are, however, some improvements that can be made, especially in the context of corporate offenders.⁸

Finally, there are some procedural matters that can be improved that, it is submitted, will result in criminal prosecutions being more efficient.⁹

With these various recommendations in mind, concrete suggestions will now be made for legislative provisions to give effect to the proposals made in this thesis, although it must be borne in mind that several of the proposals can only effectively be implemented by means of administrative discretion – it would not be possible to legislate for the proposals effectively.

⁶ Chapter 10.

⁷ Chapter 11.

⁸ Chapter 12.

⁹ Chapter 13.

2 Concrete proposals for legislative reform

These suggestions contemplate replacement of sections 33 and 34 of the National Environmental Management Act 107 of 1998 and insertion of a new Chapter entitled 'Compliance and Enforcement'.¹⁰ It also envisages the creation of a new Schedule, called Schedule X below, which contains a list of all the environmental legislation surveyed in Chapters 4-6 of this work, where necessary specifying certain sections of an Act only. In the proposed legislative provisions below, the proposals appear in Arial font (proposals look like this), with commentary in Times New Roman (the font for the rest of the thesis) where necessary following. Section numbering starts at 1 for convenience.

Chapter 7A

Compliance and Enforcement

Applicability of Chapter

1. This Chapter applies to all legislation or parts of legislation specified in Schedule X, unless the context indicates otherwise.

Environmental enforcement officers

2. In this Chapter, reference to an 'environmental enforcement officer' means any of the following:

[List all officials responsible for enforcing environmental legislation – for example, forest officers¹¹ envisaged by the National Forests Act and nature conservators envisaged by the Mpumalanga Nature Conservation Act.¹² Alternatively, this could be done by means of a schedule.]

¹⁰ This would entail renaming the existing Chapter 7 and Part 2 of Chapter 7. No proposals are made in this regard.

¹¹ Appointed in terms of section 65 of the National Forests Act 84 of 1998.

¹² Defined in section 1 of the Act, Act 37 of 1998 (Mpumalanga).

Infringement notice

3. (1) Where a person is alleged to have infringed any provision of any legislation listed in Schedule X, or where there exists on land a state of affairs the existence of which is alleged to be an offence in terms of such legislation, an environmental enforcement officer may inform the person who has infringed the legislation or the owner of land upon which an offence has occurred, as the case may be, by written notice of –

- (a) the nature of the infringement;
- (b) the steps which that person or owner must take to remedy the infringement; and
- (c) the period within which he or she must do so.

(2) Failure to comply with a notice served in terms of subsection (1) is an offence.

(3) Notice in terms of this section will be regarded as a directive in terms of section 28(4) of this Act and the provisions of section 28 shall apply to any person who fails to comply with such notice, with the necessary changes.

(4) Any person or owner upon whom a notice under this section has been served may, within ten days of receipt of such notice, appeal to the competent authority against the allegation that an offence has been committed or the directive requiring steps to be taken or both such allegation and such directive.

(5) The Minister may by notice in the *Gazette* determine such procedures to be followed and fees to be paid for appeals in terms of subsection (4) as he or she sees fit.

Comment: The purpose of this provision is to provide one type of alternative enforcement measure in the form of an infringement notice requiring the alleged offender to redress the problem, failing which it will be regarded as a directive that has not been complied with as envisaged by section 28 of NEMA, which brings into effect the consequences of such default as contemplated by that section. In other words, failure to comply with an infringement notice may result in the relevant authority taking the necessary steps to redress the problem and recovering the costs from any of the persons contemplated by section 28(9). This notice, which combines elements of an abatement notice and a notice requiring positive steps on the part of the offender, can be a very effective way of addressing environmental offences, other than very serious ones, with a relatively small administrative effort and with potentially optimal consequences for the environment. The use of such measures should, therefore, be encouraged. Reference is made in subsection (4) to the competent authority. The idea behind the ‘competent authority’ is that this

could be defined as including the Directors-General of the various departments concerned with environmental management, both national and provincial. The competent authority for the National Water Act, therefore, would be the Director-General of Water Affairs and Forestry, whereas the competent authority for the Environment Conservation Act would be the Director-General of the Department of Environmental Affairs and Tourism, and so on.

Cancellation and suspension of authorisation, licences and permits

4. (1) If a holder of any authorisation, licence or permit in terms of any legislation listed in Schedule X—

- (a) has furnished information in the application for that authorisation, licence or permit, or has submitted any other information required in terms of the legislation which provides for such authorisation, licence or permit, which is not true or complete;
- (b) contravenes or fails to comply with a condition imposed in the authorisation, licence or permit;
- (c) contravenes or fails to comply with a provision of such legislation;
- (d) is convicted of an offence in terms of such legislation; or
- (e) fails effectively to utilise that authorisation, licence or permit,

the competent authority may by written notice delivered to such holder, or sent by registered post to the said holder's last known address, request the holder to show cause in writing, within a period of 21 days from the date of the notice, why the authorisation, licence or permit should not be revoked, suspended, cancelled, altered or reduced, as the case may be.

(2) The competent authority shall after expiry of the period referred to in subsection (1) refer the matter, together with any reason furnished by the holder in question, to the relevant Minister for that Minister's decision.

(3) When a matter is referred to the relevant Minister in terms of subsection (2), that Minister may—

- (a) revoke the authorisation, licence or permit;
- (b) suspend the authorisation, licence or permit for a period determined by the Minister;
- (c) cancel the authorisation, licence or permit from a date determined by the Minister;
- (d) alter the terms or conditions of the authorisation, licence or permit; or
- (e) decide not to revoke, suspend, cancel, alter or reduce the authorisation, licence or permit.

Comment: The administrative (as opposed to judicial) revocation or suspension of an authorisation, permit or licence ought to be provided for in legislation that provides for the issue of such authorisations. This proposed provision is based on section 58(8) of the National Forests Act.¹³ It envisages a process entailing natural justice, as would probably be required by administrative law.

The section in the National Forests Act requires the Director-General to carry out the tasks that the proposed section above gives to the ‘competent authority’. This term is described above in commentary on section 3 (infringement notices).

Administrative penalty

5. (1) If a person is alleged to have committed an offence in terms of any legislation listed in Schedule 3, an environmental enforcement officer may deliver by hand to that person (hereinafter referred to as the infringer) an administrative penalty notice which must contain the particulars contemplated in subsection (2).

(2) A notice referred to in subsection (1) must—

(a) specify the name and address of the infringer;

(b) specify the particulars of the alleged offence;

(c) specify the amount of the administrative penalty payable, which may not exceed fifty penalty units;

(d) inform the infringer that, not later than 30 days after the date of service of the infringement notice, the infringer may—

(i) pay the administrative penalty;

(ii) make arrangements with the competent authority to pay the administrative penalty in instalments; or

(iii) elect to be tried in court on a charge of having committed the alleged offence; and

(e) state that a failure to comply with the requirements of the notice within the time permitted, will result in the administrative penalty becoming recoverable as contemplated in subsection (4).

(3) If an infringer elects to be tried in court on a charge of having committed the alleged contravention or failure, the competent authority must hand the matter over to the prosecuting authority and inform the infringer accordingly.

¹³ Act 84 of 1998.

(4) If an infringer fails to comply with the requirements of a notice, the competent authority may file with the clerk or registrar of any competent court a statement certified by him or her as correct, setting forth the amount of the administrative penalty payable by the infringer, and such statement thereupon has all the effects of a civil judgment lawfully given in that court in favour of the competent authority for a liquid debt in the amount specified in the statement.

(5) An environmental enforcement officer may not impose an administrative penalty contemplated in this section if the person concerned has been charged with a criminal offence in respect of the same set of facts.

(6) No prosecution may be instituted against a person if the person concerned has paid an administrative penalty in terms of this section in respect of the same set of facts.

(7) An administrative penalty imposed in terms of this section does not constitute a previous conviction as contemplated in Chapter 27 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

(8) Any person upon whom an administrative penalty under this section has been imposed may, within ten days of receipt of such notice, appeal to the competent authority against the allegation that an offence has been committed or the penalty imposed or both such allegation and such penalty.

(9) The Minister may by notice in the *Gazette* determine such procedures to be followed and fees to be paid for appeals in terms of subsection (8) as he or she sees fit.

Comment: This provision is based on section 122 of the Firearms Control Act,¹⁴ but simplified. It also contains a right of appeal, which allows an initial, easy to use, safeguard against administrative abuse of power.

Subsection (2)(c) refers to penalty units. This is a concept used in Australia which obviates the need to amend legislation to update maximum fines. The Minister may be empowered to declare by notice in the *Gazette*, the amount of one penalty unit, which may be amended from time to time to account for inflation by notice in the *Gazette*. It is envisaged that at current penalty levels, one penalty unit would be one thousand rand. This means that the maximum administrative penalty that could be imposed in terms of this section would be R50 000, which is a not insignificant sum of money. The Firearms Control Act, however, provides for administrative penalties of up to R100 000 (R50 000

¹⁴ Act 60 of 2000.

for first offences), so this amount does not seem to be out of kilter with that Act (which is currently the only South African legislation that can be used by way of comparison).

The benefits of administrative penalties are discussed in Chapter 8 at §2.1.3. In Chapter 4, it was noted that two Acts contained summary enquiry procedures which were commented on favourably in this work (the Marine Pollution (Control and Civil Liability)¹⁵ and the Marine Pollution (Prevention of Pollution from Ships) Act¹⁶). Although this is a curiously underutilised device which would serve to reduce some of the inefficiencies of the criminal law, the administrative penalty system mooted here would serve the same objectives with arguably greater efficiency.

Interdict or other order by High Court

6. A High Court may, on application by the relevant Minister or a competent authority, grant an interdict or any other appropriate order against any person who has contravened any provision of any legislation listed on Schedule X, including an order to discontinue any activity constituting the contravention and to remedy the adverse effects of the contravention.

Comment: See Chapter 8 at §2.2.1 for discussion on this device. This provision is based on section 155 of the National Water Act.¹⁷

Common law civil liability not excluded

7. Nothing in this Act shall be taken as excluding the common law right of any person to claim compensation for any loss or damage suffered by that person where such loss or damage arises out of an act that constitutes an offence in terms of any legislation listed on Schedule X.

Comment: See discussion in Chapter 8 at §2.2.3.

¹⁵ Act 6 of 1981 – commentary at 116 (supra).

¹⁶ Act 2 of 1986.

¹⁷ Act 36 of 1998.

Strict liability for damage caused by hazardous activities

8. (1) Subject to subsections (2), (3) and (4), any person who is convicted of an offence listed in Schedule H, whether or not there is intent or negligence on the part of that person, is liable for all harm or damage caused by or resulting from the act or omission which constitutes the offence for which that person was convicted.

(2) Nothing in this section precludes a person from claiming a benefit in terms of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993), but such person may not benefit both in terms of this Act and the Compensation for Occupational Injuries and Diseases Act, 1993.

(3) A convicted person contemplated in subsection (1) is not liable to any person for any harm or damage if that person intentionally caused, or intentionally contributed to, such damage.

(4) Nothing in this section affects any right, which any person has in terms of any contract of employment, to benefits more favourable than those to which that person may be entitled in terms of this section.

Comment: This provision is very loosely based on section 30 of the National Nuclear Regulator Act.¹⁸ The desirability of such a provision is discussed in Chapter 8 at §2.2.3.

This section envisages a further Schedule, Schedule H, which is intended to incorporate all offences which involve hazardous substances or hazardous activities. The justification for this measure is that persons who involve themselves in hazardous activities should, from the start, be aware of the possibility of harm occurring and be prepared to incur responsibility for such harm irrespective of their fault in respect of the occurrence of the harm in question. The idea is somewhat like an extended negligence concept where a person who engages in hazardous activities is regarded as having a heightened duty of care towards other persons and to the environment, requiring conduct on his or her part that exceeds that of the yardstick of the reasonable person.

Private prosecution

9. (1) Any person may—
(a) in the public interest; or

¹⁸ Act 47 of 1999.

(b) in the interest of the protection of the environment, institute and conduct a prosecution in respect of any breach or threatened breach of any duty, other than a public duty resting on an organ of state, in any national or provincial legislation or municipal bylaw, or any regulation, licence, permission or authorisation issued in terms of such legislation, where that duty is concerned with the protection of the environment and the breach of that duty is an offence.

(2) The provisions of sections 9 to 17 of the Criminal Procedure Act, 1977 (Act 51 of 1977) applicable to a prosecution instituted and conducted under section 8 of that Act must apply to a prosecution instituted and conducted under subsection (1): Provided that if—

(a) the person instituting a private prosecution does so through a person entitled to practice as an advocate or an attorney in the Republic;

(b) the person instituting a private prosecution has given written notice to the appropriate public prosecutor that he or she intends to do so; and

(c) the public prosecutor has not, within 28 days of receipt of such notice, stated in writing that he or she intends to prosecute the alleged offence,

(i) the person instituting a private prosecution shall not be required to produce a certificate issued by the Director of Public Prosecutions stating that he or she has refused to prosecute the accused; and

(ii) the person instituting a private prosecution shall not be required to provide security for such action.

(3) The court may order a person convicted upon a private prosecution brought under subsection (1) to pay the costs and expenses of the prosecution, including the costs of any appeal against such conviction or any sentence.

(4) The accused may be granted an order for costs against the person instituting a private prosecution, if the charge against the accused is dismissed or the accused is acquitted or a decision in favour of the accused is given on appeal and the court finds either:

(a) that the person instituting and conducting the private prosecution did not act out of a concern for the public interest or the protection of the environment; or

(b) that such prosecution was unfounded, trivial or vexatious.

(5) When a private prosecution is instituted in accordance with the provisions of this Act, the Director of Public Prosecutions is barred from prosecuting except with the leave of the court concerned.

Comment: This is the current section 33 of NEMA, very slightly amended to remove the use of the inelegant phrase ‘person prosecuting privately’ and replacement of reference to the Attorney-General with Director of Public Prosecutions.

Prosecutions by organs of state concerned with environmental management

10. (1) The Director of Public Prosecutions may delegate, indefinitely or for a specified period of time, to an organ of state that is responsible for the administration of any legislation listed in Schedule X the power to institute prosecutions in respect of any offence under such legislation.

(2) An organ of state instituting a prosecution under the power delegated in subsection (1)

—

(a) shall institute such prosecution through a person entitled to practice as an advocate or an attorney in the Republic;

(b) shall not be required to notify the public prosecutor in writing of the intention to prosecute;

(c) shall not be required to produce a certificate issued by the Director of Public Prosecutions stating that he or she has refused to prosecute the accused; and

(d) shall not be required to provide security for such action.

(3) The court may order a person convicted upon a private prosecution brought under subsection (1) to pay the costs and expenses of the prosecution, including the costs of any appeal against such conviction or any sentence.

(4) When a private prosecution is instituted in accordance with the provisions of this Act, the Director of Public Prosecutions is barred from prosecuting except with the leave of the court concerned.

Comment: This is an amended version of section 33 of NEMA that empowers organs of state to carry out ‘in-house’ prosecutions as recommended in Chapter 13 (§2). The idea behind the provision is to provide for ‘blanket’ permission from the Director of Public Prosecutions for an organ of state to carry out prosecutions without having to comply with all the formalities required by section 33.

Compensation orders in criminal trials

11. (1) Whenever any person is convicted of an offence under any legislation listed in Schedule X and it appears that such person has by that offence caused loss or damage to any organ of state or other person, including the cost incurred or likely to be incurred by an organ of state in rehabilitating the environment or preventing damage to the environment, the court may in the same proceedings at the written request of the Minister or other organ of state or other person concerned, and in the presence of the convicted person, inquire summarily and without pleadings into the amount of the loss or damage so caused.

(2) Upon proof of such amount, the court may give judgment therefor in favour of the organ of state or other person concerned against the convicted person, and such judgment shall be of the same force and effect and be executable in the same manner as if it had been given in a civil action duly instituted before a competent court.

Comment: This is taken directly from section 34 of NEMA. The justification for such a provision is discussed in Chapter 12 (§2.2).

Sentencing of environmental offences

12. Whenever any person is convicted of an offence under any legislation listed in Schedule X the court convicting such person may –

- (a) summarily enquire into and assess the monetary value of any advantage gained or likely to be gained by such person in consequence of that offence, and, in addition to any other punishment imposed in respect of that offence, the court may order the award of damages or compensation or a fine equal to the amount so assessed;
- (b) impose a fine in addition to that provided for in the legislation concerned equal to three times the commercial value of any animal, plant or other object in respect of which the offence was committed, provided that such fine may be imposed only in cases where, in the opinion of the court, the offence was committed with the purpose of exploiting the commercial value of the animal, plant or object concerned;
- (c) declare forfeit to the state any animal, plant, substance or object in respect of which the offences was committed;
- (d) declare forfeit to the state any object, including but not limited to any vehicle or vessel, used in connection with the commission of the offence;
- (e) where the court would impose a sentence of not more than five penalty units, sentence the convicted person to community service as envisaged by section 297(1)(a) of the Criminal Procedure Act, 1977 (Act 51 of 1977), provided that the court must impose a form of community service which benefits the environment if it is possible for the offender to serve such a sentence in the circumstances; and
- (f) suspend or revoke any permit, licence or authorisation issued to the offender under the legislation infringed in the commission of the offence.

Comment: This provision incorporates several of the sentencing measures already used in South African legislation (as discussed in Chapter 12 at §2). The purpose of such a

provision is to make these sentences available across the board for environmental offences and not selectively, as is currently the case.

Continuation of offence after conviction

13. Any person convicted of an offence in terms of any legislation listed in Schedule X, and who after such conviction persists in the act or omission which constituted such offence, shall be guilty of a continuing offence and liable on conviction to a fine not exceeding one penalty unit or to imprisonment for a period not exceeding twenty days or to both such fine and such imprisonment in respect of every day on which he or she persists with such act or omission.

Comment: This provision, which provides for fines for continuation of offences, is adapted from section 29(6) of the Environment Conservation Act 73 of 1989. This device was discussed in Chapter 12 at §2.1.

Costs of prosecution

14. Whenever any person is convicted of an offence under any legislation listed in Schedule X the court convicting such person may, upon application by the public prosecutor or another organ of state, order such person to pay the reasonable costs incurred by the public prosecutor and the organ of state concerned in the investigation and prosecution of the offence if, in the opinion of the court, it is just and reasonable to do so.

Comment: This was recommended in Chapter 13 and the provision is the one proposed in that Chapter, adapted from the NEMA section 34(4).

Payment of fines

15. All fines or estreated bail moneys paid or recovered in respect of any contravention of any legislation listed in Schedule X shall be paid to the organ of state which is responsible for administration of the legislation under which the prosecution in question was instituted.

Comment: This was recommended in Chapter 13 and is based on section 216(1) of the Natal Nature Conservation Ordinance.¹⁹

Comment on proposed sections 16-20 below: These provisions are all explained above, in Chapter 11.

Corporate Liability

16. Any conduct engaged in on behalf of a corporation by a director, servant or agent of the corporation within the scope of his or her actual or apparent authority shall be deemed, for the purposes of a prosecution for an offence against this Act, to have been engaged in also by the corporation if the State can prove corporate mens rea in any of the following forms:

- (a) the corporation has a policy that expressly or impliedly authorises or permits the commission of the offence or an offence of the same type;
- (b) the corporation failed to take reasonable precautions or to exercise due precautions to prevent the commission of the offence or an offence of the same type;
- (c) the corporation has a policy of failing to comply with a reactive duty to take preventive measures in response to having committed the external elements of the offence; or
- (d) the corporation failed to take reasonable precautions or to exercise due diligence to comply with a reactive duty to take preventive measures in response to having committed the external elements of the offence.

Liability of corporate officers

17. (1) Every director or officer of a corporation that engages in an activity that may result in the contravention of any law concerned with the protection of the environment has a duty to take all reasonable care to prevent the corporation from causing or permitting such contravention.

(2) Every person who has a duty under subsection (1) and who fails to carry out that duty is guilty of an offence.

(3) A director or officer of a corporation is liable to conviction under this section whether or not the corporation has been prosecuted or convicted

¹⁹ Ordinance 15 of 1974.

Sentencing of corporate offenders

18. (1) Where a court convicts a corporation of any offence in terms of legislation listed in Schedule X, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion –

(a) postpone for a period not exceeding five years the passing of sentence on one or more conditions, whether as to –

(i) compensation;

(ii) rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;

(iii) the performance without remuneration of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community;

(iv) the implementation by the corporation to the satisfaction of the court of disciplinary procedures within the corporation in connection with the offence for which this sentence was imposed: Provided that the corporation shall compile a report setting out the disciplinary procedures followed, the findings arising out of such procedures and any disciplinary action taken by the corporation pursuant to such findings, which report shall be submitted to the court which imposed the condition;

(v) the implementation by the corporation to the satisfaction of the court of policies and procedures designed to avoid non-compliance with the legislation contravened by the legislation that led to the conviction for which this sentence was imposed;

(vi) the placing of advertisements in a publication or publications as may be specified by the court either setting out the facts leading to the conviction and the findings and sentence of the court or containing whatever text as may be ordered by the court;

(vii) good conduct;

(viii) any other matter;

and order such corporation to appear before the court at the expiration of the relevant period;
or

(b) pass sentence but order the operation of the whole or any part thereof to be suspended, for a period not exceeding five years on any condition referred to in paragraph (a) which the court may specify in the order.

(2) The provisions of section 297 of the Criminal Procedure Act, 1977 (Act 51 of 1977), other than subsection 91) of that section, shall apply with the necessary changes to a postponed or suspended sentence imposed on a corporate offender under this section.

Privilege of voluntary environmental audit reports

19. (1) An Environmental Audit Report shall be privileged and shall not be admissible as evidence in any legal action in any civil, criminal or administrative proceeding, except as provided in subsections (2) and (3) of this section.

(2)(a) The privilege described in subsection (1) of this section does not apply to the extent that it is waived expressly or by implication by the owner or operator of a facility or persons conducting an activity that prepared or caused to be prepared the Environmental Audit Report: Provided that the release of an Environmental Audit Report by the owner or operator of a facility to any party or to any organ of state for purposes of negotiating, arranging or facilitating the sale, lease or financing of a property or a facility, or a portion of a property or facility:

(i) is not a waiver of the privilege; and

(ii) does not create a right for an organ of state to require the release of an Environmental Audit Report.

(b) In a civil or administrative proceeding, disclosure of material for which the privilege described in subsection (2) of this section is asserted, shall be required if the competent authority or court, as the case may be, determines that:

(i) the privilege is asserted for a fraudulent purpose;

(ii) the material is material contemplated by subsection (3); or

(iii) even if subject to the privilege, the material shows evidence of noncompliance with legislation listed in Schedule X, appropriate efforts to achieve compliance with which were not promptly initiated and pursued with reasonable diligence.

(c) A party asserting the environmental audit privilege described in subsection (1) of this section has the burden of proving the privilege, including, if there is evidence of noncompliance with legislation listed in Schedule X, proof that appropriate efforts to achieve compliance were promptly initiated and pursued with reasonable diligence. A party seeking disclosure under subsection (2)(b)(i) of this section has the burden of proving that the privilege is asserted for a fraudulent purpose.

(3) The privilege described in subsection (2) of this section shall not extend to:

(a) Documents, communications, data, reports or other information required to be collected, developed, maintained, reported or otherwise made available to an organ of state pursuant to any legislation listed in Schedule X;

(b) Information obtained by observation, sampling or monitoring by any organ of state; or

(c) Information obtained from a source independent of the environmental audit.

(4) Nothing in this section shall limit, waive or abrogate the scope or nature of any statutory or common law privilege.

Privilege of environmental audits required by legislation

20. (1) Any documents, communications, data, reports or other information required to be collected, developed, maintained, reported or otherwise made available to an organ of state pursuant to any legislation listed in Schedule X shall be privileged and shall not be admissible as evidence in any criminal proceeding, except as provided in subsection (2) of this section.

(2) In a criminal proceeding, a court shall require disclosure of material for which the privilege described in subsection (1) of this section is asserted, only if the court determines that:

- (a) the privilege is asserted for a fraudulent purpose; or
- (b) even if subject to the privilege, the material shows evidence of noncompliance with legislation listed in Schedule X, appropriate efforts to achieve compliance with which were not promptly initiated and pursued with reasonable diligence.

Comment on implementation of above proposed provisions:

The proposed legislative provisions set out here offer a suite of measures that can be used by enforcement officials, but it is not possible to set out in legislation with the type of precision necessary for legislation, the precise circumstances when measure *x* or *y* ought to be used. It is recommended that organs of state responsible for managing the environment draw up their own guidelines as to how to use the instruments at their disposal. The shortcomings of criminal law discussed earlier in this thesis make it unlikely, it is submitted, that the criminal sanction would be used as the ‘default’ enforcement tool. Whereas the existing situation is that frequently no enforcement takes place because the only enforcement tool is the criminal sanction, which there is a reluctance to use, the proposed situation offers a choice that makes it likely that the criminal sanction will be reserved for those instances recommended in the thesis and reiterated in the introductory section of this Chapter.

3 Concluding Remarks

It is somewhat sobering, after months of considering and writing about issues relating to enforcement of environmental law, to reflect on the fact that there is only so much that law, and especially domestic law, can do to address the environmental problems that

beset our planet today. And yet this very fact makes it imperative that everything be done to ensure that what law *is able* to achieve, it does, *in fact*, achieve.

This study has shown that there is much in current environmental law in South Africa, as provided for in legislation and as implemented in practice, that is inefficient and ineffective. The proposals made in this thesis are intended to improve effectiveness and efficiency with the ultimate goal of optimal enforcement of environmental law. Returning to the sentiment expressed at the beginning of this section, however, the law does not operate in a vacuum and nor does it operate mechanically. Having good laws on paper is no guarantee that the law will operate as intended and any proposals made as to how to improve the law, both in substance and in practice, will only be as strong as the officials who carry them out. The political will to enforce environmental law vigorously in order to achieve the overarching goal of sustainable development is therefore of vital importance. If this will is insipid, the law will not achieve much, however good it may be on paper.

It is encouraging, therefore, to see various signs that officialdom is starting to adopt a stricter approach towards environmental offenders. It is hoped that the proposals contained in this work will provide the tools for environmental managers and those in the criminal justice system in our country to deal efficiently and effectively with such offenders.

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