



National Environmental Law Association

WA State Conference

The Role of the Courts in Protecting the Environment

Address by

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Introduction

It is an honour and a privilege to have been invited to address the annual WA State Conference of the National Environmental Law Association. Recent decades have seen increasing public awareness and statutory recognition of the importance of protecting our environment, not only for ourselves, but also for future generations. The courts are, of course, the means by which the laws passed by our parliaments to give effect to these important aspects of public policy are enforced.

I will shortly address a number of aspects of the role of the courts in achieving that important policy objective. However, before doing so, I would like to acknowledge the traditional owners of the lands upon which we meet, the Wadjuk people who were the original inhabitants of the Swan coastal plain and who form part of the larger Nyoongar clan who were the original inhabitants of the south-west of Australia.

The original inhabitants

Given the topic which I am addressing, it is perhaps significant to compare the stewardship of the original inhabitants of this continent, as custodians of the environment, with the effect upon the environment of the activities of the settlers who have arrived since the commencement of colonisation a little over 200 years ago. Over tens of thousands of years the Aboriginal people developed a respect for the land and natural environment which is a fundamental component, perhaps the most fundamental component, of their culture, ethos and beliefs. However, over the last 200 years or so, the natural environment of our continent has been rapidly, and in many cases permanently, degraded by the settlers, not only as a consequence of the dramatic increase in population, but by

the various activities which we have carried out. This has included land clearing which has resulted in significant erosion and soil salinity, and the loss of much native flora and fauna, and by industrialisation and other activities such as mining, farming and grazing, not to mention the ubiquitous motor vehicle which have, in combination, polluted our air and water and degraded the natural environment.

By any standard of comparison, the original inhabitants of this continent were much better custodians of its natural environment than the recent settlers. We would do well to listen carefully and respectfully to what Aboriginal people have to say about the protection and preservation of our environment. This may seem to be a digression, but I will endeavour to illustrate the relevance of these observations later in this paper.

The role of the courts as the third branch of government

At the risk of reciting trite constitutional theory, the courts are, of course, the third branch of government. The legislative branch of government is responsible for creating and amending the laws by which we are governed. The executive branch is responsible for the administration of those laws, and the judicial branch is responsible for the enforcement of those laws and the adjudication of disputes in respect of their application. So, in respect of laws pertaining to the environment, the court's role can be characterised as having two general components, namely:

- (a) the adjudication of disputes with respect to the application of those laws; and
- (b) law enforcement.

Interaction between the branches of government

The interaction between the courts and the other branches of government will inevitably give rise to tensions and differences of opinion. The separation of powers ensures no branch of government has complete power or control over any other branch of government. It provides checks and balances against abuse of power but gives rise to a sense of disappointment by those within a branch of government who genuinely feel that their efforts to advance the public good have been frustrated by the limitations upon their powers imposed by our constitutional structure, and by the actions of another branch of government with which they disagree.

The courts are, like the other two branches of government, constrained by our constitutional structure. Notwithstanding the colourful epithets that are from time to time applied to court decisions and to individual Judges, courts cannot, and do not, do any more than interpret, apply and enforce the law having regard to the facts found by the court on the basis of the evidence adduced. And, unlike the courts of some other countries (notably the Supreme Court of India), the courts of this country do not initiate proceedings of their own motion - they are dependent upon the invocation of their jurisdiction by a party or parties, and upon the provision of evidence by those parties.

The theme of this paper

The burden of this paper is to develop the proposition that however highly the courts, or the judges and magistrates, or the community, might value our environment and its protection, the constraints imposed upon the role of the courts by our constitutional structures and the dependence of the courts upon the steps taken by parties to proceedings, necessarily

constrain the extent to which the courts are capable of protecting our environment. Put another way, it is, I think, a mistake to allow widespread community enthusiasm for the protection of our environment to develop expectations of the role which courts might play in that regard which exceed the capacity of the courts to deliver.

I will develop this proposition by referring to some specific examples within each of the broad areas of the court's functions - namely, the adjudication of disputes and law enforcement. Consistently with the views I have already expressed upon the significance of the stewardship of our natural environment by Aboriginal people for tens of thousands of years prior to colonisation, I will use the preservation of Aboriginal heritage, and the provisions of the *Aboriginal Heritage Act 1972* (WA) (the AH Act) in particular, as a case study for the development of my basic proposition in relation to each general area of the court's functions - namely, dispute adjudication and law enforcement.

Dispute adjudication

There are no common law principles which specifically relate to the protection of the environment. The common law offence of arson and the common law tort of nuisance might indirectly provide some protection to the environment, but only in the case of fire, or interference with the rights of a landowner or a right enjoyed by all members of the public - such as a right of thoroughfare over public roads. This gap in the common law has been filled by statute law promulgated by local, State and Commonwealth governments.

Courts are well equipped, and judges and magistrates well trained to interpret and apply statutory provisions to the facts established by the

evidence before the court. However, courts are not equipped and cannot be expected to undertake value judgments or allocate relative priorities to competing aspects of public policy of the sort which must be undertaken when, for example, a decision must be made as to whether a development which has undoubted economic benefit but adverse environmental impact will be allowed to proceed. This is recognised by virtually all legislation which aims at protecting the environment and which confers responsibility for the making of value judgments and developing public policy upon a combination of consultants, officials, elected representatives who are politically accountable, and in some instances, expert tribunals. In such a legislative environment, the role of the court is essentially limited to adjudicating upon disputes as to whether or not the legislation has been complied with.

That is, of course, a limited role which will seldom, if ever, be determinative of the ultimate outcome of any proposal, such as a development proposal. That is because even if the court determines that the legislation has not been complied with, there will almost always be an opportunity for subsequent compliance. The practical effect of this significant limitation upon the role of the court is best illustrated by some cases taken from the area of Aboriginal heritage. However, before turning to those cases, I will briefly address the AH Act.

The Aboriginal Heritage Act - the scope of the Act

The AH Act has very broad scope. By s 5, it applies to:

- (a) any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose

- connected with the traditional Aboriginal life of Aboriginal people past or present;
- (b) any sacred, ritual or ceremonial site which is of importance and special significance to persons of Aboriginal descent;
 - (c) any place which, in the opinion of the committee, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the state;
 - (d) any place where objects to which this Act applies are traditionally stored or to which, under the provisions of the Act, such objects have been taken or removed.

The committee referred to in s 5 is the Aboriginal Cultural Material Committee which is created by Pt V of the Act.

In addition, by s 6, the Act applies to all objects whether natural or artificial and irrespective of where they are found, which are or have been of sacred, ritual or ceremonial significance to persons of Aboriginal descent, or which are or were used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people past or present.

The duty of the Minister

Section 10 of the Act imposes a duty upon the minister responsible for the Act to ensure that, so far as is reasonably practicable, all places in Western Australia that are of traditional or current sacred, ritual or ceremonial significance to persons of Aboriginal descent are recorded on behalf of the community, and their relative importance evaluated, so that

the resources available from time to time for the preservation and protection of such places may be co-ordinated and made effective. The performance of that duty is enhanced by the obligation imposed by s 15 of the Act, which obliges any person with knowledge of the existence of anything in the nature of Aboriginal burial grounds, symbols or objects of sacred, ritual or ceremonial significance, cave or rock paintings or engravings, stone structures or arranged stones, carved trees, or of any other place or thing to which the Act applies or might reasonably be expected to apply to report the existence of that thing or place to the registrar of Aboriginal sites.

The protection provided by the Act

The protection provided by the Act is not limited to places or objects that have been reported or recorded as places or objects of significance. To the contrary, s 17 of the Act prohibits any action which results in the excavation, destruction, damage, concealment or alteration in any way of any place to which the Act applies, and provides similar prohibitions upon dealing with objects protected by the Act, unless the consent of the minister is first obtained. Section 18 sets out the procedure by which consent is obtained, which essentially involves the provision of notice of an act which would be likely to result in a breach of the prohibition contained in s 17, after which the committee is required to consider the matter and make a recommendation in writing to the minister as to whether or not he or she should consent to the action proposed.

Protected Areas

Although the Act generally provides protection to all places and objects with Aboriginal heritage significance, whether registered or not, there are also mechanisms provided by the Act for the declaration of protected

areas by the minister upon the recommendation of the committee. If such a declaration is made, the exclusive right to the occupation and use of the declared area is vested in the minister, and a right of compensation provided to affected landowners.

So, the general legislative scheme is to provide protection to all places and objects of Aboriginal heritage significance subject to the capacity of the minister to consent to actions which would derogate from that protection, after receiving a recommendation from a committee which is charged with the responsibility of evaluating the importance of places and objects of Aboriginal heritage and making recommendations to the minister as to the exercise of his or her powers. In that context, the role of the court is essentially limited to resolving disputes about whether or not the Act has been complied with.

State of WA v Bropho

One such dispute arose in connection with the proposed redevelopment of the site upon which the Old Swan Brewery had been situated on the banks of the river which the settlers called the Swan River, and which the Wadjuk people call Derbarl Yerrigan, at the foot of the promontory which the settlers called Mount Eliza, and which the Wadjuk people call Kaarta Gar-up and Mooro Katta. In early 1990, the Minister for Works gave notice of an intention to carry out work on the site which involved the renovation and refurbishment of the old brewery buildings. The notice was referred to the Aboriginal Cultural Materials Committee which invited submissions from persons who might be interested in the issue of the proposed works. Some people, including people of Aboriginal descent, responded to the committee's request for information and submissions.

In October 1990, the committee recommended to the Minister for Aboriginal Affairs that consent should not be given for the use of the land for the purpose proposed. In the committee's view, the site had historical, anthropological and ethnographic significance because it contained the camp of an Aboriginal clan, and was a place of ritual/sacred significance to Aboriginal people in former times and was associated with the Wagyl, a dreamtime figure of considerable significance to the original inhabitants of the coastal plain. The minister rejected the committee's recommendation and consented to the proposed use of the land. Mr Bropho and others commenced proceedings challenging the validity of the consent issued by the minister on a number of grounds, including most prominently, the ground that they had been denied the right to be heard by the minister prior to the grant of consent to the proposed work.

At first instance, Rowland J accepted the proposition that the minister's consent was void because of the denial of procedural fairness. However, that decision was set aside on appeal where particular significance was placed upon the fact that Mr Bropho had not taken up the opportunity to place material or submissions before the committee. In the view of the court, because Mr Bropho had not made representations to the committee, he had no legitimate expectation to be heard by the minister before the minister rejected the committee's recommendation. Two members of the court (Malcolm CJ disagreeing) also doubted the validity of the State's concession that Mr Bropho had standing to challenge the validity of the minister's consent. In their view, his spiritual, emotional or intellectual interest in the preservation of the site lacked the tangible or material quality of an interest in the land capable of conferring standing to commence proceedings. With respect, that view seems inconsistent with

both earlier and more recent decisions on the subject and would, I think, be unlikely to be followed today.

My point is that at no point in the proceedings was the court asked to form, nor did the court express any view as to the heritage, cultural or ethnographic significance of the site, or of the impact which the proposed development would have upon the heritage values of the site. Those matters were entirely within the province of the committee and the minister. The role of the court was limited to the ascertainment of whether the procedure mandated by the Act had been followed. Unless there had been a change of minister or a change of government between the minister's grant of consent and the decision of the court, a decision of the court setting aside the minister's consent would have had limited practical significance. While such a decision would have obliged the minister to provide an opportunity for those with an interest in the development of the site to make representations to her, she retained the right to reject those representations, together with the recommendation of the committee, and to ultimately grant consent to the proposed development.

Re Minister for Indigenous Affairs; Ex Parte Woodley

In the Pilbara there is a site known to the Yindjibarndi people as Gurrwaying Yinda. The site comprises a series of permanent pools of considerable natural beauty in which fresh water mussels known to the Yindjibarndi people as Gurrwa can be found. In 1971, a railway bridge was built across the site as part of the construction of the railway between Cape Lambert and Pannawonica which is used for the carriage of iron ore mined at Pannawonica to the port at Cape Lambert.

In February 2009, floodwaters damaged the pylons at the base of the bridge. In order to continue the transport of iron ore from the mine to the port, the railway line was deviated over a temporary bridge or causeway which was built deploying approximately 130,000 cubic metres of rock and soil. The carrying out of that work, and the creation of the temporary diversion was strenuously opposed by Mr Michael Woodley, a Yindjibarndi law man and an officer of the Yindjibarndi Aboriginal Corporation, which represents the interests of the Yindjibarndi people who are the traditional occupiers of the land which includes the site.

The temporary diversion was not designed or constructed to last the wet season which was due to commence in the latter part of 2009. Accordingly, in May 2009, Robe River Iron Associates, the manager of the railway line, gave notice of its intention to construct a new bridge and to remove the temporary diversion. The notice was referred to the Aboriginal Cultural Material Committee, which received written and oral representations from Mr Woodley and other representatives of the Yindjibarndi people. The committee decided to recommend to the minister that he grant consent to the proposed works subject to a condition that the railway line manager developer implement a cultural heritage management plan to the satisfaction of the registrar of Aboriginal sites after consultation with, and to the satisfaction of Mr Woodley and the Yindjibarndi Aboriginal Corporation. However, before that recommendation was presented to the minister, and without reference back to the committee, an official in the minister's department changed the minutes of the meeting and the terms of the committee's recommendation reported to the minister so that the condition of consent requiring consultation to the satisfaction of the Yindjibarndi people was

replaced with a condition requiring consultation to the satisfaction of the registrar on behalf of the minister.

Mr Woodley and the Yindjibarndi Aboriginal Corporation brought proceedings challenging the validity of the consent granted by the minister which I heard and determined. Because of the unauthorised alteration of the terms of the recommendation made by the committee in the documents that were presented to the minister, I concluded that the minister had not been provided with the recommendation of the committee. I also concluded that the provision of the recommendation of the committee to the minister was a condition of the valid exercise of his power to grant consent. Accordingly, I concluded that the procedures stipulated by the Act had not been followed.

However, it was submitted on behalf of the minister that I should nevertheless deny Mr Woodley's claim, and refuse to make orders setting aside the consent granted by the minister. The minister was called to give evidence in support of that submission, and testified that if he had been provided with the recommendation in the terms actually made by the committee, he would not have granted consent subject to the term recommended by the committee because he would not have been prepared to effectively give the Yindjibarndi people a right of veto over the consent which he had granted. I accepted that evidence, and concluded that making an order setting aside the minister's decision would be futile because, it was clear from the minister's evidence that, now apprised of the true terms of the committee's recommendations he would make precisely the same decision which he previously made and issue consent in precisely the same terms. Accordingly, the only consequence of the grant of such an order would be to expose the

manager of the railway line to possible prosecution in respect of the work which it had carried out in good faith and in reliance upon the validity of the consent granted by the minister. Given that the invalidity of the minister's consent was due to no fault of the railway line manager, and indeed that the facts giving rise to the defect in the minister's consent could not have been known to the railway line manager, I concluded that such a course would impose an unreasonable hardship upon the manager with no practical benefit or advantage to Mr Woodley or the Yindjibarndi people. For those reasons, even though the terms of the Act had not been complied with because the department had taken upon itself to interfere with the committee's recommendation to the minister, I refused to make an order setting aside the minister's consent.

This case demonstrates that even in a case in which non-compliance with the statutory provisions has been established, it does not follow that a court will intervene and set aside the process that was followed. The case also illustrates my earlier point in that at no point in the process was I required to form, nor did I express any detailed view as to the cultural significance of the site to the Yindjibarndi people or its heritage or environmental values, or evaluate any competing public interests between the preservation of that site, and the maintenance of a railway line which enables the export of a substantial quantity of iron ore. All that I was concerned to establish was whether the processes required by the Act had been followed, and if not, whether an order should be made setting aside the consent granted by the minister.

Environmental Protection Authority; Ex parte Chapple

The Burrup Peninsula is an area north of Karratha in the Pilbara of extraordinary environmental, archaeological and cultural heritage

significance. The area is replete with rock sites, including paintings and carvings. It is estimated that there may be a million panels of rock art in the area. Estimates vary as to the age of the art. Some estimates place the art at "up to" 30,000 years of age, but it is generally accepted that much of the art is at least 6000 years old. On any view, the art and the area is of profound significance to the cultural heritage of the original inhabitants of the Pilbara, and a very valuable part of Australia's cultural heritage.

However, the area is also the site of a large plant for the liquification of natural gas and associated facilities. During 1995, a draft land use and management plan was prepared covering the peninsula. The draft plan proposed that the land on the peninsula which had not already been developed for industrial purposes, or leased, should be divided into two land use zones. The first zone which was to comprise over 60% of the peninsula was to be a conservation zone, whereas the second was to be set aside for future industrial development, subject to formal environmental and other approvals before development could proceed.

Robin Chapple sought an order of the court compelling the Environmental Protection Authority to assess the draft land use plan before the plan proceeded any further. Accordingly, the question before the court concerned the interpretation and application of the *Environmental Protection Act* (the EP Act), rather than the AH Act. Nevertheless, as with the cases to which I have referred involving the AH Act, the only question which concerned the court was whether the EP Act required that the draft land use plan be environmentally assessed prior to adoption. The EP Act requires the EPA to consider assessing any proposal likely, if implemented, to have a significant effect on the

environment. The court unanimously concluded that the plan was not a proposal which was likely to have a significant effect on the environment because it was, even when finalised, simply a proposal to zone land, not to develop it. As the court observed, zoning did not of itself confer any rights of development. In the court's view, it was only proposals for the development of land which had to be assessed by the EPA under the EP Act, because only the development of land would be likely to have a significant effect on the environment.

The court was, however, in no doubt as to the environmental significance of the site. Kennedy J described it in these terms:

"The great significance of the Burrup Peninsula is not in any doubt. The Burrup Peninsula Draft Use and Management Plan itself stresses its importance, pointing out that Aboriginal people have used the peninsula for thousands of years. It has one of the highest known concentrations of Aboriginal sites in Australia. The average density of archaeological sites was found in 1987 to be 34.2 per square kilometre, "among the richest rock art and archaeological provinces in the world". It also has outstanding scenic values. The draft plan observes that the high precipitous topography, surrounding islands and unusual rock-pile landform provide a unique, rugged beauty. The peninsula's vegetation and flora are extremely varied and rich, both in diversity and number of species present. It has a broad diversity of fauna, including residual species. Several species thought to be present on the Burrup Peninsula or in surrounding waters have been declared threatened or in need of special protection under the Wildlife Conservation Act 1950. The significance of the peninsula has been

widely regarded as important in the national and international scientific community since the first reports on it were published in the 1960s and 1970s. At the same time, the peninsula is described as being one of the most important industrial and port sites in Australia. The scope for conflict between environmental and economic interests is patently clear."

My point is that it was no part of the court's role to resolve the conflict between environmental and economic interests. Notwithstanding the clear acknowledgement of the environmental significance of the site, the decision of the court was limited to the interpretation and application of the EP Act and had the effect that the draft land use plan did not have to be environmentally assessed prior to its adoption. As many would know, the decision in this case led to a significant amendment to the EP Act to enable the environmental assessment of town planning schemes and proposed changes in zoning of land by the EPA.

Roe v The Director General, Department of Environment and Conservation

In February 2008, the governments of the Commonwealth and Western Australia entered into an agreement for the undertaking of an assessment, under the environmental legislation of each of the State and the Commonwealth, for the purpose of identifying the most appropriate precinct within which liquefied natural gas processing infrastructure and associated facilities might be established in order to process the significant reserves of natural gas that have been discovered in the Browse Basin. The Browse Basin is situated off the north-west coast of Australia and a variety of possible sites in the Pilbara and Kimberley were assessed from an environmental and economic perspective. In

December 2008, the Premier of Western Australia announced that the preferred location for the gas hub precinct was in an area situated on the Dampier Peninsula north of Broome adjacent to the coast known as James Price Point to the settlers, or as Walmadany to the Goolarabooloo and Jabirr Jabirr people who are the original inhabitants of the area. Following that announcement, the EPA commenced a process of detailed environmental assessment of the possible development of the gas hub precinct. That process of assessment is not yet complete, partly because the plans for the development have not yet been finalised, and the particular sites for development identified.

Woodside Energy Ltd is investigating the possibility of processing natural gas from tenements in which it has an interest in the Browse Basin, using a liquefaction plant and associated facilities to be constructed at James Price Point. For the purposes of those investigations, Woodside applied to the Chief Executive Officer of the Department of Environment for a permit to clear not more than 25 ha of native vegetation in the area for the purposes of geotechnical and hydrological investigations.

Main Roads WA want to investigate and plan the possible construction of an access road to the site of the proposed precinct from the existing Cape Leveque road. For the purpose of conducting preliminary environmental and technical investigations, so as to gather the information that might be needed to obtain environmental approval to construct the road, Main Roads applied to the CEO of the Department of Environment for a clearing permit to enable the clearing of a trace line up to 19 kms long and 4 metres wide. The purpose of the trace line was to enable greater

access through the use of 4-wheel drive vehicles, so as to investigate the possible route of a road which might or might not align with the trace line.

The CEO decided to grant the clearing permits sought by Woodside and Main Roads. Mr Joseph Roe, a member of the Goolarabooloo people and, at the time he commenced proceedings in the Supreme Court of Western Australia, one of the named applicants in a native title claim that has been brought in respect of land which included the area at James Price Point, is opposed to the development of the gas hub precinct, and had objected to the grant of the Woodside clearing permit. He had not given notice of objection to the grant of the Main Roads clearing permit because he did not become aware of the application for that permit within the time permitted for objections and appeals. He commenced proceedings in the Supreme Court, challenging the grant of both permits on the ground that the EPA had not completed its assessment of the proposal to develop the gas hub precinct at James Price Point, with the result that the CEO could not lawfully grant a clearing permit which could have the effect of causing or allowing the proposal under assessment to be implemented. He also challenged the Main Roads clearing permit on the grounds that the CEO had failed to give him notice of the application by Main Roads for the clearing permit, when the EP Act required the CEO to give Mr Roe such a notice.

The Court of Appeal decided that the only proposal which had been referred to the EPA for assessment was, in the terminology used by the EP Act, a "strategic proposal", which did not include within it any "significant proposal", so that there was no legal impediment to the grant

of the clearing permits under the EP Act. The reasoning used to arrive at that conclusion was analogous to the reasoning in *Chapple's* case. At the time the proposal was referred to the EPA, it was nothing more than a generic proposal to assess the suitability of James Price Point as a site for a future gas hub precinct development. There were no development plans referred to the EPA for assessment, nor had any particular areas of land within the general precinct been identified as sites for prospective development. Accordingly, there was no identifiable proposal which, if implemented, would be likely to have a significant impact upon the environment.

Mr Roe's additional ground of attack upon the Main Roads clearing permit also failed. The court held that the delegate of the CEO, as a matter of fact, determined that the people who should be given notice were a group of people - namely, the Goolarabooloo Jabirr Jabirr people, and not Mr Roe specifically. The court further held that the group of people generally, and Mr Roe in particular had been given notice by the CEO in the form of the notice which he gave to the Kimberley Land Council which was acting as Mr Roe's agent for the purpose of the native title claim to which I have referred.

Accordingly, Mr Roe's attempts to set aside the clearing permits failed. My point is apparent. At no point in the course of the legal proceedings was the court invited, nor did it express any view as to the impact which the grant of the clearing permits in question would have upon the environment of the Dampier peninsula, or upon the Aboriginal cultural heritage values of the area. Rather, the court's primary focus was upon

the proper construction of the EP Act, and its application to the particular circumstances of the case.

The four cases to which I have referred illustrate my basic proposition that, at least in its role as an adjudicator of disputes, the role of the court is not to assess the value of environment or places or objects of Aboriginal heritage value, or the impact which any particular proposal is likely to have upon those values if implemented. Rather, the essential role of the court is limited to interpreting the relevant legislation and determining its application to the particular circumstances of a case. Most often, the focus of the court will be upon the question of whether the procedures required by the legislation have been followed. If the court decides that the procedures required by the legislation have not been followed, the usual, but not the inevitable outcome will not be to determine the development proposal, but merely to require that proper process be followed.

Law Enforcement

The court is not quite so emasculated when it comes to perform its role of enforcing laws that have been passed for the protection of the environment. However, as will be seen, there are sometimes practical considerations which constrain the efficacy of the court's law enforcement role.

Penalties and injunctions

The courts have essentially two powers which can be utilised to enforce laws aimed at protecting the environment. The first is the power of

punishing those who are found guilty of breaching those laws, and the second is the power of issuing injunctions to restrain people from breaching those laws.

Legislatures have responded to increasing community concern about environmental degradation by increasing the penalties which courts can impose upon those who breach environmental laws. For example, under the EP Act, the maximum penalty for the offence of causing serious environmental harm is, for an individual, a fine of up to \$500,000, or 5 years imprisonment, or both, with a possible daily penalty of \$100,000 for each day on which the offence is committed, and for corporations, a fine of up to \$1,000,000 with a daily penalty of up to \$200,000. The penalties available for contravention of the AH Act are not so great but, nevertheless, significant. Individuals found guilty of contravening the Act can be fined up to \$20,000 or imprisoned for up to 9 months for a first offence, and up to \$40,000 or 2 years imprisonment for a second or subsequent offence. Daily penalties for contravention of up to \$400 per day are available under the Act, and in the case of corporations, contravention of the Act can lead to a fine of up to \$50,000 for a first offence, \$100,000 for a second or subsequent offence, and daily penalties of up to \$1000. In addition, the environmental legislation specifically, and other legislation more generally, makes provision for the forfeiture of things used in the commission of offences, and for reparation orders requiring an offender to make good damage that they have caused.

In addition, the legislature has augmented the general powers of the court to grant injunctions, usually to restrain someone from engaging in unlawful conduct, or, in some circumstances, requiring a person to do

something. For example, under s 51S of the EP Act, the court may grant an injunction restraining someone from engaging in conduct which would contravene the provisions of the Act which prohibit clearing of native vegetation without a permit. If such an order is breached, the order can be enforced by way of proceedings for contempt of court. The penalties which a court can impose for contempt are entirely within the court's discretion, and are unlimited.

Practical constraints

There are some practical considerations which constrain the court's capacity to enforce environmental protection laws. The first, which I have already mentioned, is that the court has no power to act of its own motion. The court's jurisdiction must be invoked by a party or parties before the court has any power to act. The efficacy of the court's power to enforce the law therefore depends upon the extent to which either the authorities, or individuals with standing (in the legal sense) are prepared to go to the trouble and incur the expense of commencing proceedings.

This observation points to the second practical consideration which relates to the practical inability to detect all, or even a significant majority of, actions or conduct which contravenes environmental protection laws. While modern technology has made detection of some contraventions easier - for example, aerial photography and satellite surveillance has enhanced the detection of illegal clearing, in other areas the practical difficulties are enormous.

An obvious example is the area of Aboriginal heritage, which I have already addressed. As I have noted, it is estimated that there may be up to a million rock art sites in the Burrup Peninsula alone. There are literally thousands of significant sites, perhaps up to 100,000 significant sites, in other parts of the State, most notably in the Pilbara and the Kimberley. Very often they are in remote locations. Inaccessibility may go a long way towards protecting these sites, but it also makes detection of interference with those sites practically impossible.

I have had the benefit of visiting a number of more accessible sites in the Kimberley and Northern Territory myself. The art work, and its history, is extraordinary. The Wandjina and Bradshaw figures depicted in the art I have seen in the Kimberley profoundly evoke a vision of a culture and a people whose continued existence is threatened. It is simply impossible to police or control access to these sites due to their remoteness. Some of the more prominent sites receive hundreds, perhaps thousands of visitors each day. While I am sure that national park rangers do their best to discourage interference with the sites, over time it seems inevitable that human traffic is likely to cause damage to these vital artefacts of Aboriginal culture and tradition.

And, as I have noted, the places and objects protected by the AH Act go well beyond rock art sites. Given the breadth of the definitions contained in the AH Act, and the spread of Aboriginal habitation across our State prior to white settlement, the vast areas of our State which have not been degraded by settlement and development must be replete with places and objects protected by the Act. It seems inevitable that many of those

places are being degraded in contravention of the Act without anyone's knowledge.

It is very difficult to obtain reliable data on the number of prosecutions that have been brought for contravention of the AH Act. However, doing the best I can, it seems likely that the number of successful prosecutions could be counted on the fingers of two hands, even though the Act has been in force for almost 40 years. This suggests to me that prosecution and punishment is not likely to be a particularly effective way of protecting Aboriginal heritage, although I should not, of course, be taken to be suggesting that contraventions of the law should be ignored or condoned - far from it. However, given the practical problems which confront law enforcement in this area, it seems to me that Aboriginal heritage is more likely to be effectively protected by public awareness of the value of Aboriginal heritage, and of the significance of the natural environment to Aboriginal people, so that the protection of Aboriginal heritage will become a cultural norm. During my lifetime we seem to have made significant progress in discouraging people from dropping litter through a variety of means including penal sanctions and projects such as "Clean Up Australia". Increased community awareness of the importance of Aboriginal heritage is I think occurring more slowly, but is nevertheless occurring and should be encouraged.

Courts and community expectations

There are some ways in which the courts can play a role in protecting the environment through the law enforcement function. One way is through fostering and enunciating community values in the area of environmental

protection, and vigorously denouncing contravention of environmental protection laws by word and through the level of punishment imposed. Courts have an important role to play in the enunciation of community values. The performance of that role can help shape and reinforce community values in areas such as the protection of the environment and Aboriginal heritage. Although, for the reasons I have given, the number of cases coming before the courts is likely to represent only a small fraction of cases in which laws in this area are contravened, when those cases do come before the court, it is important for the court to vigorously denounce the contravention and provide a tangible demonstration of the value which the community places upon the protection of our environment by the imposition of a commensurate penalty. Although there is a general principle of sentencing to the effect that imprisonment should only be imposed as a last resort, it is equally well established that some types of offence are so serious that imprisonment is the only penalty which appropriately matches the crime. I think we will increasingly come to see environmental offences, at least where serious degradation is caused, as falling within this category.

General deterrence

One of the recognised objectives of punishing offending conduct is that of deterring others who might be minded to commit similar offences. There are some types of offending where this factor is of reduced significance - such as offences committed by persons under the influence of drugs or alcohol, or offences arising from impulsive or irrational behaviour. However, contraventions of environmental legislation tend to be pre-meditated and calculated. They are often motivated by economic advantage - such as illegal clearing for farming purposes, or illegal

discharge of waste so as to avoid the cost of appropriate disposal. In such cases, those who are considering actions which might contravene the law may undertake a calculated assessment, weighing the benefit to be derived from the contravention against the risk of apprehension and the likely penalty if apprehended. In cases of this kind, general deterrence must be a very significant factor in the sentencing process. Put more bluntly, where a calculated contravention for economic gain is established, the penalty imposed must so far exceed the potential benefit to be derived as to discourage others who might be tempted to take the calculated risk.

Summary

I have not meant to suggest in this paper that courts have no role to play in protecting the environment, or that they are powerless. I have, however, endeavoured to illustrate the fact that in the area of dispute adjudication, the court can only play a limited role, and that in the area of law enforcement, there are some practical considerations which will constrain the capacity of the courts to protect the environment. However, when courts are called upon to enforce environmental laws, it is of the utmost importance that contravention of those laws be denounced vigorously and unequivocally, and that penalties are imposed which commensurate with the value which our community places upon the protection of the environment.