Last year in Yalta, Ukraine (things can change overnight!) we focused in our study commission on the topic: Environmental pollution: is Criminal Law a good instrument?.

In the two meetings we discussed whether there exists in the different countries special legislation concerning the violation of laws regarding the environment in general, including the possibility of restitution, the role of the Public Prosecutor, the question of specialisation.

As a result of the discussion it was considered useful – in view of the complexity of the issues at hand - to further evaluate the questionnaire and bring in new elements that could be explored at the meeting in Brazil.

Question 1

As a result of the questionnaire of last year:

1.1. Could you further elaborate on the functions of specialised agencies set up to investigate and identify violation of environmental laws, if these agencies exist in your country.

The jurisdiction to investigate and identify violations of environmental laws in Australia is spread across a number of agencies at both the Commonwealth and State level. The agencies derive their enforcement powers from a range of statutes that create environmental offences. Some agencies specialise in the enforcement of
environmental laws, such as the Department of the Environment and the Australian Fisheries Management Authority. However, other agencies have much broader functions, and environmental crime only represents a small portion of their workload.

At the Commonwealth level, the key agencies which investigate and identify violations of environmental laws are:

1. **The Australian Federal Police (AFP)** - The AFP is the primary law enforcement agency responsible for investigating federal offences. Where the AFP becomes involved in the investigation of environmental crime, they will ordinarily adopt a joint agency approach that utilises the expertise of more specialised environmental agencies.

2. **The Department of the Environment** – The Department of the Environment administers a variety of Commonwealth statutes, including the *Environment Protection and Biodiversity Conservation Act 1999* which provides the legal framework for protection and management of flora, fauna, ecological communities and heritage places of national environmental significance. It is the key organisation for monitoring compliance with environmental legislation at the Commonwealth level. It collects information from industry, non-government organisations, other government agencies and the general public to identify possible contraventions. It also engages in targeted and random monitoring activities, such as patrols, audits, site visits and inspections. In certain circumstances, the Department may refer suspected contraventions to the AFP.\(^1\)

3. **The Australian Customs Service (Customs)** – Customs detects and investigates the illegal movement of environmental goods, and in particular the import or export of all animal and plant species listed in the *Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973*, or products manufactured from such species.

4. **The Australian Fisheries Management Authority (AFMA)** – AFMA is responsible for investigating illegal activities in the Australian Fishing Zone and other Commonwealth managed fisheries, such as fishing quota evasion.

5. **The Australian Maritime Safety Authority (AMSA)** – AMSA enforces environmental standards for ships in the Commonwealth jurisdiction, to prevent pollution to waterways caused by oil spills or waste caused by shipping.

6. **Australian Quarantine and Inspection Service (AQIS)** – AQIS monitors and investigates potential breaches of Australia’s quarantine laws. The key goal of AQIS is to protect the health of the Australian environment by preventing the entrance of exotic pests and diseases.

Each State maintains its own administrative arrangements for the enforcement of environmental laws. In New South Wales, for example, there is one specialised agency responsible for the enforcement of environmental laws, the NSW Environmental Protection Authority (NSW EPA).\(^2\) The NSW EPA issues environmental protection licenses to control activities that have an impact on the environment and monitors compliance with those license conditions, and also enforces environmental offences created by NSW legislation. A wide range of matters fall within its responsibilities and functions, including:

- Air, water and noise pollution
- Water and resource recovery
- Contaminated land
- Dangerous goods
- Chemicals and hazardous materials
- Pesticides
- Radiation
- Native forestry
- Coal seam gas projects
- Wind farms.

The NSW EPA’s investigative functions include conducting audits and investigating reports of pollution. It is empowered to impose fines, require stricter operating conditions, impose pollution reduction programs, order the clean-up of pollution, and may also bring criminal prosecutions against individuals or corporations which breach environmental laws.

1.2. **If not, do you think it would be useful to create these sorts of agencies?**

N/A

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2.1. Could you elaborate on the cooperation between Police, Customs and Prosecution when it comes to violation of environmental laws?

Investigatory authorities, including Police and Customs, generally possess a discretion as to how to respond to an identified violation of environmental laws. The available enforcement responses will depend upon the powers that have been conferred on an authority by legislation, and can include warnings, suspension or cancellation of permits or approvals, injunctions, remediation orders, seizure of good, fines and criminal prosecution.³

If the authority considers that criminal prosecution is the most appropriate response, the matter may be referred to either the State or Federal Director of Public Prosecutions, accompanied by a brief of evidence. In 2012-2013, the Commonwealth Director of Public Prosecutions (CDPP) dealt with the following defendants referred from agencies responsible for investigating environmental offences.⁴

<table>
<thead>
<tr>
<th>Referring Agency</th>
<th>Summary</th>
<th>Indictable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australian Fisheries Management Authority</td>
<td>18</td>
<td>0</td>
</tr>
<tr>
<td>Australian Maritime Safety Authority</td>
<td>18</td>
<td>0</td>
</tr>
<tr>
<td>Australian Quarantine and Inspection Service</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>Department of Climate Change and Energy Efficiency*</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Department of Sustainability, Environment, Water,</td>
<td>6</td>
<td>0</td>
</tr>
<tr>
<td>Population and Communities*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Great Barrier Reef Marine Park Authority</td>
<td>9</td>
<td>0</td>
</tr>
</tbody>
</table>

* Functions of this department are now assumed by the Department of the Environment.

³ See the Department of the Environment, Compliance and Enforcement Policy (September 2010), 8.
Some environmental authorities will fulfill prosecutorial functions independently of a State or Federal Director of Public Prosecutions. For example, the Board of the NSW EPA has the statutory function of determining whether the EPA should institute proceedings for serious environmental protection offences, with the advice of Environmental Counsel.⁵ Criminal proceedings in the NSW Land and Environment Court (NSW LEC) are generally commenced by the EPA or another specialist enforcement agency. In 2012, 60 per cent of prosecutions in the NSW LEC were commenced by the EPA or the Office of Environment and Heritage, and 27 per cent were commenced by local councils.⁶

2.2. What are the possibilities in your country with regard to:
   a. import/export of protected animals?
   b. import/export of skins of animals?
   c. import/export of ivory of elephants, rhino, walrus?
   d. import/export of other parts of mammals, birds, reptiles?

Australia strictly limits the importation of any animal or plant species listed in Appendices I to III to the Convention on International Trade in Endangered Species 1973 (CITES), or any product manufactured from such species.

There are over 35,000 species listed in the appendices. Appendix I contains species threatened with extinction, and trade is usually prohibited or may be permitted only in very exceptional circumstances. Australia has chosen to list some Appendix II species, such as all cetaceans (whales, dolphins and porpoises) and elephants, as Appendix I species so that stricter import and export policies apply.

Appendix II contains species that may become threatened with extinction unless trade in them is strictly regulated. Export or import of such species will generally require an export permit from the country of origin and an import permit from the country of destination. Import and export permits are granted by the CITES

⁵ Protection of the Environment Administration Act 1991 (NSW), ss 16 and 17.
management authority in each country, being the Department of the Environment in Australia.

Appendix III contains species that are protected in at least one country that has asked other CITES parties for help in controlling trade. As with Appendix II species, both export and import permits will be required.

**Question 3.**

**A number of countries see – speaking in general terms - a decline of nature. 3.1. Is this true for your country?**

Assessing the state of Australia’s environment is difficult, given its size and the variety of ecosystems it contains. In 2011, the Australian Government released a “*State of the Environment*” report, which outlined key trends and threats to Australia’s environment. It summarised that “[m]uch of Australia’s environment and heritage is in good shape, or improving. Other parts are in poor condition or deteriorating.”

The key drivers of environmental deterioration identified by the State of the Environment report include:

- The legacy of poor environmental management in the past, including the introduction of feral animals and weeds, widespread land clearing, drainage of wetlands, and intensive harvesting of fish stocks;
- Climate change, with sectors of the Australian environment being vulnerable to relatively small increase in temperature or decreasing precipitation, or to projected increases in sea levels; and
- Population and economic growth, with associated growth in the built environment, increases in resource consumption and waste generation.

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However, effective environmental management strategies have also resulted in improvements in the quality of Australia’s environment over the past decades. For example, levels of carbon monoxide, nitrogen dioxide, sulphur dioxide and lead in urban air have decreased over the past two decades.

3.2. Do you have specific areas where this decline is visible? For instance the deforestation of the tropical rainforests in a number of countries? The decline of water resources? Competition between water resources for recreational use as opposed to agricultural use?

The State of the Environment report identifies a number of key areas in which environmental decline is visible. These include:

- Inland water
  Australia’s inland water environments have been degraded by high levels of usage and profound drought, particularly in the southern half of the Continent. In southern regions, changes in water usage since European settlement have affected ecosystems and seen the decline in the populations of some native species. The pressures on inland water systems have been, and will continue to be, magnified by human-induced climate change.

- Land
  Soils and vegetation are in poor condition in areas of intensive land-use, particularly where agricultural production is concentrated. Key concerns include the loss of soil carbon, soil acidification and erosion. Livestock grazing, the most extensive of Australia’s land uses covering 55 per cent of the continent, continues to place pressure on the land. Other land-uses that have significant impacts on land quality include urban expansion, mining and other forms of agriculture.

  Native vegetation has been encroached upon by human settlement, with only around 25 per cent of Australia’s original estimated extent of native vegetation remaining intact.
- **Marine environment**
  While the Australian offshore marine environment is in good condition, areas near the coast, bays and estuaries are suffering. This has largely been caused by unregulated human activities in these areas, altering the natural levels of freshwater, sediment and nutrient inputs, and aquaculture in coastal waters. Biodiversity has also suffered due to the impacts of earlier excessive hunting and fishing. Climate change is a future threat, as it is predicted to increase water temperatures and lead to ocean acidification and sea level changes.

- **Biodiversity**
  Since European settlement, Australia has suffered a major decline in biodiversity. Despite efforts to reverse this trend, data suggests that population size, geographic range and genetic diversity are decreasing in a wide range of species of plants and animals. Key pressures on biodiversity include the clearing of native vegetation, introduced species and changed hydrology.

- **Coasts**
  The Australian coasts are some of Australia’s most heavily settled areas. The pressures on the coastal regions tie together many of the threats to the environment identified above, but are exacerbated by the concentration of population growth along the coast. There is also a serious threat to the built environment stemming from the risk of sea level rises as a result of climate change.

3.3 In some places, the use of water for agriculture and the building of structures on certain land may threaten the extinction of some small fish, birds or other creatures. In your country, are laws used to protect animal rights over the rights of humans?

The balance between the interests of local communities and of fauna and flora in Australia is determined and managed through planning laws. The majority of planning decisions are made at a State level. In NSW, the key statute is the *Environmental Planning and Assessment Act 1979* (NSW), which is supplemented
by the Environmental Planning and Assessment Regulation 2000. These legislative instruments provide for the creation of two types of ‘forward planning’ instruments:

- **State Environmental Planning Policies (SEPPs):** these address specific planning issues of state or regional significance, and are prepared by the Department of Planning at the direction of the Minister. Examples include SEPP 14, which provides for the protection of coastal wetlands, and SEPP 56, which controls the planning and development of land on the foreshores of Sydney Harbour.

- **Local Environmental Plans (LEPs):** these guide development proposals and the protection of natural resources in local government areas, and are generally prepared by local councils. They generally divide land into different zones, and indicate the types of development allowed in each zone. Examples of zones include: low, medium and high density residential; neighbourhood centre; commercial; forestry; primary production; and environmental conservation. Each zone specifies land uses which are permitted, permitted with consent only, or prohibited.

Ecologically sustainable development is an object of the *Environmental Planning and Assessment Act*. This object is facilitated through environmental assessment requirements. For some types of development, a proponent of a proposal is required to prepare an “Environmental Impact Statement” (EIS) before the consent of the relevant authority, either the Minister for Planning or a Local Council, will be granted. An EIS includes a detailed description of the likely impacts on the environment, the justification for the development, and an analysis of any feasible alternatives.

Development proposals that will automatically require an EIS include:

- **State significant development** – this category is usually defined by the terms of a SEPP. It generally includes commercial developments, large-scale tourist developments, projects on state significant sites, or activities that have

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8 *Environmental Planning and Assessment Act 1979*, s 5(a)(vii).
significant environmental impacts (such as large-scale mining or industrial projects).

- Designated development – this category is defined in Schedule 3 to the Environmental Planning and Assessment Regulation, and generally includes developments with high environmental impact, such as cattle feedlots, chemical industries, quarries, mines and waste management facilities.

Even where a proposed development does not fall into one of these categories, an environmental assessment may be necessary. Any Authority approving a development has a duty to “examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment.”\(^9\) If an Authority determines that the activity is likely to significantly affect the environment, it must require an EIS to be prepared and considered prior to granting approval.

A “Species Impact Statement” (SIS) may also be required if an activity is likely to significantly affect a threatened species, population or ecological community or habitat. The *Threatened Species Conservation Act 1995* (NSW) allows for endangered populations of plants and animals, or endangered ecological communities, to be listed, which engages the relevant protections set out in the planning laws.

When an Authority is deciding whether to approve a project, it is required to consider principles of ecologically sustainable development.\(^10\) The Authority is also able to grant approval subject to conditions, which may include conditions that offset or mitigate adverse environmental impacts of a proposal. The criminal law plays a role in enforcing the requirement for development approval. It is a criminal offence to develop without consent, or to breach the conditions of a development consent. The maximum penalty is $1,100,000. However, prosecution of these offences is rare, as civil action has prevailed as the preferred enforcement mechanism.

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\(^9\) EPAA, s 111.

\(^10\) *BGP Properties Pty Ltd v Lake Macquarie City Council* [2004] LEC 399.
Approval for development may also be required under federal legislation. The *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) applies to "matters of national environmental significance", which includes:

- World heritage properties
- National heritage places
- Wetlands of international importance
- Nationally listed threatened species and ecological communities
- Nationally listed migratory species
- Activities relating to nuclear energy, including uranium mining
- The Commonwealth marine environment.

### 3.4. Do you feel that criminal law could or should be an effective instrument to safeguard nature? Is civil law sufficient? If not, why not?

The criminalisation of environmentally harmful conduct plays an important role in safeguarding Australia’s natural environment. However, the criminal law operates most effectively when complementing strong civil and regulatory law measures.

A key advantage of criminalisation is that it allows for the imposition of harsher sanctions. In NSW, for example, Tier 1 offences under the *Protection of the Environment Operations Act 1997* carry heavy maximum penalties. An example of a Tier 1 offence is s 115, which prohibits wilfully or negligently disposing of waste in a manner that harms or is likely to harm the environment.\(^\text{11}\) For these offences, courts may impose a penalty on an individual of up to $1 million or 7 years imprisonment for offences committed wilfully, and up to $500,000 or 4 years imprisonment for offences committed negligently. In respect of a corporation, a court may impose a penalty of up to $5 million for an offence committed wilfully and $2 million for a negligently committed offence.

Such heavy sanctions serve an expressive purpose, giving voice to community outrage at the destruction of the environment, and also play an educative function,

\(^{11}\) Sections 115.
helping to shape attitudes of members of the public by indicating governmental and societal condemnation. These functions are not adequately performed by civil or regulatory responses to environmental crime.

Sanctions also deter the commission of offences. Large corporations may simply absorb inadequate civil penalties as a cost of business if their polluting activities are sufficiently profitable. The deterrent effect of criminal offences is therefore enhanced by the extension of criminal liability from corporate entities to individuals. An example of such an extension is s 169 of the *Protection of the Environment Operations Act*, which provides that if a corporation commits certain offences, including all Tier 1 offences, the directors or managers of the corporation are taken to have also committed the offence, unless the person satisfies the court that they were not in a position to influence the conduct of the corporation in relation to the contravention, or used all due diligence to prevent the contravention.

It is important, however, that criminal sanctions are complemented by an array of civil and regulatory measures. Criminal prosecutions tend to be more costly, as sufficient evidence must be gathered to satisfy the criminal standard of proof. In particular, courts will generally interpret criminal offences carrying heavier penalties as requiring a *mens rea* element, proof of which may be difficult.\(^{12}\) Courts have held that an offence under s 115 requires not only wilfulness in relation to the disposal of waste, but also that the disposal was done either with intent to harm the environment, or with an awareness of the likely harm that will be causes.\(^{13}\) A *mens rea* requirement has also been extended to some Tier 2 offences, which are generally less serious than Tier 1 offences and carry lesser penalties.\(^{14}\) Civil and regulatory measures may be cheaper, less time-consuming and therefore a more effective tool for enforcement agencies to use on a day-to-day basis.

Criminal penalties also only operate after the environmental offence has occurred. Civil and regulatory measures are more apt to prevent environmental damage. As an example, the *Protection of the Environment Operations Act* also makes provision for

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\(^{12}\) *He Kew Teh v The Queen* (1985) 157 CLR 523.

\(^{13}\) *Environmental Protection Authority v N* (1992) 26 NSWLR 352.

\(^{14}\) See *EPA v Bulga Coal Management Pty Ltd* [2014] NSWLEC 5; 200 LGERA 235
notices that operate prior to any charge being laid or conviction being obtained. A notice may be given requiring clean-up action when a regulatory authority reasonably suspects that a pollution incident has occurred or is occurring. Notices can also be issued where a regulatory authority reasonably suspects that an activity is being carried out in an environmentally unsatisfactory manner, to prevent a pollution incident. These orders, properly characterised as regulatory rather than criminal, allow more efficient responses to environmental incidents than prosecutorial action.

Question 4.

4.1. Do in your country the responsible authorities develop incentives to report pollution on a voluntary basis?

Early voluntary disclosure of breaches of environmental laws may be considered by prosecuting authorities when exercising their prosecutorial discretion to charge offences or seek particular orders. The NSW EPA’s Prosecution Guidelines notes that regard will be had to whether:

1) The person notified the EPA promptly
2) The information assisted the control, abatement or mitigation of any harm to the environment
3) The information substantially aided the EPA’s investigation of the incident
4) The information was available from other sources
5) The disclosure occurred prior to the EPA or any other regulatory body obtaining knowledge of the non-compliance.

Otherwise, there are few schemes that incentivise the reporting of pollution or other environmental crimes on a voluntary basis. It is more common for the law to impose

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15 Section 91.
16 Protection of the Environment Operations Act, s 96.
a duty on individuals or corporations to notify of a pollution incident which causes or threatens material harm to the environment.  

4.2. If yes, how do they develop these incentives?

See response to 4.1.

4.3. Do you think that there are possibilities left unused? What is your personal idea?

The voluntary reporting of pollution can assist authorities in the detection of contraventions of environmental laws. In Australia, community organisations serve an important function by monitoring and reporting pollution. An example of such a community organisation is the Blue Mountains Conservation Society (the Society), an incorporated voluntary group of around nine hundred members committed to conserving the environment in the Blue Mountains regions. In 2009, the Society brought civil enforcement proceedings against Delta Electricity claiming that the company had polluted the waters of the Cox River in Lithgow, in contravention of the Protection of the Environment Operation Act 1997, s 120. The pollution was initially detected by another community organisation, the Lithgow Environment Group, which carried out regular voluntary water quality testing.

The NSW Land and Environment Court made orders limiting the Society’s liability to pay Delta’s costs if unsuccessful to $20,000, on the basis that the proceedings were in the public interest. While this is not an incentive to report pollution, it does indicate that courts may seek to limit some of the disincentives to voluntary reporting and civil enforcement actions. The proceedings were eventually settled after Delta Electricity admitted that it had discharged waste waters containing pollutants into the river, and agreed to undergo works to stop the pollution.

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19 See response to question 3.4 above.
It is difficult to assess whether there would be significant utility in incentivising voluntary reporting. Mandatory reporting obligations on the agents or employees of a corporation, who are in a position to have greater knowledge of and control over the potentially environmentally harmful activities is a more effective strategy.

4.4. Could you elaborate on the possibilities to enlarge the possibilities of restitution instead of punishment?

While punishment is often an appropriate remedy to reflect the community’s outrage at environmental offending and to deter future offending, there is great practical value in orders that aim to restore or remediate environmental damage. This is reflected in legislation that allows bodies enforcing environmental laws to seek a broad range of restitutionary orders.

In NSW, in addition to imposing a jail sentence or fine, the options available to the courts when sentencing offenders include:

- **A Clean-Up Order** – To order the offender to take clean-up action or steps. These are the most typical form of restitutionary orders;\(^{21}\)
- **A Compensation Order** – To order compensation to be paid to those who suffered damage as a result of the offence, or who incurred costs in cleaning up the harm caused by the offence;
- **An Investigation Costs Order** – To order the offender to pay costs and expenses incurred during the investigation of the offence. This order may be seen as restitution for the community who have, through their public authorities, incurred costs in enforcing environmental laws;
- **A Monetary Benefits Penalty Order** – To order the offender to pay a sum up to the amount of the monetary benefit derived from the offence. This order reflects the principle that an offender should not profit from committing an offence;

- **An Environmental Service Order** – To order to the offender to carry out a specified project for the restoration or enhancement of the environment, not necessarily being the environment affected by the offence;

- **An Environmental Audit Order** – To order the offender to carry out an environmental audit of activities carried on by the offender. These orders can be sought not only in relation to the premises and activities involved in the offence, but also other premises and activities of the offender. It is not intended to punish an offender, but to remedy a situation where there are serious ongoing failures in a defendant's environmental protection systems.

Importantly, these orders may be made in conjunction with traditional punishment-based orders, such as fines and custodial sentences. Breaches of environmental laws must, in appropriate circumstances, be met with criminal sanctions in order to reflect the gravity of environmental offending.

Another avenue for seeking restitution of the environment in NSW is under the *Contaminated Land Management Act 1997*. This legislation creates a hierarchy of responsibility for the remediation of contaminated land, being land where hazardous substances occur at levels likely to pose an immediate or long-term hazard to human health or the environment. The Act places primary responsibility for remediation on the person who caused the contamination, in accordance with the “polluter pays” principle. However, if it is not practicable to require the polluter to remediate the land, the owner of the land then becomes responsible for remediation. Owner of land who has complied with a remediation order can seek to recover costs from the person responsible for the contamination. The structure of this legislation indicates that remediation of environmental harm is prioritised over punishment of the wrongdoer.

**Question 5.**

*We all know that our world is full of forms of legal pollution (air pollution, water pollution, huge masses of plastic in the oceans).*
5.1. Can the Judiciary be more active in their verdicts to urge the politicians to really have interest in solving the existing problems?

The Australian judiciary has traditionally adopted a conservative approach to advocating for law reform in their judgments. In *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 633, Mason J stated:

“The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court’s facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities.”

A judge is able, in *obiter dicta*, to raise concerns about environmental policies or legislation. However, caution must be exercised when adopting that course of action. As the above quote above indicates, there are limitations on a court’s capacity to offer constructive law reform advice. More importantly, courts must operate in a way that preserves their capacity to fulfil their constitutional role of adjudicating disputes impartially and in accordance with the law. Strong criticisms of environmental legislation or policy may undermine the perception of judicial impartiality.

5.2. Could organizations such as Greenpeace or World Wildlife Fund be more active? Do activists from such environmental organizations as Greenpeace go too far? Should they be punished if their activities harm or endanger people?

The strategies adopted by environmental organisations are determined according to their own evaluation of what methods are likely to be effective to win media attention and public sympathy, increase awareness, and ultimately bring about legislative or policy change. However, it is a fundamental tenet of the rule of law that laws must apply to all people equally, and organisations therefore must comply with relevant laws or risk the consequences of prosecution.

A recent example of this is the case of *R v Moylan* [2014] NSWSC 944. The offender, Daniel Moylan, was a 26 year old environmental activist who published a hoax media release from the Australia and New Zealand Banking Group Limited
(ANZ) announcing that it had withdrawn its $1.2 billion loan facility to Whitehaven, an Australian coal mining company. The loan was primarily intended to be used for a coal mining development in the Gunnedah Basin of NSW, which the offender claimed would have serious adverse environmental consequences. The media release caused a significant fall in Whitehaven’s share price, resulting in a reduction of market capitalisation of around $300 million. Although the share price recovered after the media release was revealed as a hoax, many shareholders were unable to mitigate their losses.

The offender was charged under s 1041E(1) of the Corporations Act 2001 (NSW), for disseminating false information to induce persons to dispose of or acquire financial products. Notwithstanding that that offence is primarily intended to target white-collar criminal activities, and that the offender’s purpose was to protest the coal mining project, the offender’s conduct fell within the terms of the offence and he was accordingly convicted. The sentencing judge, Davies J, noted that the damage caused by the offender was considerable. That his actions were not intended to cause loss to investors was reflected in his sentence, and he was sentenced to imprisonment for 1 year and 8 months but immediately released on a 2-year good behaviour bond.

The right of environmental organisations to protest in public spaces will depend on the laws in operation in a particular state. In NSW, for example, police officers ordinarily have a power to issue a direction to a person who is obstructing other persons or traffic, or engaging in conduct that could constitute harassment or intimidation of others, or is likely to cause fear in others, however, that power cannot be exercised in relation to an “an apparently genuine demonstration or protest.” Under Commonwealth Law, there is an offence of “taking part in an assembly [which causes an] unreasonable obstruction” at a Commonwealth facility.

In Tasmania, controversial laws have been introduced into parliament which would penalise protesters who disrupt business with a $2000 on-the-spot fine, and, for a second offence, a mandatory minimum three-month jail sentence.

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22 At [75].
23 Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s 197.
However, any law which restricts a person’s right to freedom of expression, including protest on environmental matters,\(^{26}\) may be held invalid pursuant to the implied freedom of political communication in Australia’s constitution. The two-step test that will be applied is (1) Does the law effectively burden freedom of communication about government or political matters; and (2) Is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system for representative and responsible government.\(^ {27}\)

**Question 6.**

The International Court of Justice (ICJ) in The Hague (Holland) gave a decision in March this year which forbids Japan to hunt whales in the Southern seas (see the activities of the The Sea Shepard). Still Iceland and Norway will continue to hunt whales. Will there be more whales for Iceland and Norway to hunt if Japan is forbidden to hunt? Who wins in such a situation?

In 2010, Australia submitted an application to the International Court of Justice (ICJ) requesting that the Court adjudicate on the lawfulness of the “Japanese Whale Research Program under Special Permit in Antarctica” (JAPRA II), a program under which the Japanese government issued licenses for the killing and taking of whales for purported scientific research. Australia claimed that by authorising and implementing JAPRA II, Japan was in breach of its obligations under the *International Convention for the Regulation of Whaling 1946* (ICRW) and its Schedule.

The lawfulness of JAPRA II principally turned upon whether the program fell within Article VIII of the ICRW. Article VIII provides an exception to the obligations arising under the ICRW where the whaling is conducted “*for the purposes of scientific research.*” Australia submitted that JAPRA II was “*merely a guise*” under which to continue commercial whaling: see at [129].

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27 Lange v Australian Broadcasting Corporation; Coleman v Power
In a judgment delivered on 31 March 2014, the Court held that JARPA II does not fall within the scope of Article VIII: *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)*. Accordingly, Japan’s activities pursuant to JAPRA II were found to be in violation of several provisions of the Schedule to the ICRW and the obligation to respect the 1986 moratorium on commercial whaling.

The Court stated, at [226], that:

“JAPRA II involves activities that can broadly be characterized as scientific research... but... the evidence does not establish that the programme’s design and implementation are reasonable in relation to achieving its stated objectives.”

The decision is significant in establishing that an objective test applies when determining whether a program is for the purposes of scientific research. The Court held that whether activities are for the purpose of scientific research does not turn upon the intentions of individual government officials, but on the objective evaluation of “whether the design and implementation of a programme are reasonable in relation to achieving the stated research objectives.” An objective test provides opportunity for judicial scrutiny of the evidence supporting the justifications of a program. In respect of JAPRA II, the ICJ founds that there were “weaknesses” in the scientific justifications offered by Japan as to the size of lethal samples, such that the ICJ could infer that JAPRA II was not “driven by strictly scientific considerations”: [156]. The Court also suggested that future programs would require a State to undertake studies of the feasibility or practicability of non-lethal methods: [144].

However, the decision is unlikely to lead to a permanent cessation of whaling in the Southern Ocean. The ICJ’s reasoning was limited to an evaluation of JAPRA II, and is only binding with respect to JAPRA II. It would be open to Japan to develop a new scientific whaling program that purports to fall within the confines of the ICJ’s ruling. The ICJ was unwilling to lay down any criteria or general definition of “scientific research”: see at [86], and also unwilling to adopt Australia’s submission that the
killing of whales should only be permitted when non-lethal research methods were not available: [78], [83].

The significance of the judgment is also constrained by the fact that Court’s decision is binding only upon Japan, and only in respect of JAPRA II. It has no direct implications for other nations that continue to undertake commercial whaling, such as Norway and Iceland, which undertake overt commercial whaling despite being signatories to the ICRW.

Nonetheless, the ICJ’s judgment may have an influence on whaling practices, as it sends an important signal that whaling in contravention of the ICRW may not be tolerated by other member states. Iceland’s whaling in particular rests on a legally contentious basis. Iceland withdrew from the ICRW in 1992, but re-joined the International Whaling Commission (IWC) in 2002. They did so on the basis that they would not authorise commercial whaling before 2006, but would seek to have the moratorium lifted and replaced with a “Revised Management Scheme” (RMS), which would permit whaling under a system of quotas to be managed by the IWC. Iceland recommenced commercial whaling in October 2006, despite many States questioning the legality of their non-compliance with the moratorium.28

6.1. Do you think that more countries should address the ICJ in order to settle disputes arising with regard to environment?

The ICJ’s decision in Whaling in the Antarctic demonstrated that the ICJ is willing to entertain environmental disputes and grapple with scientific and technical evidence. As discussed above, it also confirmed that the test for whether an activity is for scientific purposes is objective, providing scope for the judicial scrutiny of the reasonableness of the design and implementation of a program in relation to its purported scientific objectives. The parties to the dispute, in this case Australia and Japan, stated their intention to abide by the decision. This should encourage other nations to bring such disputes before the ICJ.

28 By contrast, Norway is not legally bound by the 1986 moratorium, as it issued and maintains a formal objection to the moratorium from the outset.
Question 7.
What are your ideas about finding a balance between the economic interests and environmental harm that can be a result of an economic activity?

The policy goals of environmental protection and economic growth are often portrayed as being in conflict. In Australia, strong economic growth and terms of trade in recent decades have been driven by the export of primary resources, including coal and iron ore. However, mining, particularly from open cut coal mines, can lead to environmental degradation and places pressures on long-established but small rural communities.

In Australia, the balance is sought to be drawn by the implementation of strategic planning and environmental regulations: see questions 1 to 4 above. In NSW, planning decisions are subject to judicial review to the Land and Environment Court, and on appeal to the NSW Court of Appeal, to ensure that the relevant decision maker has given proper consideration to all relevant factors prescribed in the legislation, regulations or policies, and not taken into account any irrelevant considerations.\textsuperscript{29}

7.1. Do you for instance think that criminal law could have as a form of punishment the obligation to the industry to work on the “cradle to cradle” principle? That means that all the raw materials used to make a product have to be reused at the end of the lifetime of such a product.

Waste management and recycling programs are implemented by State and territory governments, as well as local councils. “Cradle to Cradle” product certification is gaining increasing recognition in the Australian market place, and many brands are choosing to obtain certification for marketing purposes.

It would be difficult to legally require industries to comply with the cradle to cradle principle. Cradle to cradle design may be impossible or very costly for manufacturers to implement. Some materials are not susceptible to recycling. Further,\textsuperscript{29}

\textsuperscript{29} See, for example, Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc [2014] NSWCA 105.
implementation of cradle to cradle design often requires the creation of facilities to accept broken or used products to be disassembled and recycled.

**Question 8.**

8.1. **If one country spends large amounts of its wealth on cleaning the air, but other countries continue to pollute the air in the course of economic activity, is the first country foolish since air goes all around the world?**

Transboundary pollution and the degradation of shared natural resources provide a challenge to countries who implement strict environmental policies within their own borders. Political tensions may arise, both domestically and at an international level, if one country regards itself as bearing a disproportionate or unfair burden in the protection of the global commons. Nonetheless, providing international leadership is likely to lead to more countries adopting appropriate environmental regulation, and so in the long term will result in better environmental outcomes.

It is possible that environmental challenges in the ICJ may require countries to take more responsibility for transboundary harm. There is some recognition in international law of an obligation to prevent transboundary harm resulting from activities within a State’s territory. This obligation derives from the *Trail Smelter Arbitration*, where it was held that:

“no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”

In the *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996]* ICJ 226, the ICJ stated:

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30 *The Trail Smelter Arbitration between the United States and Canada*, 35 AJIL 684 (1941).
“The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”

However, the Court fell short of holding that the obligation to prevent trans-boundary pollution was a rule of customary international law.

In 2008, Ecuador applied to the ICJ for the resolution of a dispute between itself and Colombia concerning the alleged use of aerial spraying by Colombia of toxic herbicides at locations near, at and across its border with Ecuador. It claimed that the spraying had caused serious damage to people, crops, animals and the natural environment at the Ecuadorian frontier. In Ecuador’s written memorials, the State submitted, *inter alia*, that Colombia had an obligation at customary international law to prevent transboundary harm resulting from activities within their own territory. Colombia and Ecuador reached an agreement to settle the matter in 2013, and the case was removed from the ICJ’s list in 2013. Nonetheless, it indicates the potential for the ICJ’s jurisdiction to be invoked in transboundary environmental matters.

8.2 If environmental pollution is truly a world-wide problem rather than a local problem, what kinds of incentives could be created to encourage all countries to resist the tendency to prefer economic activity over environmental constraints? Is the criminal law more or less effective than other incentives?

Refer to responses to questions 3 and 4.

8.3 Cleaning and protecting the environment is not free, it is expensive. Who should bear the cost? Why?

The “polluter pays” principle provides an equitable and effective approach to the distribution of the cost of environmental protection. That is, those who create pollution should bear the costs of managing, mitigating or remedying environmental degradation.
This principle is reflected in Australian environmental policies. See, for example, the scheme established by the *Contaminated Land Management Act 1997*, discussed in the response to question 4.4 above.

**Question 9**

9.1. Is there any other comment on the subject you would like to make.
9.2. What are your “outside of the box thinking “ideas?
9.3. Do you feel a personal responsibility to guard the nature in the world for the coming generations.

The implementation in Australia of an Alien Torts Act, modelled on US Alien Torts Statute, 28 USC § 1350, would enhance the enforcement of international environmental laws.

The US Alien Torts Statute grants jurisdiction to federal district courts over “all causes where an alien sues for a tort only in violation of the law of nation or of a treaty of the United States." Pursuant to this provision, a number of environmental claims have been brought. These have generally involved an alien plaintiff suing a multinational company defendant that has caused environmental harm through their operations in a developing country. The claims have been based on customary international law, environmental treaties, and human rights such as the right to life, the right to health, or the right to sustainable development.

To date, none of these claims have been successful. They have failed primarily because US courts have not considered the principles of environmental law to create norms that were sufficiently specific, universal and obligatory to found a legal duty, the breach of which constitutes a tort. For example, in *Beanal v Freeport-McMoran Inc*\(^\text{31}\) the Fifth Circuit Court of Appeals affirmed a decision of a district court to dismiss a claim brought by a resident of Tamika, Indonesia, against Freeport-McMahon, which operated mines in Tamka. The environmental torts were based on three international law principles, including the Polluter Pays Principle, the

\(^{31}\) 197 F 3d 161 (Fifth Cir 1999).
Precautionary Principle and the Proximity Principle. The Court stated that those principles:

“merely refer to a general sense of environmental responsibility and state
abstract rights and liberties devoid of articulable or discernible standards and
regulations to identify practices that constitute international environmental
abuses or torts.”

Despite these difficulties, an Alien Torts Act may provide an avenue for the better
enforcement of international environmental law principles, and in particular the
strengthening of corporate environmental accountability. It would provide a forum for
the enforcement of international law by individuals, rather than States. Providing
access to the Australian court system would be particularly beneficial, because of the
strength of our legal institutions and commitment to the rule of law, which may be
lacking in some developing countries where multinational companies are operating.
There is also a growth of more specific and obligatory environmental laws,
particularly in international treaties and conventions, that could found actions in
torts.\footnote{See, for example, the International Convention on the Regulation of Whaling 1946 and the response to
question 6 above.}

The presidency of the Third Study Commission looks forward to receive your
answers not later than in September 2014. That will give us time to present the
answers in a proper way.

On behalf of the commission,

Frans G. Bauduin, President of Study Commission III.
Amsterdam: April 2014.