INITIATIVES TO COMBAT CORPORATE ENVIRONMENTAL CRIMES: A COMPARATIVE STUDY

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INTRODUCTION

Corporate criminal responsibility and corporate officer's liability for corporate crimes have long been debated and are still far from being conclusively resolved. In the parallel vein, corporate responsibility for environmental crimes has become a current issue not only in the corporate sector but also for the theorists, criminologists, lawmakers and courts alike. The nature of environmental crimes, the attitude of the legislation and courts for the enforcement of environmental laws, the strictness and enormity of the sanctions for environmental crimes have all become nightmarish for the corporators. The theorists and criminologists are sweating to justify the questions that if the corporation is capable of doing environmental harm in its juristic capacity and even if 'yes' how a corporation can be made to suffer criminal sanctions? How effective are those sanctions to deter a corporation from doing environmental harm? The courts are often in a problematic position to reason the appropriateness of attributing corporate environmental crimes into the frame of conventional (common law) crimes. Again, the question arises with the ability of the regulatory agencies to enforce environmental regulations compared to the mainstream criminal law enforcers - "police"- who enforce conventional criminal laws.

This paper discusses these ubiquitous questions from an Australian points of view referring to the important environmental legislation, especially *Protection of the Environmental Operations Act* 1997 (NSW) and *Environment Protection Act 1970* (Vic) and also recent judgements of the courts indicting corporations and corporate officials for environmental

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crimes. The paper also analyses the U.S. environmental laws especially, Clean Water Act 1977, Resource Conservation and Recovery act (RCRA) 1988, and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 1988 (all U. S.) and their enforcement with a view to compare Australia's position. This paper is also aimed to discuss briefly the implication of corporate environmental auditing and reports to the concerned authorities with a view to mitigate environmental penalties.

NATURE OF CORPORATE ENVIRONMENTAL CRIMES

Before going into discussion on the nature of the corporate environmental crimes, a short look at the legal definition of the 'environment' and 'environmental harm' that constitutes environmental crimes seems to be useful. The general idea about 'environment' is wide enough to include everything existing in the universe. Such a vague idea cannot be good enough at least to become a legally enforceable issue. As a result, relatively recently enacted 'environment protection legislation tends to define environment more in terms of components of the earth.'[1] "The term 'environment' therefore, now generally encompasses all natural resources and organisms, organic and inorganic matter, facets of the environment (land, air, and water), human-made or modified structures and areas, and interacting natural ecosystems."[2] The statutory definition of "environmental harm" also awaits judicial construction and interpretation. As such "environmental harm may be described as any direct or indirect alteration of or impact upon the environment which has an adverse effect on or degrades the environment, of whatever degree or duration."[3] For the imposition of liability (civil or criminal), especially in the states of Queensland, South Australia and Tasmania it is essential to establish that

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1 Bates G, Lippman Z, Corporate Liability for Pollution, LBC Information Services 1998, p. 13.

2 Environmental Protection Act 1997 (ACT), section 4; Protection of the Environment Operations Act 1997 (NSW), Dictionary; Protection of the Environment Administration Act 1991 (NSW), section 3; Contaminated Land Management Act 1997 (NSW), section 4; Environment Protection Act 1993 (SA), section 3; Environmental Management and Pollution Control Act 1994 (TAS), section 3, maintained in ibid.

3 Protection of the Environment Operations Act 1997 (NSW); Environment Protection Act, 1997 (ACT), sections 4 "environmental harm", 8(2) (environmental harm resulting solely from appearance and siting of artificial structures); Contaminated Land Management Act (NSW), section 4 "harm".

the alleged defendant has done some sort of environmental harm. Environmental harm may be any or combination of the following types:[4]

- Serious environmental harm;
- Material environmental harm;
- Environmental nuisance.

However, in other States and the Territories instead of using 'environmental harm' reference is made to the offences involving environmental pollution. There, environmental pollution means,

> to include anything that may cause detrimental change in the quality of the surrounding environment, affect the safety or health of human beings, or harm wildlife.[5]

The seemingly yawning term like "pollution"[6] has warranted more specific judicial interpretations in several cases.[7] Notwithstanding the different nomenclature, the main aim of all legislation must have been to ascertain some environmental offences, violation of which would render a person either incorporated or unincorporated, to be subject to some civil or criminal liability provided by these pieces of legislation in accordance with the gravity, nature and scope of such offences.

In Australia, there is no definition of "person" in the pollution control legislation. Except for Victoria, in other States "prohibitions in environmental protection legislation are directed to 'persons'."[8] Under the Victorian Environment Protection Act, 1970 it is expressly provided that a

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[4] Environmental Protection Act 1997 (ACT), sections 3, 137-141; Environmental Protection Act 1994 (QLD), sections 14-17; Environment Protection Act 1993 (SA), section 5; Environment Management Act 1997 (ACT), s4, ibid.

[5] Supra note 1, reference made to Environment Protection Act 1970 (Vic), sections 39(1) (water), 41(1) (air), 45 (1*)* (land); Protection of the Environment Operations Act 1997 (NSW).

[6] For example, in Protection of Environment Operations Act 1970 (NSW) pollution means water, air noise or land pollution: Dictionary. Land pollution means the degradation of land because of the disposal of waste on the land: Dictionary. Air pollution means the emission into the air of any air impurity: Dictionary. Noise pollution means the emission of offensive noise: Dictionary. Ibid., at p. 17.

[7] *Electricity Commission (NSW) v EPA*, [1992] NSWLR 496; *Carbon v Palos Verdes Estates Pty Ltd.* [1991] 72 LGRA 414; *Phosphate Cooperative Co of Australia Ltd v EPA*, [1977] 138 CLR 134; cited in ibid

[8] Supra note 1, at p. 128.

corporation is liable for environmental offences. Section 2 of the Act binds the "Crown, and everybody, whether corporate or unincorporate, constituted under any Act for a public purpose."[9] As a result, "corporations may be held liable for an offence under all Australian Environmental Legislation."[10] A corporation can be held liable for any of three offences, namely, serious offences requiring proof of *mens rea*; mid-range offences (imposing strict or absolute liability) and minor offences (imposing strict or absolute liability).[11] In the States of New South Wales the Protection of the Environment Operations Act 1997 provides for all three types of offences, namely, Tier 1 offences (serious offences),[12] Tier 2 offences (mid-range offences)[13] and Tier 3 offences (minor offences).[14] Environment Protection Act 1970 (Vic) has also provisions for serious offences (aggravated pollution),[15] mid-range offences,[16] and minor offences.

RATIONALE FOR IMPOSITION OF CORPORATE CRIMINAL LIABILITY

There is not a single environment protection statute without having provisions for regulatory environmental offences, commission of which attracts criminal sanctions. Usually, on violation of any regulation any or combination of three actions, namely, civil, administrative or criminal, follows. However, in recent years the trend to impose criminal sanctions on corporations is one the increase, as is public opinions about the seriousness of environmental crimes. In the U.S.A. the EPA(Environment Protection Authority) referrals of criminal cases to the U.S. Justice Department have steadily and dramatically increased from 20 in fiscal year 1982 to 107 in 1992 to record 278 in 1997. Criminal fines were a record $169.3 million in fiscal year 1996,[17] 221 defendants were charged with

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9 Ibid., at p. 129.

10 Id.

11 Ibid., at p. 131.

12 See, note 55 below.

13 See, note 59 below.

14 Minor offences are not discussed in this paper.

15 s 59 E

16 ss 39(1), 41, 43

17 Environment Protection Agency Press Release, EPA Sets Records for Environment while Extending Program for Industry to Disclose and Correct Violations, Dec 22, 1997; EPA, Enforcement and Compliance Accomplishments Report FY 1996, May 1997 (hereinafter called Report

environmental offences, and individuals were sentenced to 1,116 months in prison.[18] In Australia, in the year of 1986 the Australian Institute of Criminology conducted a survey on the attitudes to crime and sentencing in Australia. Approximately 2,500 Australians were questioned about their attitudes to thirteen offences that included murder, heroin trafficking, wife bashing, income tax evasion and water pollution by a factory, which resulted in death of one person. They were asked to select appropriate sentences for each of the offences. Not surprisingly, the pollution offences ranked as the third most serious ones. Asked about the appropriate punishments for the fictional polluter, the most commonly suggested penalty was a fine of at least $50,000 and one in three of the participants suggested that a prison sentence be imposed where a death had occurred as a result of the pollution.[19]

Law certainly reflects social demands. Theorists, lawmakers, politicians and courts have to consider social urge for the incorporation of laws, regulations, and orders that would better serve the social needs. And that gives law a dynamic nature instead of being dogmatic as well as static. As a result, we get new legal doctrines overriding or denying even the older ones. Criminology is not an exception. Notwithstanding the contradiction and eyebrows from various quarters and its inherent limitations, imposition of criminal liability on corporations for environmental crimes has become a rule rather than exception. The underlying reasons being, while environmental legislation are aimed to prevent serious harm to the environment, punishing the offenders with adequate sanctions, e.g., fines and/or imprisonment assumed to have had deterring effect on the polluters. It is also presumed that imposition of severe sanctions on corporations would effectively be resulted in the change of corporate behaviour. "Belief in deterrence underlies political and judicial, as well as public, approaches to pollution offences."[20] Duncan and Norberry give example that during his Second Reading Speech on the Environmental

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1996) at p. 4. Maintained in Gaynor, K.A., and Bartman, T.R., "Criminal Enforcement of Environmental Laws," 10 Colorado International Environmental Law and Policy Yearbook, 39 at 120 (LEXIS-NEXIS).

[18] Report 1996, ibid., at p. 4.

[19] Wilson, P., Walker, J., and Mukherjee, S. "How the Public Sees Crime: An Analysis survey", 2 (1986) Trends and Issues in Crime and Criminal Justice, Australian Institute of Criminology. Maintained in Duncan Chappel, D., and Norberry, J., "Deterring Polluters: The Search for Effective Strategy," 13:1 (1990) UNSW Law Journal, p. 98.

[20] Chappel D., and Norberry, J, ibid., at p. 102.

Protection (General Amendment) Bill 1989 Victorian Minister of Planning and Environment spoke about the need to introduce minimum penalties in certain circumstances. The minister showed his unhappiness with the magistrates' failure to impose fines and tendency to opt for bonds for corporate polluters. In his words "One large company has received five bonds and one trivial fine since 1984, totally negating the deterrent effect Parliament had intended when setting the maximum penalties for offences."[21] In *State Pollution Control Commission v Quality River Sand Pty Ltd.*,[22] the judge remarked that criminal sanctions should not only reflect the seriousness of an offence but also "what Brennan J… Described as the 'secondary deterrent purpose' of the criminal law namely, 'the purpose of educating both the offender and the community in the law's proscriptions so that the law will come to be known and obeyed." In the U.S.A the courts tend to liberally construe the criminal provisions of the environmental laws with a view to maximise their deterrent value.[23] In *United States v Johnson and Towers, Inc.,* it was maintained that "criminal penalties attached to regulatory statutes intended to protect public health, in contrast to statutes based on common law crimes, are to be construed to effect the regulatory purpose."[24] Therefore, liberal construction of environmental criminal provisions warrants imposition of strict penalties and far reaching liability.[25] From the social perspective, Braithwaite and Geis observe that imposition of criminal sanctions on corporations and if need be on the officials would have a deterring effect on the corporators who maintain high status, respectability and standards of living. The social stigma that is involved with a criminal conviction would deter many white-collar criminals from committing environmental crimes.[26] They maintain:

> [c]orporate crimes are almost never crimes of passion; they are not spontaneous or emotional, but calculated risks taken by rational actors.

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[21] Victoria, Legislative Assembly, Parliamentary Debates, 12 October 1989, 1485, in ibid.

[22] Unreported, Land and Environment Court, 28 June 1989, cited in Chapel and Norberry, supra note 19.

[23] Gaynor and Bartman, supra note 17.

[24] 741 F.2nd 662, 666 (3rd Cir.1984) cited Gaynor and Bartman, supra note 17.

[25] Gaynor and Bartman, supra note 17.

[26] Braithwaite, J. and Geis, G., "On Theory and Action For Corporate Crime Control," Chappell and Norberry, supra note 19 above, at p. 103.

> As such they should be more amenable to control by policies based on the utilitarian assumptions of the deterrence doctrine. [27]

From traditional points of view, a corporation may be vicariously liable for the acts of its agents. It may have to bear the responsibility of the acts of its officials that happen to be its "directing mind and will".[28] In a relatively recent case it has been held that the acts of its employees can be attributed to the corporation.[29] In this case Lord Hoffmann observes that directors' acts may be attributed to the company on the ground that the company appoints servants and agents whose acts by a combination of the general principles of agency and the company's primary rules of attribution, counts as the acts of the company.

Such an approach can be construed as to dispense with the mental and physical elements required by criminal justice for the commission of an offence. Arguments usually advanced that corporation does not have any mental autonomy to commit a crime neither has it any physical existence capable of doing any material harm. With a view to counter such arguments the rules of attribution can be properly applied to prove the required mental elements by the statute from the mental states of the employees of the corporation.

In the U.S.A, imposition of criminal responsibility on a corporation is justified on the general rules of agency. Additionally, the courts have the opportunity to impose criminal liability on low-level employees "even where the statute expressly makes liable only the persons "in charge" of a facility."[30] U.S. Federal prosecutors also developed "responsible corporate officer" doctrine, which used to apprehend a corporate officer who did not have direct participation in the criminal act but was in a position to have prevented the institution of such act.[31] Another approach deals with holding a corporate officer liable for his/her "wilful blindness" to criminal violations.[32] Sometimes parent corporations can be held liable under the U.S. Federal jurisdiction for the criminal conduct of their subsidiaries.[33]

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[27] Braithwaite and Geis, ibid, at p. 302, in Chappell and Norberry, ibid.

[28] *Tesco Supermarkets Ltd. v Nattrass*, [1972] AC 53.

[29] *Meridian Global Funds Management Asia Ltd. v Security Commission*, [1995] 3 WLR 414.

[30] *United States v Carr* 880 F. 2d 1550 (2nd Cir. 1989) cited in supra note 16.

[31] *United States v Park* 421 U.S. 658 (1975) cited in ibid.

[32] *Boyce Motor Lines v United States*, 342 U.S. 337 (1952) cited ibid.

[33] *United States v Exxon Corp. & Exxon Shipping Co.*, Crim. No. A-90-o15-cr (D Alaska) cited in ibid.

"Policy reason" for making corporation environmentally liable as Zada Lippman in her seminal work puts it,

> stems mainly from the difficulties inherent in identifying or gathering evidence against the actual wrongdoer; from a practical belief that the provision of proper management systems to guard against pollution is an organisational rather than a personal responsibility; and from a perhaps belated recognition that pollution is in effect the utilisation of a public resource for private gain which is properly regulated through corporate responsibility for protection of that resource. [34]

Irrefutably, organisation has much greater resource available to avoid and deal with the pollution management than private individuals. Thus, the proposition is that institutional liability would be more appropriate than individual liability to serve the statutory purpose. [35]

Imposition of personal liability for corporate environmental crimes on directors or other concerned in the management generally,

> stems from the attitude that it would be undesirable from a policy perspective to insulate top level management from their personal responsibilities for ensuring adequate environmental protection in the day-to-day activities of their organisations. [36]

Conviction does not only have a financial repercussion but also has the devastating affect on the social status and position of a director or an officer with a considerable social stature. Such a fear makes it imperative for directors or managers to make sure that environmental best practice is followed by the corporation. However, the question whether criminal liability for corporate environmental crimes should be imposed on the corporation itself or its directors has attracted plethora of conferences and comments. Following are few frequently advanced arguments with regard to the effectiveness of imposition of criminal liability on corporation and/or its officials.

ARGUMENTS AGAINST IMPOSITION OF CRIMINAL LIABILITY ON CORPORATIONS

There is no broadly accepted theory of corporate blameworthiness that justifies the imposition of criminal penalties on corporations. [37] However,

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[34] Supra note 1, at p. 3.

[35] Id.

[36] Id.

[37] Developments in the Law, "Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions," 92 (1979) Harvard Law Review, p. 1241.

three different theories of corporate blameworthiness have developed in the various systems of corporate criminal liability.[38] Those theories are:[39]

- Corporations are morally responsible for the acts and intent of each of its agents;
- Corporations are morally responsible for the acts only of its policy-making officials not for those of lower-level positions;
- Corporations are responsible when its procedures and practices unreasonably fail to prevent corporate criminal violations.

Still there are considerable critiques against and recommendations for these theories. At first, a rather banal remark is made that corporation is nothing but a juristic person that cannot commit any wrong in a physical sense. Neither has it got mental autonomy to orchestrate or design to commit a wrong. An exploration of such contentions is outside the scope of this paper. However, a brief discussion of arguments offered with regard to the effectiveness of imposition of criminal sanctions on corporations looks worthwhile. When we talk about imposition of penalty on a corporation it sounds ineffective since it has "no soul to damn: no body to kick".[40] If the main objective of a criminal sanction is to make the wrongdoer suffer in the cases where a corporation is fined the objective seems to be defeated because such fines eventually fall on innocent stakeholders. Coffee has pointed out at least four levels that have to bear the brunt of penalties on a corporation[41] namely, stockholders, bondholders and other creditors, lower echelon employees and finally the consumers. Some other view that compared to economic gains a corporation makes violating statutory environmental provisions may be too minimal to have any deterrence effect. On the other hand, such fines "may be considered as costs of doing business."[42] Some recommendations have also been made in this regard.

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[38] Ibid., Referred to, U S NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 184 (1970)

[39] Ibid., at pp. 1242-43

[40] Coffee, J.C. Jr. "No Soul to Damn: No Body to Kick" An Unscandalised Inquiry into the Problem Of Corporate Punishment," 79 (1981) Michigan Law Review, p. 386.

[41] Ibid., at pp. 401-2.

[42] Gaynor and Barman, supra note 17.

These include imposition of equity fine, (stock dilution), probation and punitive injunction, adverse publicity and community service.[43]

With regard to the prosecution of corporate officials the effectiveness of the sanctions is also debatable. A statute by express provision may make corporate officers liable for a corporate crime but enforcement of such statutory provisions often leads to miscarriage of justice. Chappell and Norberry give a simple example of a scenario outlined by a senior officer of the NSW State Pollution Control Commission where he remarked:

> a [past] tendency, particularly with large organisation, for top management to issue instructions for all pollution and environmental requirements to be met while at the same time placing conflicting demands upon their middle management to meet costs and production targets…middle management have been forced into a position of complying with environmental requirements either incompletely or not at all. In many cases the most senior management in the organisation have professed ignorance of the situation. [44]

It has also been recognised that in some corporate practice junior managers are designed as vice-presidents responsible for going to jail if need be to protect the officers of the highest echelon.[45] Fisse and Braithwaite,[46] are of the opinion that change in the corporate behaviour may not come by imposing liability on the corporations. To make it happen it is imperative to have individual accountability on the part of the corporate officials. They also argue that prosecuting corporate officers is not a proper way to achieve it. Such a result can be expected by prosecuting the corporations which would result in making them themselves enforce individual accountability within the corporation. Such an idea generally comes from several difficulties in prosecuting corporate officers.

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[43] Fisse B and Braithwaite J, Corporations, Crimes and Accountability, 1993, at pp. 42-46.

[44] Court, J., "Government Environmental Initiatives in New South Wales" TRR Seminar, Environmental and Pollution Law, Sydney, 16 August, 1990, p. 6, in Chappell and Norberry, supra note 19, at p. 105.

[45] Braithwaite, Corporate Crime in the Pharmaceutical Industry, in Chappell and Norberry, supra note 19.

[46] Gaynor and Barman, supra note 17.

Firstly, prosecuting individuals within a corporation is not cost and resource effective, leading to prosecution of corporations instead.[47]

Secondly, determining the internal accountability of a corporation is a very difficult task since a corporation is in a better position to obscure its internal accountability if it likes to do so.[48]

Thirdly, if the corporation has the opportunity to consider the guilty director as dispensable, prosecution of such a director would certainly frustrate the objective since "the company may simply dismiss or take away any power from that individual"[49] concerned.

Fourthly, piercing the corporate veil and catching the real culprit behind requires efforts. Hiding behind the corporate veil is a common corporate practice. Lifting corporate veil and sheeting individual responsibility home becomes more problematic in cases say where a multinational company is concerned. Director or officer of such a company may help, abet or authorise the commission of an offence even without setting his foot in a foreign jurisdiction or may commit a crime on behalf of the company and be posted overseas afterwards.[50] In this case it would be highly difficult to hold such a director personally responsible even if possible that would cost a lot of precious time and money.[51]

Finally, when corporate negligence is concerned that "occurs through a collective action or communication breakdown. In these circumstances, causation may be whittled down to an individual responsible, but the attribution of fault to an individual would be more difficult because usually it is something within the organisational structure that has resulted in negligence."[52]

To overcome these difficulties Fisse argued for a less adversarial approach that would empower the corporation to effectuate internal accountability. He maintains:

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[47] Buban-Litic, K., "Criminal Liability of Company Directors for Pollution Damage: A Comparative Approach between the U.S and Australia" 4 (1995) Australian Journal of Corporate Law, p. 418.

[48] Fisse B, "Recent Development in Corporate Criminal Law and Corporate Liability to Monetary Penalties," 13(1) UNSW Law Journal, p. 28.

[49] Supra note 47.

[50] Supra note 48.

[51] Supra note 47, at p. 419.

[52] Id.

> In a society moving increasingly toward group action it may become impractical, in terms of allocation of resources, to deal with systems through their components. In many cases it would appear more sensible to transfer to the corporation the responsibility of policing itself, forcing it to take steps to ensure that the harm does not materialise through the conduct of people within the organisation. Rather than having the state monitor the activities of each person within the corporation, which is costly and raises practical enforcement difficulties, it may be more efficient to force the corporation to do this, especially if sanctions imposed on the corporation can be translated into effective action at the individual level. [53]

In this regard the decision of Rogers CJ in *AWA Ltd. v Daniels,* [54] provides for the requirements of corporate awareness of the regulatory compliance not only by the directors but also even by 'persons lower down the corporate ladder'. That calls for a sort of corporate internal accountability. No directors or responsible officer can just shut their eyes and let things happen and when called for their accountability shield themselves behind the organisational veil or defend their sloppiness by claiming that they did not see the misconduct happen or did not have a duty to see what was happening.

STATUTORY PROVISIONS FOR ENVIRONMENTAL CRIMES

This section deals with statutory provisions under important Australian and United States environmental statutes.

As environmental pollution increase at an alarming rate it becomes imperative for the government to undertake some regulatory schemes that would help to improving the environmental standards. Under the regulatory statutes different measures are taken to make the polluters comply with the statutory requirements. These include civil, administrative or criminal measures. Taking administrative or civil measures against a corporation are plausible whereas imposition of criminal sanctions against corporations has been a fairly recent phenomenon. Today there is not a single environment protection statute without some criminal provisions for environmental crimes.

PROTECTION OF THE ENVIRONMENT OPERATIONS ACT 1997 (NSW)

Political concern for the public outcry for strict measures to be taken by the government to combat corporate or individual pollutants reflects in the

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[53] Supra note 48, at p. 47, supra note 47, at p. 420.

[54] [1992] ACLC 993 pp 166-67.

speech of then New South Wales Minister for the Environment, Tim Moore, who while introducing the Environmental Offences and Penalties Bill referred to:

> …broad concern in the community at the failure of government over many years to address adequately the level of penalties available to prosecuting authorities, and other measures for environmental protection that are available to the government and to various instrumentalities, primarily the State Pollution Control Commission.[55]

After the enactment of PEOA (NSW) the EOPA (NSW) has lost its relevance. Now PEOA has following provisions for different environmental offences:

Serious Offences[56]

Under this Act a person is guilty of an offence for wilfully or negligently disposing of waste; wilfully or negligently causing any substance to leak, spill or otherwise escape that would or likely to harm the environment; or wilfully or negligently emitting any ozone depleting substance into the atmosphere that is or likely to harm the environment. Once an offence is established liability travels not only on the person committing the contravention but also to the owner of the waste or substance including the owner immediately prior to the disposal or escape.[57] Under section 116(1) [escape of substance within the meaning of the Ozone Protection Act 1989] if a contravention takes place liability may extend to a wide range of persons provided prosecution proved that they have "willfully or negligently, in a material respect, caused or contributed to the conditions which gave rise to the commission of the offence."[58] These persons are:

> (a) the possessor of the substance;
> (b) the owner of the container;
> (c) the owner or occupier of the land on which the substance or container was located; at the time of the alleged leak, spill or escape.[59]

The penalty structure under the Act differs as to the corporation and individuals. Under section 119 of the Act a corporation can be liable for a

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[55] New South Wales Legislative Assembly, Parliamentary Debates, 1 August 1989, 8814, in Chappell and Jeniffer, supra note 20, at p. 99.

[56] Sections 115(1), 116(1), 117(1).

[57] Sections 115(1)(b), (3); 116(1)(b), (5); 117 (1)(b), (2).

[58] Section 116(2).

[59] Sections 116(2) (a)-(b).

penalty not exceeding $1 million and in any other cases the penalty is $250,000 or seven years' imprisonment or both. Further, section 168 provides that a person who attempts, conspires, aids, abets, counsels or procures another to commit an offence under the Act would also be deemed to have committed the same offence.

Prosecution has to prove the presence of wilfulness, recklessness or gross negligence on the part of the defendant for the constitution of a Tier 1 offence. An offence of this nature was first proved in the case of *Environment Protection Authority v Gardner,*[60] in which the defendant was sentenced, to 12 months imprisonment with a financial penalty of $250,000 (maximum penalty under the statute for an individual) for violation of section 5(1) of the Environmental Offences and Penalties Act 1989. In addition, a fine of $170,000 was imposed on him as prosecution's cost. The facts of the case was as follows:

Gardner was the owner and operator of a caravan and relocatable home-park. Each of the relocatable homes had its own toilet facilities. Since the area did not have access to reticulated sewerage system the caravan park was serviced by septic tanks. The system was designed in a manner that all sewage generated would be stored in a central holding tank via number of septic tanks. Once the holding tank was full the sewage used to be removed into a road tanker and then transported to a disposal point designed by Port Stephens Council.

Under the ownership of Gardner the holding tank was emptied twice a week. However, when the park was sold out subsequently to a new owner he found that it was necessary for him to empty the effluent in the holding tank approximately eight times a week, which resulted in emptying of approximately 130,000 litres of extra sewage per week. Subsequent investigation revealed that there were partially concealed system of underground pipes, valves and bypasses and a pipeline running into the wetlands near the Karuah River. A long time practice of disposing off sewage in the waters of the wetland and the river caused change in the physical, chemical and biological condition of the waters. In addition, the viral contamination near the outlet of the pipe constituted a serious health risk to active oyster leases in the vicinity. There was also evidence of sewage smells in the village.

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[60] (Unreported Land and Environment Court, NSW, Lloyd J, 7 November, 1997), cited in Lippman, Z., "Polluter Pays for Environmental Crime" 15:1 (1998) Environment and Planning Law Journal, at p. 3.

Gardner was found wilfully disposing sewage effluent to the river. His knowledge of the installation, design and operation of the system to discharge sewage to the river was established by evidence. In the words of Lloyd J., Gardner had made "numerous self-serving and deceptive statements to residents of the village which indicated a consciousness of guilt in relation to the use to which he was putting his pump system."[61] Further, the defendant had a financial motive before the commission of such offence. It had been estimated that he had saved approximately $138,000 during the period October 1993 to April 1996 through this practice.

The defendant argued that he did not have proper knowledge that pumping large quantities of effluent into the river would harm or be likely to harm the environment. The court rejected the argument and held:

> the effects of sewage on oysters are so obviously detrimental and serious that, in my view, the defendant possessed the requisite knowledge that his wilful disposal of sewage waste to waters was likely to change the condition of those waters in a manner which would render them noxious or detrimental to the safety of persons as set out in section 5 of the *Clean Waters Act 1970.*[62]

The Judge continued:

> even if the defendant were to be somehow ignorant of the contaminating effects of sewage on oysters, such a belief, in the circumstances of this case, could only be the result of a wilful blindness on the part of th defendant. That is the defendant could only have believed that a discharge of sewage in the proximity of oysters was not likely to cause health or contamination problems if he had deliberately shut his eyes to the consequences of his action.[63]

While assessing the gravity of the case, Lloyd J observed that it was the "most serious case of environmental crime to have come before this curt"[64] which indicated that subject to any objective circumstances, the offence would attract the maximum penalty provided by the statute. The court examined the objective circumstances of the case and held:

> This case contains a number of aggravating features. Your actions were not an isolated or single act of pollution, as are most cases that come before the court. It was a deliberate act repeated a number of times a

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[61] Quoted in ibid, at p. 12.

[62] Quoted in ibid., at p. 14.

[63] Id.

[64] Ibid., at p. 6.

> week for the 128 weeks of the offence period. It was done for the motive of financial gain. It had the most serious consequences of environmental harm and likely environmental harm imaginable. Moreover, harm to the environment in this instance affects not one or two people but the community as a whole. You were aware that it would cause harm to the environment. You were aware that what you were doing was illegal. You went to a great deal of trouble to conceal what you were doing. I cannot imagine a worse case than this."[65]

In an another case of *Environment Protection Authority v White,*[66] White, a director and major shareholder of a company, was convicted of negligently disposing of waste in a manner that would be likely to harm the environment. In this case White was fined $25,000 and sentenced for 400 hours of community service. He was also ordered to pay $18,590.70 for rectification of the environment and $11,000 as prosecutor's cost. While handling down the sentence, Talbot J observed:

> In an offence of this nature it is important to have regard to the powerful consideration of general deterrent. Persons, such as defendant, who handle toxic materials must appreciate the onerous burden imposed on them, in favour of the general community, to do so with care.[67]

The judgement in *White* seems to be lenient than that of *Gardner* simply because White was convicted for negligently removing toxic soil on one occasion only and the court did not find his offence at the serious end of the range.[68] In addition, not only the defendant pleaded guilty and offered to pay the costs of removing and disposing of the contaminated soil but also it was evident that his action would not have long-term harm to the environment.[69]

Mid-range Offences[70]

Unlike the tire 1 or serious offences establishment of *mens rea* is not a precondition for mid-range offences. Under most environments protection legislation mid-range offences are usually related to cause pollution or to cause or permit pollution or environmental harm.[71] A person is guilty of

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[65] Ibid., at p. 7.

[66] (1996) 92 LGERA 263, cited in ibid

[67] Supra note 60, at p. 8.

[68] Ibid., at p. 8.

[69] Id.

[70] Sections 120 (water), 124-129 (air), 136 –140 (noise) and 143, 144 (land)

[71] Environment Protection Act 1997 (ACT), sections 138, 139(1); Protection of the Environment Operations Act 1997 (NSW) sections 120, 124-129, 136-

mid-range environmental offences on polluting or causing or permitting pollution to water, air and land and also creating noise pollution. Offences relating to water, air and land attract a maximum penalty of $250,000 for a corporation and $120,000 for an individual offender. A further penalty of $120,000 for a corporation and $60,000 for an individual is imposed for each day if the offence continues. Offences relating to noise pollution carry comparatively less amount of penalty. In this case $60,000 and in addition $6,000 each day if the offence continues can be imposed on a corporation and $6,000 and in addition $600 per day if the offence continues, may be imposed on an individual.

ENVIRONMENT PROTECTION ACT 1970 (VIC)

In the State of Victoria the Environment Protection Act 1970 provides for several criminal provisions both for corporate and individual offenders. Under the Act the serious offences are that of "aggravated" pollution. Under section 59 of this Act a person is guilty of an offence for intentionally, negligently or recklessly polluting the environment or causing or permitting an environmental hazard[72] that results in serious damage or substantial risk of serious damage to the environment, serious threat or substantial risk of a serious threat to the public health. Likewise, the EPOA (NSW) EPA (VIC) also has different penal provisions for corporate and individual offenders. For breaches of section 59E of the Act a penalty of $1 million may be imposed on a corporation and a maximum $250,000 may be imposed on an individual offender.

Under the Act the presence of requisite mental element is necessary for the commission of serious offences. In this regard, in August 1998 a company and its director were fined $40,000 under section 59E of the Act, for

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140, 143,144; Water Act 1992 (NT), section 15(2); Environment Protection Act 1994 (Qld), sections 121 (1)(2), 123(1), (2); Environment Protection Act 1993 (SA), section 80(1)(2); Environmental Management and Pollution Control Act 1994 (Tas), sections 51(1)(2); Environment Protection Act 1970 (Vic) sections 39(water), 41 (air), 45 (land) 27A (environmental hazard), ibid p. 146 no. 61.

[72] Environmental hazard means "a state of danger to human beings or the environment whether imminent or otherwise resulting from the location, storage or handling of any substance having toxic, corrosive, flammable, explosive, infectious or otherwise dangerous characteristics" EPA (Vic) 1970 section 4 (1)

intentionally causing environmental harm through illegal landfill.[73] The illegal landfill was found to contain plastic, timber, general builder's rubble and rotting garbage, which through a number of gullies flowed into the Maribyrong River, via Deep Creek and Jackson Creek. Referring to this case the Victorian Environment Protection Authority, (EPA), Dr Brian pointed out:

> Illegal landfilling of wastes poses a significant threat to the environment and to the health of the community. The substantial fines handed out to both the company and to Mr. Roda as [D]irector of the company sent a clear message as to the seriousness with which the offence is viewed. It also serves warning to company directors to treat their environmental responsibilities with the same diligence as they do their financial duties.[74]

With regard to the mid-range offences section 27A applies. This section deals with offences relating to industrial waste that cause environmental hazards. According to this section "any person who stores, transports, reprocesses, treats, disposes of or otherwise handles any substance in such a manner as to …cause or permit an environmental hazard" is guilty of an offence. The maximum penalty the offender incurs is $20,000 and in addition $8,000 per day if the offence continues. The section does not provide for any higher penalty for a corporate entity. However, the Act provides for some specific offences committed with intent, contravention of which carry an increased penalty. Section 67AA provides that if a court is satisfied that any of the following offences, namely, that of sections 27A(1)(c), 39,41, 45 or 59D, was committed intentionally the court has the discretion to increase the penalty of maximum $40,000 and $16,000 per day if the offence continues further from the day of conviction. Under sections 59D(1) and (2) it is an offence if a person intentionally or negligently provides false or misleading information or conceal information from the Environment Protection Authority or an authorised officer. It is also an offence to conceal information or provide false or misleading information concerning the properties or hazards of industrial waste, thereby endangering human beings or the environment or adversely affecting the operation of any plant or equipment used to treat or dispose of industrial waste.[75]

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[73] Maintained in Baird, R.J., "Liability of Directors and Managers for Corporate Environmental Offences – Recent Prosecution," 16:3 (1999) Environmental and Planning Law Journal, at p. 194.

[74] EPA Media Release dated 12 August 1998, quoted in ibid

[75] Supra note 1, at, p. 150.

CRIMINAL PROVISIONS UNDER U.S. ENVIRONMENT PROTECTION STATUTES

In the U.S.A almost every environmental statute imposes criminal liability. Gaynor and Bartman referring to an analysis of U.S. federal prosecution show that "during the period 1984 to 1990 seven statutes formed the basis for almost all environmental criminal prosecutions."[76]

Fifty percent of these prosecutions took place under RCRA provisions often in conjunction with charges under CERCLA. The Clean Water Act represented another 25 percent.

THE RESOURCE CONSERVATION AND RECOVERY ACT

Taking into view that, historically, in the U.S.A the largest number of environmental criminal prosecutions were concerned with illegal transportation, storage, or disposal of hazardous waste, the RCRA was passed in 1976, which had undergone amendments in 1980, 1984, and 1988. It is the primary statute regulating the management of hazardous waste. "The regulatory program under RCRA mandates the tracking of hazardous waste from cradle to grave (from generation to disposal) through a system of manifests and permits."[77] Those include "the generator of a hazardous waste must notify the EPA of the waste it generates, obtain an identification number for manifesting purposes, and arrange for proper disposal of the waste."[78] The statute also requires transporters of hazardous waste to follow the manifest system.[79] In addition, it requires "a facility that treats, stores, or disposes of hazardous waste to obtain a permit that establishes certain standards for handling waste."[80] Violation of any of these provisions constitutes an offence that carries "penalties including a fine of $50,000 per day of violation and/or up to five years' imprisonment."[81] Further, under the statute additional penalties can be imposed on a person if he knowingly:

(a) files documents containing materially false statements;
(b) destroys, alters or conceals any reports required under law;
(c) transports hazardous waste without a manifest;
(d) exports hazardous waste without required notice;

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[76] Gaynor and Bartman, supra note 17.

[77] Ibid., at p. 123.

[78] 42 U.S.C. 6928 (d) (4) 1994, in supra note 17.

[79] Ibid., 6928(d) (5), in supra note 17.

[80] Ibid., 6928(d) (7) in supra note 17.

[81] Ibid, 6928(d), in supra note 17.

> (e) treats, stores, or disposes any used oil not identified as hazardous waste without having a permit, condition, or applicable regulation.

The offenders incur additional penalties of a maximum two years' imprisonment and/or a fine of up to $50,000 per day.[82] The maximum penalties would be doubled in cases of second convictions of all of these offences.[83] Finally, the Act provides that a person who violates any of the foregoing provisions knowing that he "thereby places another person in imminent danger of death or serious bodily injury" the violator would be subjected up to fifteen years, imprisonment and/ or up to $250,000 in fines.[84] The statute creates offences of specific category of "knowing endangerment" crime. Under this type of crime a corporation may be fined up to $1 million for an offence.[85]

THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT (CERCLA)

This Act generally referred to as "Superfund," primarily focuses on hazardous and toxic waste activities. Under the Act the EPA is empowered to respond to release or threatened release of hazardous waste into the environment. The Act also creates a mechanism to address problems arising from past disposal practices. "The EPA can, through the 'superfund' itself pay for the cleanup of hazardous waste sites."[86] Under the Act criminal sanctions can be imposed "for the failure to notify the government of releases of hazardous substances in quantities above specified thresholds."[87] Section 9603(b) of the Act requires a person in charge of a vessel or facility to notify the government upon learning of a release of a hazardous substance. On violation of this provision the person will render himself for prosecution up to three years' imprisonment and significant fines.'[88] "Other criminal provisions under CERCLA cover the failure of owners and operators of facilities where hazardous wastes were treated, stored, or disposed to notify the government of their existence and

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[82] Supra note 17.

[83] Note 64 above, 6928(d), in supra note 17.

[84] Ibid., 6928(e).

[85] Id.

[86] Supra note 17.

[87] 42 U. S. C. 9603 (1994), in supra note 17.

[88] Ibid., 9603(b), in supra note 17.

to keep certain records of their activities."[89] Violation of these provisions would subject a person up to one year's imprisonment, and/or substantial fines or up to three years' imprisonment and/or substantial fines respectively.[90]

THE CLEAN WATER ACT

The Clean Water Act was enacted in 1977 and significantly amended in 1987. The Act deals with a program that requires a permit for the discharge of any pollutant into US waters. The Act "provides for misdemeanour penalties for the negligent discharge of pollutants into the nation's waterways without a permit or in violation of a permit condition."[91] Those penalties include one year's imprisonment and/or a fine of $ 25,000 for each day of violation.[92] In addition, the Act imposes maximum felony penalties of three years' imprisonment and/or fines of at least $5,000 and up to $50,000 per day of violation of its provisions. In cases of the offence of "knowing endangerment" the Act provides for a maximum penalty of fifteen years' imprisonment and/or up to $250,000 as fines.[93] All of these maximum sanctions would be doubled in cases of second convictions.[94] Finally the Acts requires any person in charge of a vessel or facility from which oil or hazardous substances are released to report the release to the concerned authority. In violation of this provision a penalty up to five years' of prison term and/or a fine of $10,000 for every day of the violation can be imposed on the offenders.[95]

ENFORCEMENT IN AUSTRALIA AND U.S.A.

All of the statutes discussed above provide an array of civil and criminal enforcement tools to compel a person (including corporation) to comply with their requirements. Enforcement of civil provisions on corporations have been a traditional practice whereas enforcement of criminal provisions begs few questions. The reasons being the statutory criminal provisions, allegedly, are more prone to make the party comply with the provisions than to prosecute them. The regulatory agencies also are less

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[89] Ibid., 9603 (c)-(d), in supra note 17.

[90] Ibid., 9603 (c)-(d), in supra note 17.

[91] Supra note 17.

[92] 33 U.S.C. 1311(a) (1994).

[93] Ibid, 1319 (c) (2), in supra note 17.

[94] Ibid., 1319 (c) (1), in supra note 17.

[95] Ibid., 1321, in supra note 17.

equipped than police to enforce criminal sanctions on polluters. Hawkins[96] in his empirical work shows that regulatory agencies often lack morale and confidence that police do possess. He maintains:

> Regulatory agencies must operate in a political environment, for regulation is intended to preserve the sometimes fragile balance between the interests of economic activity on the one hand and the public welfare on the other.[97]

In the words of Braithwaite,

> a proliferation of studies since 1970 tend to show that from the top administrator to the junior inspector, most officers of regulatory agencies never [see] themselves as law enforcers. [98]

In addition, some environmental pollution may be too disastrous to be remedied or resulting in long-term even permanent loss of human or natural resources. In these cases conviction of the offenders would hardly have any implication. As a result 'prevention better than cure' may be a popular slogan among the agencies. Thus it is a popular allegation made against regulatory agencies that "despite … wide variations … in policies relating to prosecution, … *regulatory agencies* invariably seek co-operative relationships with industry"[99] *(emphasis added).* However, in recent years courts have taken very positive steps for the enforcement of environmental criminal provisions. The court judges' concerns about community demand for stricter penalty for environmental polluters often reflect in their decisions. In *State Pollution Control Commission v Incitec Ltd,*[100] the Chief Judge of the Court stated that the penalty for breach should reflect the community's displeasure towards companies licensed to pollute but breaching the conditions of their license.

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[96] Keith Hawkins, Environment and Enforcement Regulation and the Social Definition of Pollution, 1984, at pp. 8-15

[97] Ibid., at p. 9.

[98] Braithwaite J, "White Collar Crime" 11 (1985) Annual Review of Sociology, at pp. 9-10, in Chappel and Norberry, supra note 21, at p. 111.

[99] Grabosky P., and Braithwaite, J., Of Manners Gentle, Enforcement Strategies of Australian Business Regulatory Agencies, at p. 47, in Chappell and Norberry, at note 21, at p. 112.

[100] *SPCC v Incitec LTd.* unreported, Land and Environment Court, 25 October, 1989, in Chappel and Norberry, note 19 above, p. 101

In a very recent case in Queensland [101] Justice Newton stated that "the penalty must act as a deterrent to other companies and employees." Thus, different legal doctrines have emerged from various court decisions in the U.S.A and Australia that are used to enforce the criminal provisions of the environment protection legislation.

AUSTRALIA

In Australia, due to the inherent deficiency in the common law to provide a comprehensive system of environmental protection, several statutes have been enacted for the enforcement of criminal provisions to control environmental harm also to impose sanctions on the offenders. Australian States and Territories have differences in their criminal justice systems. While some of them rely on common law the rest have their own codified system of criminal law. [102] Thus, common law principles do not apply on those state jurisdictions, which have their own criminal code unless expressly reserved. However, in common law States common law principles do not apply if the statutes clearly delineate liability. Caught in such a complex position, Australian courts tend to apply different methods to convict pollution offenders. Below is a brief discussion of statutory and common-law methods to determine the criminal liability of corporations and directors in Australia.

Common Law Responsibility

Generally, the three necessary elements that constitute a common law crime are *mens rea* (guilty mind), *actus reus* (unlawful acts) and a link between the act and the consequences. For a statutory crime, mental element is usually refereed to the intention sometimes, it is expressly provided that negligence or some other mental element will suffice. While in serious offences (Tier 1) establishment of *mens rea* is required in many other cases a statute may create an offence without specifying the relevant mental

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[101] *Williams (DEN) v Chemprod Nominees Pty Ltd and Jeoffrey Robert Stanford*, (Southport District Court, Feb, 1999), in Rachel Jane Baird, "Liabilities of Directors and Managers for Corporate Environmental Offences – Recent Prosecutions" 16:3 (1990) Environmental and Pollution Law Journal, 192.

[102] Those rely on common law are Australian Capital Territory, the Northern Territory, New south Wales, Victoria and South Australia; those have their own criminal codes are, Queensland, Western Australia and Tasmania, in Bates J, Lippman, Z, note 1 above, p. 128.

element. In *He Kaw Teh v The Queen,*[103] the High Court divided statutory offences into three categories:

> (1) where *mens rea* applies in full;
> (2) where the offence is one of strict liability so that the prosecution does not have to rebut *mens rea* in proving the *actus reas*. However, if the evidence raises a likelihood of honest and reasonable mistake the prosecution must rebut that reasonable doubt;
> (3) where the offence creates absolute liability.[104]

In the field of environmental criminal law the courts have taken this approach as a model to analyse offences that require the presence of *mens rea*. The root of this approach can be found in the Canadian case of *R v City of Sault Ste Marie,*[105] in which the Canadian Supreme Court recognised three similar categories of offences:

> 1. Offences in which *mens rea*, consisting of some positive state of mind such as 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…These offences may properly be called offences of strict liability;
> 3. Offences of absolute liability where it is not open to the accused to avoid liability by showing that he or she was free of fault.[106]

Nathan J of the Victorian Supreme Court acknowledged his debt to the decision in *Sault Ste Marie,* while handing down his decision in *Allen v United Carpet Mills, Pty Ltd.*[107] The classification of statutory offences in *He*

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[103] [1985] 157 CLR 523, in ibid, pp 129-130.

[104] at 576, in ibid

[105] [1978] 85 DLR 161, cited in Farrier, D., In Search of Real Criminal Law, at pp. 83-84

[106] Farrier, ibid.

[107] [1989] VR 323, 326-7, in ibid.

Kaw Teh applies in all common law jurisdiction in Australia. In other states except for Tasmania [108] the classification of *He Kaw Teh,* does not apply.

To hold a corporation liable for environmental crimes following legal doctrines are usually applied:

General responsibility

In general a corporation may be held responsible for the acts of its agents. However, when criminal responsibility is concerned the principle of *Tesco Supermarkets*, [109] has to be applied. That means a corporation is responsible for the acts of its employees who constitute the "directing mind and will" of the company. The *Tesco* doctrine tends to have lot of inherent drawbacks since under this doctrine the top-level management is virtually insulated from environmental crimes those generally originates at the middle or lower level management. However, the recent decision of Privy Council in *Meridian Global Fund*, [110] where Lord Hoffman pioneered the rules of attribution affirms that the act of an employee may legally be attributed to the act of the company. In addition, Rogers CJ in *AWA Ltd. v Daniels,* [111] held that persons even lower down the corporate ladder may exercise substantial control over the activities, especially of mammoth corporations. Thus both case laws have opened wide avenues for the courts to hold corporations liable for environmental criminal activities not only by its top-level management but also employees even of lower levels of the corporation.

Vicarious responsibilities

In Australia, the common law basis of primary corporate liability has been replaced by some form of statutory vicarious criminal liabilities. In cases of offences requiring *mens rea* in some states a corporation may be vicariously liable for the conduct of its officers or other defined persons whereas in other states such liability extends only on evidence of intention. [112] In the state of New South Wales, under section 169(4) of the PEOA 1997, the intention of an officer, employee or an agent of the corporation (acting within their capacity as such) may legally be imputed to establish the

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[108] Bates, G., Environmental Law in Australia, 4th ed, Sydney, 1995, Ch, 10, at p. 425, in supra note 1, at p. 131.

[109] [1972] AC 153.

[110] [1995] 2 BCLC 116: [1995] 3 WLR 413.

[111] [1992] 10 ACLC 933 at 166-67.

[112] Supra note 1, at p. 161.

intention of the corporation. The EPA 1970 (VIC) also provides the same provision under section 66B(2). Sections 182(1)(2) of the Environment Protection Act 1994 (QLD) provides that a person (including corporation) will be liable for the conduct of its representative "acting within the scope of their actual or apparent authority."

For the offences that do not require specific *mens rea* the question surfaces whether corporations will be vicariously liable for the criminal conduct of their agents. The question arose in several cases but in *State Pollution Control Commission v Hunt,* [113] Bignold J held that "vicarious criminal responsibility did not apply in respect of Tier 2 offences under the Environmental Offences and Penalties Act, 1989*,* (NSW)." [114] The Court of Criminal Appeal rejected the observation of Bignold J in *Tiger Nominees Pty Ltd. v State Pollution Control Commission.* [115] In this case, Gleeson CJ (with whom Mahoney and Campbell JJ concurred), "considered that the imposition of vicarious criminal responsibility for acts of employees under section 16(1) of the Clean Waters Act 1970 was consistent with the long title of the Clean Waters Act 1970, its purpose, and the definition of "pollute' in section 5 of the Act. The responsibility which attaches is the same as it would be in the law of tort in that the employer will only be liable in circumstances where the employee is acting within the course of his or her employment." [116] The courts have applied the same principles also to acts of the independent contractors and employees of the contractors in several cases. [117]

Conviction for Serious Offences (requiring *mens rea*)

Establishment of mental elements required under the Protection of the Environment Operations Act, 1997, (NSW) for conviction of a serious environmental offence (Tier 1 offence) are "wilfulness or negligence". It is clear from the wording of the statutes that *mens rea* must be shown in relation to the first component of the act of "disposal" of waste or "escape" of substances, but the question arises if the statute requires any such relation to the second component harm or likely to harm to the

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[113] [1990] 72 LGRA 316

[114] Supra note 99.

[115] [1992] 25 NSWLR 715, cited in ibid.

[116] at 720-21, in ibid., at pp. 163-64.

[117] *State Pollution Control Commission v Australian Iron and Steel Ltd*, [1992] 74 LGRA, 387; *Environment Protection Authority v Snowy Mountains Corporation Ltd*, [1994] 83 LGERA 51; cited in ibid.

environment under sections 115(1), 116(1), and 117(1) of the Act.[118] Bignold J in *State Pollution Control Commission v Hunt*,[119] held that *mens rea* must be shown in relation to both components of the offence. His decision was criticised by Stein J in *State Pollution Control Commission v Blue Mountains City Council.*[120] His Honour held that "such an interpretation would defeat the object of the legislation and that the mental element applied only to the act of disposal and not to the harm to the environment."[121] The matter finally resolved by the decision in *Environment Protection Authority v N,*[122] in which the Court of Criminal Appeal favoured the Approach of Bignold J in *SPCC v Hunt.* In this case, Hunt CJ (with whom Enderby and Allen JJ agreed) held that "the prosecution must prove wilfulness not only in relation to the disposal of waste, but also that the disposal was done either with intent or with an awareness of harm or likely harm to the environment."[123] It was also held that proof of actual knowledge of harm to the environment was not essential but could be inferred from 'wilful blindness'."[124]

Again the problem persists to determine whether the relevant degree of negligence for serious offences is of criminal standard (the same as gross negligence or recklessness) since the PEOA, 1997 is silent in this respect. The question arose in *State Pollution Control Commission v Kelly*,[125] where a company was charged under section 6(1) of the Environmental Offences and Penalties Act, 1989 NSW, (section 116(1) of PEOA 1997) for negligently causing a substance to escape from a container. The defendant argued that only gross departures from appropriate standards of conduct should lead to conviction. Hemmings J rejecting the argument held:

> In my opinion, section 6 compels the objective determination in each case of standard of care, rather than nominate a degree of departure which is necessary to constitute negligence. .. Negligence in this context in my opinion is the failure to exercise such care, skill and foresight that

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118 Ibid., p. 135.

119 [1990] 72 LGRA 316, cited in ibid.

120 [1991] 72 LGRA, 345, cited in ibid.

121 Supra note 1, at p. 135.

122 [1992] 26 NSWLR, 352.

123 at 356, in supra note 1, at p. 136.

124 at 358, in ibid.

125 Unreported, Land and Environment Court, NSW, Hemmings J, 21 June 1991, cited in ibid.

would be expected of a reasonable person in the particular situation of the person charged. [126]

However, the degree of negligence that is required to constitute Tier 1 offences has now been provided by the decision of Court of criminal Appeal in *Environment Protection Authority v Ampol Ltd.* [127] In this case Ampol, the owner of a fuel depot containing underground tanks which were used for storing petroleum products was charged with an offence under section 6(2)(c) of the EOPA, 1989 [now section 116(2)(c) of the PEOA 1997 (NSW)]. The facts of the case were that while filling the tank an employee of the lessee of the depot, Brir Pty Ltd. allowed the underground tank to overflow into the stormwater system which resulted in pollution of a nearby creek. Ampol was charged on the ground that as the owner of the land on which the substance or container was located at the time of escape "negligently in a material respect, caused or contributed to the conditions, which gave rise to the commission of the offence." [128] Rejecting the defendants argument that "negligence" should be construed in the criminal sense meaning "gross negligence" Pearlamn J convicted Ampol. The Judge "adopted a statutory measures based on obligations imposed by the statute to avoid or minimise environmental harm." [129] Pearlamn also pointed out that "the risk of harm to the environment was foreseeable, and relevant pollution equipment such as bunding, a shut-off valve and high-level alarm, was not used." [130] Pearlman J imposed a penalty of $75,000 on Ampol and decided that Ampol should not receive a lesser penalty than that was imposed on Brir Pty Ltd., which was the lessee of Ampol's depot and the principal accused of the offence. [131]

The implications of the *Ampol* case, as Bates and Lippman put, are that "owners of property will have to conduct an assessment of their sites, whether or not they are leased to others. Where environmental harm is a foreseeable risk of on-site activities, the owner will have to expand capital on control equipment or construction works so that any potential spill will be contained." [132]

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126 Ibid., at p. 15.

127 [1993] 81 LGERA 433, cited in Bates, Lippman, supra note 1 above, p. 137.

128 Supra note 1, p. 137.

129 at 439, in ibid.

130 Supra note 1.

131 In *Environment Protection Authority v Brir,* [1995] 85 LGERA 45, Perlman J imposed a penalty of $50,000 on Brir, maintained in ibid.

132 Note, 1 above, p. 139.

Conviction for mid-range offences (without specified *mens rea*)

There are many environmental offences that do not specify the relevant mental element for the constitution of such offences. Those are the offences of strict liability. In *State Pollution Control Commission v Tiger Nominees Pty Ltd*,[133] Hemmings J was of the opinion that it was "well established… that section 16 [Clean Water Act 1970 NSW] (now section 120 of the Protection of the Environment Operations Act 1997) creates an offence of 'strict liability' and that 'knowledge' is not an element of 'cause' or 'causing'." It was also held that the Clean Air Act 1961 (NSW) sections 14(1) (now sections 124-126 of the PEOA 1997) are strict liability offences.[134] However, the Victorian courts have taken a different view. In the case of *Allen v United Carpet Mills*,[135] due to the negligence of the concerned operator rubber latex from a tanker overflowed into a creek. Nathan J held that the "offence of 'causing pollution' to waters under section 39(1) of the Environment Protection Act 1970 (Vic) was one of absolute liability, thereby excluding the defence of honest and reasonable mistake."[136] While handing down the decision The Judge "had regard to numerous factors including the purpose and subject matter of the Act, the potential damage and the fact that the penalty provided for the offence was not oppressive."[137]

Thus, under Australian Environment Protection Statutes mid-range offences are of strict or absolute liability. Provisions for these offences are made with a view that they would serve the objective of the legislatures to deter the polluters from doing and continuing environmental harm. Proof of intention for commission of an environmental offence often takes a lengthy procedure and has to undergo complex evidential tests. On the other hand, offences of strict or absolute liability do not require such tests to be done. It will suffice if prosecution can only prove the *actus reus* of the offence. However, in the previous decisions courts have required a positive act on the part of the defendant instead of a just omission. The English

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133 [1991] 72 LGRA 337 at 342, cited in ibid.

134 *Environment Protection Authority v Water Board* (1993), 79 LGERA 103; *State Pollution Control Commission v Broken Hill Pty Ltd* (No 1) 74 LGRA 351; *Environment Protection Authority v Australian Iron & Steel Pty Ltd* (No2) 1993, 78 LGERA 373; cited in supra note 1.

135 [1989] VR 323, cited in ibid.

136 Supra note 1.

137 Ibid..

case in this point is *Alphacell v Woodward*,[138] in which Lord Wilberforce stated that "some active operations or chain of operations involving as the result the pollution of the stream" were required. In *Majury v Sunbeam Corporation,*[139] the New South Wales Supreme Court followed the decision of *Alphacell*. In this case McClemens CJ "found that the defendant had 'caused' pollution since the whole process of storing potassium cupro cyanide, the control of the tanks, the method of working and the drainage system were all under his exclusive control. Further, the drainage system was designed in such a way that if there was a major leak, the chemical would flow into the nearby river."[140]

Conviction for failure to comply with the regulatory scheme

In addition to pollution offences, a person can be liable for commission of a number of offences created by the statutes. The most frequent ones are constituted:

> (a) if any environmentally significant activity is undertaken without proper license. Section 48(2) of The PEOA 1997 NSW provides that it is an offence to carry on a scheduled activity without having a license. In cases where there are certain conditions attached to the license, breach of these conditions is an offence, that may carry a maximum penalty of $250,000 and further $120,000 per day if the breach persists, for a corporation and $120,000, in addition $60,000 for each days breach after the conviction, for an individual; [141]
>
> (b) On failure to obtain a required work approval to carry out scheduled development work or contravention of any of environment protection licenses. Under sections 47, 48 of the PEOA 1997, NSW, failure to obtain such a license may incur a penalty of $250,000 and $120,000 per day if the offence continue for a corporation, and $120,000 in addition $60,000 per day if the offence persists for an individual;
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> (c) On failure to notify the appropriate authority of the occurrence of environmental pollution; [142]

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138 [1972] Ac 824, cited in ibid, p. 156.

139 [1974] 1 NSWLR 659.

140 BSupra note 1, at p. 156.

141 Protection of the Environment Operations Act, 1997, NSW, sections 48(2), 64.

142 Protection of the Environment Operations Act, 1997 NSW, section 152.

(d) On failure to comply with any environment protection notice or orders. Under section 91(5) of the PEOA 1997 NSW, failure to comply with a clean-up order may render a corporation to bear a maximum penalty of $250,000 and an individual $120,000.

Corporate officers' responsibility

Most of Australian environment protection legislation have provisions that impose liability on individual corporate officers for the acts of the employees due to their position in the corporation. Those officers may include "directors, chief executives, receivers, managers, liquidators, and employees with management responsibilities or responsibilities in respect of matters to which the contravention relates."[143] Section 147(1) of the Environment Protection Act 1997 (ACT); section 169(1) of the PEOA, 1997, NSW; and section 66B of the Environment Protection Act 1997 (Vic); all provide that "where a body corporate commits an offence, every person who is a director of, or who is concerned in the management of the body corporate is taken to have committed the same offence."[144]

DEFENCES

Common law defences

Under the common law it is a defence if the defendant shows that he made a reasonable mistake under the influence of a mistaken set of facts, which if true would render the act or omission innocent. In the well-known case of *Proudman v Dayman*,[145] Dixon J maintained:

> As 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 otherwise be an offence.[146]

However, this defence is available only for the strict liability offences. In New South Wales the defence is available for offences under section 120 of the PEOA 1997, NSW.[147] This defence was in question in *State*

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143 Supra note 1, at p. 167.

144 Id.

145 [1943] 67 CLR 536, cited in ibid.

146 Id.

147 *Woodward v Cleary Bros (Bombo) Pty Ltd* (1984) 54 LGRA 409, at 412-13; *Cooper v ICI Australia Operations Pty Ltd* [1987] 64 LGRA 59 at 65-66; *State Pollution Control Commission v Australian Iron & Steel Ltd* [1992] 74 LGRA 387 at 393; *Hunter Water Board v State Rail Authority of New South Wales* (No1) [1992] 75 LGRA 15 at 19 and *State Rail Authority of New South Wales v Hunter Water Board* [1992] 28 NSWLR 721, cited in Supra note 1.

Railway Authority of New South Wales v Hunter Water Board, [148] in which water pollution resulted from the escape of diesel from a break in an underground PVC pipe. The defence advanced by the defendant was that the depot manager's belief "that there had been no problems with the installation of the pipe, that he was absolutely certain that the system would work, and that the pipe was maintenance free." [149] Rejecting the defence Gleeson CJ pointed out that the following requirements are necessary to establish such defence:

> (1) the mistake must be one of fact not law;
> (2) there must be positive belief that the consequence will not ensue. The belief must be specific to relate to the elements of the particular offence;
> (3) the mistake must be honest and reasonable." [150]

Statutory defences

Both in the States of New South Wales and Victoria it is a statutory defence for the corporate officers if they convince the court that:

> they had no knowledge of the contravention; or
> they were not in a position to influence the conduct of the corporation; or
> if in such a position, they used all due diligence or took reasonable steps to prevent the contravention by the corporation. [151]

Due diligence defences

Undoubtedly due diligence defence is an important defence for both the corporation and its officers in Australia especially in cases where statutes have provided for such defences. In *State Pollution Control Commission v Kelly*, [152] a director was held responsible for pollution of a creek due to the inadequate disposal facilities of the corporation. Kelly relied on the defence of due diligence under section 10(1)(c) of the then Environmental Offences and Penalties Act 1989 (NSW). Hemmings J rejecting the defence pointed out that:

> Due diligence…depends on the circumstances of the case, but contemplates a mind concentrated on the likely risks. The requirements

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[148] [1992] 28 NSWLR 721.

[149] Supra note 1, at p. 169.

[150] Ibid., p. 170.

[151] Protection of the Environment Operations Act 1997 (NSW), section 169(1); Environment Protection Act 1970 (Vic), section 66B(1A), in ibid.

[152] [1991] 5 ACSR 607, cited in ibid., at p. 199.

> 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 o 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. This particularly applies to activities requiring experience and acquired skill for proper execution. [153]

THE UNITED STATES

With regard to the nature of regulatory provisions against environmental crimes, it is often admitted that the U.S position tends to be predominantly coercive than is the case in England, Canada and Australia. [154] Fowler, reasonably predicts that due to the enormous public awareness and call for environmental protection in the Western world, "government could stand or fall in the future on their environmental records." [155] His prediction reflects in various market research surveys. For example, a recent CBS News Poll reveals that 53% of Americans think environment will be in worse condition in the next century. [156] Majority of the participants in a joint ABC News/Washington Post survey considered environmental issues as very important in the 1998 congressional election. [157] In another survey, 68% of the respondents felt that "protection of the environment should be given priority, even at the risk of curbing economic growth." [158] Not

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[153] Ibid., at 608-09.

[154] Fowler, R.J., "A Comparative Analysis of Liability for Environmental Damage" 7 (1990) Environmental and Planning Law Journal, p. 273,

[155] Ibid., p. 271.

[156] CBS News Poll, Question ID: USCBS.040698 R49, Apr. 6, 1998,available in WL POLL (reporting a national telephonic survey of 782 adults), in Allenbough, M.H., "What is Your Water Worth? Why we need Federal Fine Guidelines for Corporate Environmental Crimes," (1999), American Law Review, p. 3.

[157] ABC News/Washington Post Poll, Question ID: USABCWP.071498 22L, July, 14, 1998, available in WL POLL (noting that 20% of those who felt the environment was a very important issue also felt that it would be a deciding factor for them in the election), Allenbough, ibid.

[158] Gallup Poll, Question ID: USGALLUP.98AP17 R43, Apr. 17, 1998, available in WL POLL (reporting a national telephonic interview of 1007 adult Americans) in Allenbough, ibid.

surprisingly, "most Americans feel that corporations found responsible for polluting the environment should be punished through the imposition of fines even larger than those they are currently receiving."[159] That such pressing public concern would have its impact in the government policy is not a surprise at all. As a result, the government's efforts to enforce environmental criminal provisions are in the increase annually. The Pollution Prosecution Act 1990,[160] that mandated the hiring of 200 environmental criminal investigators for the Environmental Protection Agency has been a driving force for the last decade for the government to take environmental crimes seriously. That results not only in the changes in the statutory provisions for prosecuting environmental offenders but also in the enactment of the U.S. federal sentencing guidelines[161] that effort to punish environmental offences more severely than other serious crimes.[162] Below is a brief discussion of common legal doctrines that are applied by the U.S. courts to prosecute environmental criminals both corporate and unincorporated.

Vicarious liability

Generally, it is a legal rule that a corporation is liable for the acts of its employees. The interpretations of environmental protection statutes illustrate that in accordance with established precedents a corporation may be vicariously liable for its employees' criminal conduct."[163] However, it is provided that the employee must act within the scope of his employment.[164] Further, in *United States v Hayes International Corp.*,[165] as a

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[159] Allengough, ibid, referring to, Great American TV Poll Survey #7, Question ID: USPSRA.91TV07 R06, March, 1991, available in WL POLL (reporting that 61% of 600 adults surveyed felt that the fines and punishment corporations receive for polluting are not harsh enough while only 5% felt that they were too harsh).

[160] Pollution Prosecution Act of 1990, 42 U.S.C. 4321-4370(d) (1994), in supra note 17, at p. 123.

[161] U.S. Sentencing Guidelines Manual 2Q1.1-2Q2.1 (1989), in ibid.

[162] Gaynor, K.A., and Bartman, T.R., "Here's the Stick, But Where's the Carrot: The Draft Environmental Sentencing Guidelines," 8 (1994) Toxic Law Report. (BNA) pp. 898-902, in supra note 17, at p. 123.

[163] Supra note 17, at p. 127.

[164] *United States v. Basic Const. Co.*, 711 F.2d 570 (4th Cir.1983); *United States v. Sun-Diamond Growers*, 964 F. Supp. 486, 490 (D.D.C.1997). See generally Brickey, K.F., Corporate Criminal Liability 3:01-3:11(1992 & Supp. 1997). Cited in ibid

rule of attribution, the court held the corporation liable for the act of its employee in charge of the disposal of hazardous wastes. In *Apex Oil Co. v United States,*[166] the negligence of the employees was attributed to the corporation. In this case employee of the oil company were failed to notify the Coast Guard or the EPA as required under the statute of two oil spills they witnessed.[167] To hold a corporation attributively liable for the conducts of its employee it is not necessary that the employee has to be in a managerial position. In *United States v Carr*,[168] the question arose whether Carr, a civilian maintenance foreman who used to supervise other maintenance workers was "in charge of a vessel or facility" as used in CERCLA. The court instructed the jury:

> So long as the Defendant had supervisory control or was otherwise in charge of the truck or the area in question, he is responsible under [CERCLA]…If you find that he had any authority over either the vehicle or the area, this is sufficient, regardless whether also exercised control.[169]

Upholding the instruction, the Court of Appeals, pointed out that "lower-level supervisory employees," i.e., any person of "relatively low rank – who, because he was in charge of a facility, was in a position to detect, prevent and abate a release of hazardous substance" are included in the "supervisory" category.[170] The court went further to hold a foreman and a service manager who are even not in a position to secure a permit criminally liable for disposing of hazardous waste without a permit.[171] Although their charges were dismissed by the trial judge on the ground that the provision of the statute would be applicable only to the "owners and operators" of the company, the Third Circuit upheld that it was the Congress's intention to make 6928 applicable to anyone defined as person under RCRA.[172]

Thus, from the above discussion it is clear that "the courts have repeatedly rejected attempts to narrow the scope of criminal liability under

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165 786 F.2d 1499 (11th Cir. 1986), in supra note 17, at. p. 127.

166 530 F.2d 1291 (8th Cir. 1971) cited in ibid.

167 at 1295, ibid.

168 880 F.2d 1550 (2d Cir. 1989), in ibid, at p. 128.

169 Id.

170 Id.

171 *United States v Johnson and Towers Inc.* 741 F.2d 662 (3d Cir. 1984), cited in ibid.

172 Ibid., at pp. 664-67.

environmental statutes."[173] It is also clear that "employees need not hold high-level positions for their conduct to be imputed to the corporation."[174]

Responsible corporate officer doctrine

According to this doctrine a corporate officer will be liable for any activities that violate a public welfare statute regardless of his participation as long as he/she is in a position to prevent and correct the violation.[175] This doctrine was first adopted in *United States v Dotterweich.*[176] In this case a corporate president was held criminally liable for the violations of *Food, Drug and Cosmetic Act.*[177] In this case Dotterweich was charged for allowing his company to sell misbranded drugs into interstate commerce as a violation of the Food, Drugs and Cosmetic Act. The defendant argued that only the corporate employer who was responsible for the shipment of the misbranded drug could be held liable. Rejecting the argument the Supreme Court stated the practical reasons for their decisions that under such a public welfare statute an offence is committed "by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws."[178] Later in the case of *United States v Park,*[179] the Supreme Court had the opportunity to amplify the doctrine of *Dotterweich.* In this case, likewise *Dotterweich* a corporate owner/director was held responsible for violation of Food, Drug and Cosmetic Act. The defendant was charged for allowing its food storage warehouse to become infested and unsanitary. Despite the defendant's argument that he delegated certain specific duties to his employees and he had no actual knowledge of the violations being done by his corporation and neither was there any reason to believe that he should have had such knowledge, the court established an important doctrine – "responsible relation to the situation."[180] The court recognised the principle that "a corporate agent, through whose act, default, or omission the corporation committed a crime, was himself guilty

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173 Supra note 17, at p. 128.

174 Ibid.,

175 Ibid., at p. 133.

176 320 U.S. 277, 280 (1943), cited in ibid.

177 Ibid., at pp.280-85.

178 Ibid., at p.284.

179 421 U.S. 658 (1975) cited in ibid.

180 Ibid., at p. 669.

individually of that crime."[181] The Court further reasoned that "the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them."[182] The Court applied the same reasoning in *United States v Brittain*,[183] to hold a director liable for illegal wastewater treatment plant discharge under the Clean Water Act.

However, the doctrine remains uncertain as to "the question of how far up the corporate ladder the responsibility travels."[184] The question arises "whether the responsible corporate officer doctrine permits the government to impute criminal knowledge from a subordinate employee to an individual officer who otherwise had no knowledge, actual or inferable, of the crime."[185] Most of the statutes provide that knowledge possessed by another person may not be attributed to the defendant when knowing endangerment offences are committed.[186] Finally the 'responsible corporate officer' doctrine fell short in the case of *United States v MacDonald & Watson Waste Oil Co.*[187] In this case the company, its owner and president and company employees were prosecuted for disposal of hazardous waste in violation of RCRA. Upon the argument advanced by the defense with regard to the defendant officer of the company D'Allessandro the trial court instructed the jury that he could be convicted if it is proved that:

> (1) he was an officer (not merely an employee);
> (2) he had direct responsibility for the allegedly illegal activities; and
> (3) he knew of or believed that the allegedly illegal activity had occurred in the past.[188]

In this case finally the criminal conviction of D'Alssandro was overturned. The Appeal Court pointed out that "even where a responsible corporate officer believed that an instance of illegal transportation had

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[181] Ibid., at p. 670, quoted in, Kane, L.R., "How Can We Stop Corporate Environmental Pollution?: Corporate Officer Liability," 26 (1991) New England Law Review, at pp. 303-304.

[182] Supra note 17, at p. 672.

[183] 931 F.2d 1413 (10th Cir. 1991), cited in supra note 17, at p. 134.

[184] Supra note 17, at p. 134.

[185] Ibid., at p. 136.

[186] Ibid., no 117.

[187] 933 F.2d 35 (1st Cir. 1991), cited in ibid, at p. 136.

[188] Ibid. at pp. 50-1.

occurred in the past, he did not necessarily have the required knowledge of the violation charged." [189]

Conviction for offences requiring *mens rea*

There are certain environmental offences constitution of which require presence of specified *mens rea.* These include:

Knowledge*:* Gaynor and Bartman identified that while trying environmental cases courts usually inquire about three things regarding the necessary degree of knowledge contemplated by environment protection statutes. [190] These are:

- Is knowledge of the law or regulation required?
- Is knowledge of the permit status of the activity required?
- Is knowledge of the underlying material facts required? [191]

The principle of *ignorantia legis non oexcusat* – ignorance of the law does not excuse – is considered to be the most well-rooted maxim in the Anglo-American criminal law. [192] Likewise, ignorance of law does not serve a defence to an environmental offence. In *United States v Freed,* [193] the defendant was convicted of illegally possessing hand grenades without proper registration required by the National Firearms Act. [194] The Supreme Court held that "the prosecutor was not required to prove the defendant's knowledge that the grenades needed to be registered where the statute itself did not specify a *mens rea*." [195] In another case of *United States v International Minerals & Chemical Corp.*, [196] the Court disagreed to the defence that knowledge of the regulation required to commit a knowing violation of an Interstate Commerce Commission regulation. The Court held that the word "knowingly" in the statute required only general knowledge of the danger that may result from the goods. [197] The Court further pointed

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189 Ibid. at p. 55.

190 Gaynor, Bartman, supra note 16, at p. 138.

191 Ibid.

192 Sharon L Davies, "The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance" 48 (1998) Duke Law Journal, 341.

193 401 U.S. 601 (1971), reh'g denied, 403 U.S. 912 (1971) cited in supra note 16, at p. 138.

194 Ibid.

195 Ibid.

196 402 U.S. 558 (1971), cited in ibid.

197 Ibid., at pp. 562-65.

out that "But [whereas here]…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."[198]

However, the Supreme Court adopted a different approach in *Liparota v United States.*[199] In this case the court distinguished the statutes that were in question in *Freed, and International Minerals,* from the food stamp statute[200] and stated that "the prosecutor had to prove that the defendant knew that his possession of food stamps was unauthorised but not that the defendant had specific knowledge of the statutory provisions prohibiting that possession."[201] Interestingly, in *United States v Johnson & Towers,*[202] the third Circuit reversed the holding of the trial Judge that under RCRA the prosecution did not have to prove defendant's knowledge of the violation of law. The Court held the word "knowingly applies to all elements of the offence."[203] The court continued "the government need only prove knowledge of the actions taken and not the statute forbidden them."[204] It is imperative that the term "knowingly" "must also encompass knowledge that the waste material is hazardous."[205] Thus the *Johnson* decision affirms that knowledge requirement is related to the disposal and that the materials were hazardous not that there was no permit. One year later in *United States v Hayes International Corp.*,[206] the court rejected the defendants' claim that *Liparota* approach should be applied in this case and "the government would have to prove that defendants had specific knowledge that their actions violated RCRA." In *United States v Weitzenhoff,*[207] the court held that

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198 Id.

199 471 U.S. 419 (1985), cited in ibid.

200 The statute provides criminal penalty for any one who "knowingly uses, transfers, acquires, alters, or possesses" food stamp in an unauthorized manner.

201 Ibid., at p. 425.

202 441 F 2d 662, 669 (3rd Cir. 1984), cited in ibid, at p. 139.

203 Ibid., at p. 669.

204 Ibid.,

205 Ibid., at p. 667.

206 786 F. 2d,1499, 1503 (11th Cir. 1986), cited in ibid, at p. 140.

207 513 U.S. 1128 (1995), cited in ibid.

"the government is not required to prove that defendants knew that their acts violated the Clean Water Act." [208]

In *Johnson,* the court held that the government must prove that the defendant was aware of the lack of permit, however, the knowledge could be inferred from the conduct. [209] In *Hayes* also the court held that knowledge could be proved by inference holding that "in this regulatory context a defendant acts knowingly if he wilfully fails to determine the permit status of the facility." [210] However, in *United States v Hoflin*, [211] the 9th Circuit adopted a contrasting view. In this case, the defendant relying on the decision in *Johnson,* argued that "the government was required to prove he had knowledge that the plant where he had ordered paint cans to be disposed of was unpermitted." [212] The Court declined to adopt or distinguish the *Johnson*'s decision instead dispensed with knowledge of the permit status as an element of offence. [213] In *United States v Speech,* [214] the defendant was convicted under RCRA of "knowingly transporting…any hazardous waste…to a facility which does not have a permit." [215] The district court instructed the jury that the government was not required to prove that defendant knew the permit status of the receiving facility. The Appeals Court reversing the instruction held that "government must prove that the defendant had knowledge that the receiving facility did not have permit." [216]

In *International Minerals,* the Supreme Court observed that the government had to prove the defendant's knowledge that the material being shipped was hazardous like "thinking in good faith that he was [shipping] distilled water when in fact he was [shipping] some dangerous acid would not be covered." [217] All in *Johnson, Hayes, and Hoflin,* it has been observed that "even in cases involving public welfare statutes, the government must prove the defendant's knowledge of certain underlying

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208 Ibid., at p. 286.

209 F.2d 662, 669 (3rd.Cir. 1984), cited in No 16 above, p. 141.

210 786 F. 2d at 1499, 1504 (11th Cir. 1986), cited in ibid.

211 880 F. 2d 1033, 1034 (9th Cir.1989), cited in ibid.

212 Ibid.

213 Ibid., at p. 1286.

214 968 F. 2d 795 (9th Cir. 1992) cited in ibid.

215 42 U.S.C. 6928 (d) (I) (1994) cited in ibid.

216 Supra note 17, at p. 142.

217 402 U.S 558, 563-64 (1971), quoted in ibid.

material facts to obtain conviction."[218] In *Hayes,* the defendant claimed that they believed the paint they transported was being recycled in a good faith mistake of fact.[219] The court recognised the existence of such a defence. In a rather recent case *United States v Ahmed,*[220] where "the defendant was prosecuted for an unpermitted discharge to navigable waters and to a sanitary sewer in violation of the Clean Water Act."[221] The court rejected the defendant's argument that the statute requires "the proof of knowledge of every element of the offence, not just knowledge of a discharge."[222] In a very recent case of *United States v Wilson,*[223] the fourth Circuit held that "Congress intended that the defendant have knowledge of each of the elements constituting the proscribed conduct even if he were unaware of their legal significance."[224] In this case the court observed that "even though the Clean Water Act is a public welfare statute, the status does not eliminate the availability of a mistake-of-fact defence."[225]

The concept of "wilful blindness" was actually developed in non-environmental cases.[226] In *Boyce Motor Lines*,[227] the court observed that the government could prove the violations of Interstate Commerce Commissions regulations by showing that the defendant "wilfully neglected to exercise its duty under the Regulation to inquire into the availability of…an alternate route."[228] In a similar case *United States v Hanlon*,[229] the court held "[it] is settled law that a finding of guilty knowledge may not be avoided by a showing that the defendant closed his eyes to what was going on about him; 'see no evil' is not a maxim in which the criminal defendant

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218 Supra note 17, at p. 141.

219 786 F.2d at 1505, citd in ibid.

220 101 F. 3d 386 (5th Cir. 1996), cited in ibid.

221 Ibid., at p. 388.

222 at 389, in ibid, p. 143

223 133 F. 3d 251 (4th Cir. 1997), cited in ibid.

224 Ibid., at p. 262-64.

225 Id.

226 Congress has defined "willful blindness" as deliberate ignorance about the conditions. Requiremens and circumstances within which one is working. H.R. Rep No. 98-198. Pt.3 at 9 (1984) reprinted in 1984 U.S.C.C.A.N. 5576., 5644, in ibid, no. 197.

227 342 U,S. 337 (1952), cited in ibid.

228 at 342, in ibid, p. 146.

229 548 F. 2d 1096 (2d Cir 1977) cited in ibid.

should take any comfort."[230] In the case of *Hayes,* the court held that "a corporate officer's wilful failure to determine the permit status of a facility to which hazardous waste was transferred satisfies the requirement of knowledge under RCRA."[231] In *United States v Hopkins*,[232] the supervisor of a company's wastewater testing program was convicted for falsifying discharge monitoring result. The court instructed the jury that the defendant could be convicted if it was found that "there was a high probability that company employees were tampering with a monitoring device or method." Hopkins objected to this conscious avoidance instruction. The court pointed out that such a charge would appropriately levelled when "(1) the element of knowledge is in dispute (2) the evidence would permit a rational juror to conclude that the defendant was aware of a high probability of the disputed fact and consciously avoided confirming it."[233] The court convicted Hopkins on the ground of his "wilful blindness".

Negligent violations of criminal statutes

Both the Clean Water Act (CWA) and Clean Air Act (CAA) provide criminal penalties for negligent violations of their provisions. Under the CWA "any person who negligently violates specified sections of the CWA, or any permit condition or limitation implementing any of such sections, is subject to imprisonment for up to one year and a fine between $ 2,500 and $25,000 per day of violation."[234] Under CAA, "any person who negligently releases a listed hazardous air pollutant or extremely hazardous substance and negligently places another person in imminent danger of death or serious bodily injury is subject to a fine and imprisonment for up to one year."[235] In *United States v Frezzo Bros. Inc.,*[236] the first prosecution of a corporate officer was held for violations of the CWA. In this case "the defendants were convicted of wilfully and negligently discharging

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230 at 1101, ibid .

231 786 F. 2d at 1502-o5, cited in ibid.

232 53 F. 3d533 (2d Cir. 1995), cited in ibid p. 147.

233 at 548, in ibid.

234 Charles T Autry, Graham Holden, "Liability of G&T and Distribution Cooperative Officers, Directors and Managers under Environmental Law", 38:2 (1997) Management Quarterly, pp. 37-52.

235 Ibid.

236 602 F. 2d1123 (3rd Cir. 1979) cited in Gaynor, Bartman, supra note 16 at p. 147.

pollutants associated with their mushroom farming business into the navigable waters of the United States without a permit."[237] The court observed that in such a case the prosecution need only establish "that the water pollution abatement facilities were negligently maintained by Frezzos and were insufficient to prevent discharge of the wastes."[238] Later in *United States v Oxford Royal Mushroom Products Inc.,*[239] the court held that "the *mens rea* required for negligent conduct cannot be viewed as entirely distinct. It is well settled that intentional conduct may be imputed to a tortfeasor because of grossly negligent conduct."[240] It is obvious that the negligence standard contemplated by the CWA raises the question if the negligence is "gross" or "wilful". However, the proposed Environmental Crimes Act supports this view.[241] The proposed bill defines the term "negligence" as "a person is negligent if he or she is unaware of a risk so severe that the lack of awareness is a gross deviation from a reasonable person's standard of care."[242] In the absence of any judicial recognition to date, "future case law may clarify whether the proof of mere simple negligence will suffice to sustain a conviction under the Clean Water Act."[243]

Knowing endangerment

All RCRA, CWA and CAA have provided for severe criminal sanctions for "knowing endangerment" offences. "Knowing endangerment" has been defined as placing another in imminent risk of danger of death or serious bodily injury by violating the provisions of the statutes.[244] Considering the severity of the penalties for "knowing endangerment" offences the prosecution is required to proof not only that the defendant "knowingly" violated the law but also that he/she "knew at that time he thereby placed another person in imminent danger of death or serious bodily injury."[245] In *United States v Protex Industries,*[246] the defendant was convicted of violating RCRA's knowing endangerment provision because the defendant failed to

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237 at 1124, in ibid.

238 at 1129, in ibid.

239 487 F. Supp852 (E.D. Pa. 1980) cited in ibid.

240 at 857, ibid.

241 Supra note 16, at p. 148.

242 H.R. 3641, 101st Cong. 1st Sess. (1989), cited in ibid.

243 Supra note 222.

244 E,g. 42 U.S.C 6928(e) (1994), in ibid.

245 ibid.

246 874 F. 2d 740 (10th Cir. 1989), cited in ibid.

provide its employees with adequate protection against solvent poisoning.[247] As a result, three Protex employees had suffered from "psycho organic syndrome."[248] The defendant unsuccessfully argued that the trial court rendered unconstitutionally vague definition of serious bodily injury contemplated by RCRA also that its instruction to the jury on imminent danger also rendered the statute unconstitutionally vague. The Court rejecting the arguments held that the trial court's interpretation of the statutory language was "not an unforeseen expansion of a criminal statute" in violation of due process.[249] However, in two later cases,[250] the Appeals Court acquitted the convicted under "knowing endangerment" offences by the trial courts. In those cases the Appeals Courts read the "knowing endangerment provisions somewhat narrowly."[251] In the words of Gaynor and Bartman, "absent additional opinions in this area, it is hard to determine how useful knowing endangerment provisions will prove as a weapon in the government's criminal enforcement arsenal."[252]

MITIGATION OF PENALITIES

Considering the effectiveness of the criminal sanctions for corporate environmental crimes and also the difficulties in proving corporate violations of environment protection statutes the Australian government has undertaken policies, compliance of which mitigates huge penalties for environmental crimes. These policies primarily are Justice Department Voluntary Disclosure Policy and EPA Audit Policy Statement. Issued on July 1, 1991, the DOJ guidelines hoped to "encourage self-auditing, self policing and voluntary disclosure of environmental violations by the regulated community by indicating that these activities are viewed as mitigating factors in the Department's exercise of criminal environmental enforcement discretion."[253] In the year of 1986, the EPA proclaimed its

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[247] at 742, ibid.

[248] ibid.

[249] at 744, in supra note 16, at p. 149.

[250] *United States v Borowski*, 977 F. 2d 27 (1st Cir. 1992); *United States v Plaza Helath Laboratories INC.,* 3 F. 3d 643 (2nd Cir.1993), cited in ibid., at pp 148-49.

[251] Supra note 16, at p. 149.

[252] Ibid., at p. 150.

[253] 1991 DOJ statement, Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator, in Robert W. Darnell, "Environmental Criminal Enforcement and Corporate Environmental

"Environmental Auditing Policy Statement" that intended to "encourage regulated entities to institutionalise effective audit practices as one means of improving compliance and sound environmental management."[254] In 1995 the EPA substantially updated its old policy statement[255] and created several incentives for corporations' voluntary compliance evaluations and disclosure to the government with a view to correct violations. As a primary incentive the EPA statement offers conditional waiver of the "gravity based component" of an applicable penalty, provided the regulated entity satisfies nine listed criteria required to be fulfilled and demonstrates due diligence in preventing the violations.[256] If the concerned corporation satisfies all those criteria then it "can have the gravity-based component of its penalty or a violation entirely waived."[257] Again, "a company that discloses a violation that it discovered not as the result of an existing auditing or due diligence program can nevertheless obtain a waiver of 75% of the gravity-based penalty, where the company has satisfied other eight criteria."[258] Another conditional incentive offered by the EPA is that "it will not recommend to the Department of Justice that criminal enforcement be brought against a company that has disclosed environmental violations and otherwise satisfied the nine enumerated conditions."[259] Despite its limitations it is reported that an increasing number of companies are taking advantage of the EPA policy for voluntary auditing and disclosure. In October, 1997, it had been reported that

> the EPA and GTE Corp. agreed to settle 600 emergency planning and Clean Water Act violations the company had voluntarily disclosed, for the amount of $52,264.[260]The company had identified the noncompliance through a nationwide 10,000 facilities.[261] The settlement amount was reportedly equal to the expense the company avoided by its noncompliance; the EPA reported that it had waived $2.38 million in

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Auditing: Time for a Compromise?" 31 (1993) American Criminal Law Review, 123.

[254] 1986 EPA Statement, 51 Fed. Reg. 25,004, 25,008 (1986), in ibid, at p. 130.

[255] 60 Fed. Reg 66,706-12 (1995) (Policy Statement), in note 16 above, p. 156.

[256] Gaynor, Bartman, supra note 16, at p. 156.

[257] 66708-12, supra note 236.

[258] Ibid.

[259] Ibid.

[260] Environmental Audits: Company Agrees to Settle 600 Violations; Case Involves Most Sites Ever Under Policy, Daily Envt1. Rpt. (BNA) (Oct 16, 1997), in ibid at p. 158.

[261] Ibid.

punitive fines in response to the voluntary disclosure and the company's correction of the infraction. [262]

In Australia, although the regulatory agencies are very much keen to encourage voluntary environmental auditing as a corporate culture any statement containing conditional waiver for such an effort is still to come. On the other hand the legacy of the High Court's decision in *Environmental Protection Authority v Caltex Refining Co Ltd,* [263] that affirmed that corporations do not enjoy any privilege against self-incrimination has "serious implications for government policy which encourages the conduct of voluntary environmental audits." [264] However, in the States of New South Wales, under section 180 of the PEOA 1997 (NSW) "documents prepared for the sole purpose of voluntary environmental audit are protected documents." [265] Such documents may not be "obtained by any regulatory authority or used in evidence against any person in any proceedings connected with the administration or enforcement of the environment protection legislation." [266]

CONCLUSION

From the above discussion at least one thing is clear that not only public but also judiciary and lawmakers are now much more concerned about environmental pollution and enforcement of environmental protection statutes than they were one or two decades before. Plethora of environmental legislation, numerous court judgements and emergence of lots of environmental protection groups and organisations both in Australia and the U.S.A are reminiscent of such an assumption. However, the problems remain unsolved as to the determination of environmental offences and imposition of appropriate sanctions for the same. For example, except for water pollution from toxic escape, air, land, noise pollution, global warming and ozone depletion all are not easily visible or conceivable harms. Since the process is slow and time consuming the only way to detect such harms require long time research and observation. It becomes highly impossible to pinpoint the exact culprit for such offences. Sometimes, the wrongdoer may not be aware of the harm he/she is doing to the environment.

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[262] Ibid.

[263] [1993] 178 CLR 477, cited in supra note 1, at p. 89.

[264] Supra note 1.

[265] Ibid., at p. 90.

[266] Ibid., sections 181, 182, the PEOA 1997 (NSW).

Further, diseases as a result of exposure to the polluted environment also sometimes require long time to be perceived. Such unperceived injury may not be recoverable in damages for being time barred or by that time the corporation responsible for such crime may be wound up, relocated, or sold out. Thus, the problem does not end. To resolve such problems a global approach is the emerging trend. The recent "Koyoto" conference on global warming and the commitment of the participants in this treaty is a landmark step towards global environmental protection. Various organisations including governments are working for public awareness about environment. United States, Canada, England and Australia have been more active in dealing with environmental pollution. As a part of the process the environment protection statutes in all those countries have criminal provisions for environmental offences. In the U.S. some serious environmental offences are treated more severely than conventional offences. Corporations have also been subjected to criminal responsibility since they have endless exposures to the environment and use natural resources in a commercial basis. There is no denying that being extraordinarily resourceful they have enormous capacity to cause environmental harm.

Imposition of sanctions on corporations and/or corporate officers for environmental crimes has called for scores of seminars, debates and researches. Although the question whether a corporation can be subjected to criminal liability has become exploded and banal, the debate remains incessant with regard to the effectiveness of the sanctions on corporations. While the assumption is that criminal sanction would have a deterrent effect on the wrongdoer and the community at large, it is often argued that when the corporation is large enough and takes a calculative risk such sanction does not serve the purpose. On the other hand, if the sanction is too severe that results in the closer or partial closure of the corporation that has ultimate affect on the shareholders and other stakeholders. Government has the liability to protect the environment and, at the same time, it is also responsible for the economic development of the country. Thus, a policy that would provide for both objectives like 'the snake will die but the stick will not break' is still to come. However, many researchers have proposed for engaging in softer policies by the government. Although most of them agreed on the usefulness of the imposition of individual liability on the corporate officers and the attribution of employees' liability on the corporation, they argue that instead of making the officials personally liable it would bear considerable results if the corporations are encouraged to adopt compliance systems like 'environmental

programming' within the organisation and have their own intra-disciplinary mechanisms.

The U.S.A has undertaken a prospective step as to the mitigation of the environmental penalties. Penalties are mitigated if the corporations adopt voluntary environmental auditing and disclose their violations of Environment Protection Statutes to the government. In Australia under EOPA 1997 (NSW) and EPA 1970 (Vic) there are provisions relating to the voluntary disclosure of the environmental violations by the corporations. But enforcement of these provisions still awaits demonstration. Instead of seeking only for slamming huge fines on the corporation or prosecuting directors for environmental crimes it can wisely be suggested that voluntary auditing and disclosure of violations also be encouraged. Such a philosophy requires changes not only in the government but also in the judicial attitudes.

To sum up, it may be stated that neither in the U.S.A nor in Australia the conventional criminal laws or environment protection statutes have been able to provide sufficiently adequate measures to combat environmental crimes. The U.S courts are reluctant to admit statutory offences that require knowledge as strict liability offences but to some extent rely on circumstantial evidence to satisfy the knowledge requirement. As a result, even if the liability is found it becomes tedious to find out the prerequisite intent for the offence. Under Australian statutes as well presence of knowledge is necessary for the commission of serious environmental offences. However, the prosecution has to prove not only the knowledge of disposal but also its affect on environment on the part of the offender, which tends to be difficult and complex.

Considering the limitations underlying the issue of combating corporate environmental crimes this paper would suggest imposition of liability on the corporate officers through corporation instead of holding them personally liable as an alternative option for combating corporate environmental crimes, which would intensify the introduction of internal preventive measures among the corporations. It is environmental awareness that is more important for the elimination of the evil of environmental crimes even before that is hatched. Instead of sticking to stricter measures, softer punitive measures like equity fines, adverse publicity, community service and corporate probation coupled with mitigation of penalties for voluntary audit and disclosure may be taken into consideration for better results in reducing corporate environmental crimes.