Recent Developments in Sentencing for Environmental Offences

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Introduction

In his final contribution to the *Australian Bar Review*, Judge Goldring of the New South Wales District Court remarked, "sentencing is the most difficult task that faces any judicial officer in the criminal justice process".[1] Indeed, the time I have spent on the bench of the Land and Environment Court of NSW has done little to convince me otherwise. Sentencing is a complex process, involving, as it does, the "instinctive synthesis" of a myriad of factors. In sentencing, there is never a 'right' answer. As the newspapers often demonstrate, the process is frequently subject to intense debate, and is susceptible to policy change as sentencing responds to shifts in societal views and values.

Often courts sentencing for environmental offences have been variously criticised for imposing mainly fines, for imposing fines too light to deter, for imposing penalties that are not tailored to the offender or to the offence and for not reflecting the moral repugnance of the crime. Over the past decade, legislatures have sought to address these concerns by the implementation of a 'two-pronged' approach: first, by increasing the maximum penalties available for environmental offences; and second, by expanding the range of sentencing sanctions that may be imposed by courts.

More by way of adjunct to, rather than comment upon, Judge Cole's[2] excellent and comprehensive paper,[3] I wish to briefly discuss these two recent developments in sentencing for environmental offences and touch upon their underlying rationales.

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[1] The Hon Judge J Goldring, "Facts and statistics in the sentencing process" (2009) 32 *Australian Bar Review* 281, pp 282 and 286.

[2] Her Hon Judge Susanne Cole of the South Australian Environment, Resources and Development Court.

[3] Her Hon Judge Susanne Cole, "Developments in sentencing for planning and environmental crime", *paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals, Perth* (28 August – 2 September 2012).

Tougher Sentences

Generally the penalties imposed by the courts in Australia for environmental offences have increased over the last decade. Although there are difficulties inherent in identifying any clear statistical trend, due primarily to a lack of analysis of the available data or a lack of data due to an absence of reporting, there are clear indications that the courts are more inclined to impose higher monetary penalties on environmental offenders.

As Judge Cole's paper demonstrates, recent case law supports this proposition. Prosecutions under s 12(1) of the *Native Vegetation Act* 2003 (NSW), for instance, are illustrative of this point. In the decisions of *Director-General, Department of Environment and Climate Change v Hudson*[4] and *Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No 4)*[5], the defendants were fined $400,000 and $200,000 respectively for clearing native vegetation. In the former case, 486ha of land was cleared in circumstances where the offence was committed deliberately as part of a commercial operation. The latter case involved clearing over 65ha of land in similar circumstances. These decisions are to be compared with earlier cases,[6] in which, despite the maximum penalty for the offence remaining at $1,100,000, penalties in excess of $100,000 were rarely, if ever, imposed.

Prosecutions for environmental offences in Victoria have been following a similar trend. The Victorian Environment Protection Agency ("EPA") has indicated that, of their "major prosecutions"[7] for the financial year 2010/2011, fines were awarded in

[4] (2009) 165 LGERA 256.
[5] [2011] NSWLEC 119.
[6] See, for example, *Director-General of the Department of Land and Water Conservation v Leverton Pastoral Co Pty Ltd* [2002] NSWLEC 212, where a fine of $5,000 was imposed for clearing of 136ha of land, and *Director-General of the Department of Environment and Climate Change v Taylor* [2007] NSWLEC 530, where a $20,000 fine was imposed for 30.5ha of clearing.
[7] These statistics did not include matters that were permanently stayed or adjourned.

the vicinity of $7,500 to $200,000.[8] By contrast, for major prosecutions in the year 2004/2005 fines of between $4,000 and $8,000 were awarded.[9]

Similar sentencing patterns have been observed in other States, particularly in relation to the unlawful clearing of land and pollution offences.[10]

Increases in Maximum Statutory Penalties

Tougher penalties have typically resulted following an increase in the maximum statutory penalty for an offence. The maximum statutory penalty for an offence acts as an upper limit upon the sentencing judge's discretion. It is of significance in determining the objective gravity of the offence, which is a primary consideration in sentencing any offender.

In recent years, parliaments have repeatedly increased the maximum monetary penalties for environmental offences. In New South Wales, for example, penalties for Tier 1 offences under the *Protection of the Environment Operations Act* 1997 (NSW) have increased from $1,000,000[11] to $5,000,000.[12] Penalties for Tier 2 strict liability pollution offences have increased from $125,000 to $250,000[13] to $1,000,000.[14] In Victoria, the *Environment Protection (Enforcement and Penalties) Act* 2000 (Vic)[15] increased penalties substantially – from $20,000 to $240,000 for general pollution offences and from $40,000 to $500,000 for dumping industrial waste.

The introduction of higher maximum penalties is often justified on the basis of a desire to achieve greater deterrence. In *Director-General of the Department of Environment and Climate Change v Taylor*, Lloyd J stated:[16]

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[8] Environment Protection Authority (Victoria), *Annual Report 2010-2011*, pp 17-18.
[9] Environment Protection Authority (Victoria), *Annual Report 2004-2005*.
[10] Samantha Bricknell, *Environmental crime in Australia: AIC Report 109* (Australian Government, Australian Institute of Criminology, 2010), p xiii.
[11] Under the *Protection of the Environment Operations Act* 1997 (NSW), when enacted.
[12] Pursuant to the *Protection of the Environment Operations Amendment Act* 2005 (NSW), which commenced on 1 May 2006.
[13] Under the *Protection of the Environment Operations Act* 1997 (NSW), when enacted.
[14] Pursuant to the *Protection of the Environment Operations Amendment Act* 2005 (NSW), which commenced on 1 May 2006.
[15] Which amended the *Environment Protection Act* 1970 (Vic).
[16] [2007] NSWLEC 530 at [32].

> …persons will not be deterred from committing environmental offences by nominal fines. There is a need to uphold the integrity of the planning system of protecting and preserving endangered ecological communities. There is a need to send a strong warning to others who may be minded to breach the law that such actions will be visited upon with significant consequences.

These comments were reflected by Sherryl Garbutt, the (then) Victorian Minister for the Environment in the second reading speech for the *Environment Protection (Enforcement and Penalties) Act* 2000:[17]

> The *Environment Protection Act* must contain adequate deterrents to potential environmental offenders… this Bill will raise the financial penalties for general environmental offences in Victoria by an order of magnitude [and will] bring environmental penalties in Victoria into line with community values… The key to ensuring that environmental laws provide effective deterrence is to have appropriately tough environmental penalties and visible and effective enforcement…

Increases to maximum statutory penalties can also occur in response to particular environmental events. In 2010, following highly publicised incidents involving oil discharges and reef groundings, the Queensland Government dramatically increased the maximum penalties for marine pollution – from $1.75 million to $10 million for a corporation and from $350,000 to $500,000 for an individual – and the Northern Territory government enacted the *Environmental Offences and Penalties Amendment Act* 2010 (NT), which doubled penalties for pollution offences.

Recent increases in the maximum penalties for environmental offences are no doubt driven by a greater community awareness of the impacts of environmental crimes and reflects a concomitant public willingness to denounce such conduct.[18]

Alternative Sentencing Options

But in many cases, notwithstanding increases in the quantum of monetary penalties, the imposition of a fine is inadequate. This is because some defendants, especially

[17] Victorian Parliament, Second Reading Speech, *Environment Protection (Enforcement and Penalties) Bill 2000*, Legislative Assembly, 31 May 2000, pp 2074-6 (Ms Garbutt).
[18] *Camilleri's Stock Feeds Pty Limited v Environment Protection Authority* (1993) 32 NSWLR 683 at 698. See Second Reading Speech, *Environment Protection (Enforcement and Penalties) Act* 2000 (Vic), above n 17, where the increase in maximum statutory penalties was said to "bring environmental penalties in Victoria into line with community values".

corporate defendants, have the capacity to financially absorb monetary penalties as a cost of business. Accordingly, a fine is unlikely to be a deterrent either to the specific defendant or more generally to the industry at large.[19] Further, the imposition of a fine does nothing to rectify the environmental damage that has been caused by the offence. A large fine may not meet the cleanup and restoration costs needed to deal with the resultant environmental harm.[20]

In recognition of the limitations inherent in imposing monetary penalties alone, several Australian jurisdictions have provided their courts with a significant degree of flexibility in sentencing environmental offenders by enacting provisions that allow the making of alternative sentencing orders. Therefore, while the imposition of fines remains the most common sentencing option for environmental offences,[21] increasingly, courts may choose from a variety of alternative sentencing options in punishing environmental offenders.

Sentencing options vary between jurisdictions, with each State having its own unique package of sanctions.[22] These include:

- orders for restoration or rehabilitation;
- orders to carry out a specific project for restoration or rehabilitation;
- publication or notification orders;
- orders for the payment of costs, expenses and compensation;
- environmental audit orders;
- orders to establish or undertake a training course;

[19] New South Wales Law Reform Commission, *Sentencing Question Paper 11: Special categories of offenders* (July 2012), p 13.
[20] Samantha Bricknell, above n 10, p 23.
[21] New South Wales Law Reform Commission, *Sentencing Question Paper 7: Non-custodial Sentences* (June 2012), p 11; Samantha Bricknell, above n 10, p 18; The Hon Justice Brian Preston, "Principled Sentencing for Environmental Offences", *paper presented at the 4th International IUCN Academy of Environmental Law Colloquium –Compliance and Enforcement: Toward More Effective Implementation of Environmental Law, White Plains, New York* (16-20 October 2006), p 33; C Abbot, "The Regulatory Enforcement of Pollution Control Laws: The Australian Experience" (2005) 17 *Journal of Environmental Law* 161, p 170.
[22] See s 67AC of the *Environment Protection Act* 1970 (Vic) (introduced in 2000), s 250 of the *Protection of the Environment Operations Act* 1997 (NSW) (introduced in 2005), s 502 of the *Environment Protection Act* 1994 (Qld) (in Queensland, apart from rehabilitation and restoration orders, alternative sentencing orders were introduced in 2010 by the *Environmental Protection and Other Legislation Amendment Bill* 2010), and s 133 of the *Environment Protection Act* 1993 (SA) (introduced in 2006).

- orders for the payment of moneys into an environmental trust; and
- orders for the payment of moneys to an environmental organisation for a particular environmental project.

What is the rationale for these alternate forms of punishment? As observed above, it has been recognised that the imposition of a fine on certain classes of offenders, such as corporate offenders with deep pockets, will not always prove to be a useful deterrent to prevent undesirable environmental behaviour, and will therefore fail to constitute an appropriate sanction for the commission of the particular offence in question.[23] Some environmental offences, such as the unlawful clearing of native vegetation or building without development consent, have the potential for high economic return and will therefore necessitate some other type of penalty to ensure the requisite level of approbation. For an offending corporation the publication of the offence in a newspaper, or "naming and shaming", may be a more effective punishment.[24] A publication order has the added benefit of increasing awareness of the existence of the offence, particularly in jurisdictions where judgments are not published.[25]

Although statutes across many jurisdictions now contain provisions for making alternative sentencing orders, the rates of utilisation of these provisions differ. The use of alternative sentencing orders is most prevalent in New South Wales and Victoria, where it has been embraced with the express recognition that it permits courts in those States to tailor sentencing to fit the crime and the offender,[26] thereby ensuring "individualised justice" in sentencing.[27]

[23] Samantha Bricknell, above n 10, p 19.
[24] Samantha Bricknell, above n 10, p 21.
[25] Rosemary Martin, "Alternative sentencing in environmental protection: making the punishment fit the crime" (2003) 77(7) *Law Institute Journal* 32.
[26] Rob White, "Prosecution and sentencing in relation to environmental crime: Recent socio-legal developments" (2010) 53 *Crime, Law and Social Change* 365, p 374; Rosemary Martin, ibid, p 41.
[27] *R v Whyte* (2002) 55 NSWLR 252 at [147] per Spigelman CJ; The Hon Justice Brian Preston and Hugh Donnelly, *Achieving consistency and transparency in sentencing for environmental offences* (Judicial Commission of New South Wales, June 2008), p 8.

In 2001/2002 twelve alternative sentencing orders were made under s 67AC[28] of the *Environment Protection Act* 1970 (Vic) following the introduction of that provision in 2000, with seven such orders made during 2002/2003. However, by 2010/2011, 12 out of 25 "major prosecutions" [29] involved a s 67AC order.[30] Of the companies prosecuted, eight were required to pay money to a specified entity for an identified environmental project and one publication order was made.

Similarly, to date in 2012 there have been three instances of the use of the equivalent New South Wales provision, namely, s 250[31] of the *Protection of the Environment Operations Act* 1997 (NSW) ("the POEO Act"), with four in 2011 and five in 2010. Often, several s 250 orders are made within the same set of

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[28] Alternative sentencing orders that may be made under s 67AC(2) of the *Environment Protection Act* 1970 (Vic) include orders for a person convicted of an offence under that Act:

(a) to take any action specified by the court to publicise –
  (i) the offence;
  (ii) any environmental or other consequences arising or resulting from the offence;
  (iii) any penalties imposed, or other orders made, as a result of the commission of the offence;
(b) to take any action specified by the court to notify one or more people or classes of people of the matters listed in paragraph (a) (for example, to publish a notice in an annual report or to distribute a notice to people affected by the offence);
(c) to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit (even if the project is unrelated to the offence);
(d) to carry out a specified environmental audit of the activities carried on by the person.

[29] Statistics did not include matters that were permanently stayed or adjourned.

[30] Environment Protection Authority (Victoria) *Annual Report 2010-2011*, pp 17-18.

[31] Alternative sentencing order (called 'additional orders') that may be made under s 250(1) of the *Protection of the Environment Operations Act* 1997 (NSW) include:

(a) order the offender to take specified action to publicise the offence (including the circumstances of the offence) and its environmental and other consequences and other orders made against the person,
(b) order the offender to take specified action to notify specified persons or classes of persons of the offence (including the circumstances of the offence) and its environmental and other consequences and of any orders made against the person (including, for example, the publication in an annual report or any other notice to shareholders of a company or the notification of persons aggrieved or affected by the offender's conduct),
(c) order the offender to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit,
(d) order the offender to carry out a specified environmental audit of activities carried on by the offender,
(e) order the offender to pay a specified amount to the Environmental Trust established under the *Environmental Trust Act 1998* , or a specified organisation, for the purposes of a specified project for the restoration or enhancement of the environment or for general environmental purposes,
(f) order the offender to attend, or to cause an employee or employees or a contractor or contractors of the offender to attend, a training or other course specified by the court,
(g) order the offender to establish, for employees or contractors of the offender, a training course of a kind specified by the court,
(h) if the EPA is a party to the proceedings, order the offender to provide a financial assurance, of a form and amount specified by the court, to the EPA, if the court orders the offender to carry out a specified work or program for the restoration or enhancement of the environment.

The Local Court is not authorised to make an order referred to in paragraph (c), (d), (e) or (h).

proceedings. For example, in *Environment Protection Authority v Tea Garden Farms Pty Ltd*,[32] the defendant pled guilty to an offence under s 120 of the POEO Act for causing sediment-laden water to be discharged from a rural dam into the waters of a marine park. The defendant was ordered to pay $40,000 to Great Lakes Council for the Kore Kore Creek Bushland Reserve Project and $37,000 to the Marine Parks Authority for a project in Port Stephens Great Lakes Marine Park involving the installation of "seagrass friendly moorings" and to publicise the offence in *The Sydney Morning Herald* and *Newcastle Herald* newspapers.

By contrast, few alternative sentencing orders have been made pursuant to s 133 of the *Environment Protection Act* 1993 (SA),[33] or s 502 of the *Environmental Protection Act* 1994 (Qld).[34]

Alternatives to Criminal Prosecution

Another recent trend is to eschew criminal prosecutions altogether and more readily pursue administrative remedies such as civil penalty regimes, enforceable undertakings and penalty infringement notices. Prosecution is not pursued except for the most serious of cases and only after cooperative or negotiated attempts at resolution have failed.[35] One advantage of this approach is a saving in costs otherwise spent on litigation. For resource starved regulatory agencies, this is attractive. But the adoption of civil penalties as an alternative to criminal sanctions has not been universally endorsed. In Western Australia there has been an attempt to change its enforcement culture by emphasising that prosecution is a tool to be used "where appropriate" and not only as a "last resort".[36]

[32] [2012] NSWLEC 89.
[33] See, for example, *Harvey v Rocks And Pty Ltd* [2007] SAERDC 24 (9 May 2007); *Circelli v Lochert Bros Pty Ltd (No 2)* [2012] SAERDC 19. In the latter case, the complainant sought a publication order under s 133(1)(c) but it was considered that any advertisement would have little impact because of the lapse of time between the offence and its publication (at [20]).
[34] The provision was considered, but not applied, in *Crowther v State of Queensland* [2003] QPELR 505.
[35] See, for example, Australian Government Department of Sustainability, Environment, Water, Population and Communities, *Compliance and Enforcement Policy: Environment Protection and Biodiversity Conservation Act 1999* (December 2009).
[36] Department of Environment (WA), *Enforcement and Prosecution Policy* (November 2004); Rosemary Martin, above n 25, p 43.

In several jurisdictions, environmental statutes now permit the use of penalty or infringement notices for less serious offences.[37] A penalty notice gives the person to whom it is issued the option of either paying the penalty set out in the notice or electing to have the matter dealt with by a court.[38] Penalty notices can provide a low cost enforcement option for regulatory agencies and the fact that a penalty notice is subject to a court challenge and the imposition of a higher maximum fine on conviction reduces the incidence of non-compliance and challenge. Disadvantages include a failure to consider the circumstances of individual cases; a failure to correspond with the environmental harm occasioned by the breach; and the effect of removing the offence from the public arena.[39] Accordingly, the Australian Law Reform Commission recommends that penalty notices should only be used:[40]

- for relatively minor offences;
- for offences with a high volume of contraventions;
- where a penalty must be imposed immediately to be effective; and
- where strict or absolute liability offences are involved.

Penalty notices must therefore be viewed as "merely one tool in the tool kit".[41]

The use of enforceable undertakings is widespread in many jurisdictions, but again particularly in New South Wales and Victoria. Enforceable undertakings are administrative resolutions to breaches, or potential breaches, of the statute creating the environmental offence that, if not complied with by the person giving the undertaking, can be enforced by a court. For prosecutors, they can represent a quicker, more cost-effective alternative to litigation in appropriate cases.[42] Enforceable undertakings are, of course, not new and are frequently used by regulators such as ASIC, APRA and the ACCC. In New South Wales, the EPA can

[37] In New South Wales, for example, tier 3 offences under the *Protection of the Environment Operations Act* 1997 (NSW) are dealt with by way of penalty notice.
[38] Australian Law Reform Commission, *Report 95: Principled Regulation: Federal Civil and Administrative Penalties in Australia* (31 October 2002), at [12.4].
[39] Matthew Baird, "A brief overview of the use of administrative penalty arrangements, or penalty notices, for environmental offences in Australia and New Zealand" (2007) 13 *Local Government Law Journal* 14, p 16.
[40] Australian Law Reform Commission, above n 38.
[41] Matthew Baird, above n 39, p 17.
[42] Parliament of New South Wales, Second Reading Speech, *Protection of the Environment Operations Amendment Bill* (13 September 2005).

accept court enforceable undertakings following the introduction of the *Protection of the Environment Operations Amendment Act* 2005 (NSW). Similar provisions exist in Victoria.[43]

Enforceable undertakings shift the cost of enforcement from courts and prosecutors to the offending party. Often, the estimated costs of compliance with an enforceable undertaking (to, for example, improve the company's environmental performance by addressing systemic issues or operating systems) will be significantly higher than a fine imposed for the commission of the offence. A good illustration of this is the prosecution of PZ Cussons Australia Pty Ltd by the Victorian EPA. The company had continued to breach a condition of a licence, resulting in the discharge of stormwater. The enforceable undertaking entered into by the company was estimated to cost $595,000, which exceeded the quantum of any fine ordered that year following prosecution by the EPA.[44] Similarly, the enforceable undertaking entered into by Cargill Processing Limited following a prosecution for an offence of atmospheric pollution, has been estimated to have cost the company $600,000.

Civil penalty regimes represent another alternative to prosecution that are now being embraced. The civil penalty regime contained in the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) has been a hallmark of the Commonwealth legislation since the commencement of that Act. In 2005, South Australia followed suit by introducing civil penalties for lower breaches of the *Environment Protection Act* 1993 (SA).[45] Unlike the Commonwealth scheme, however, the South Australian civil penalty regime allows for direct negotiation between the prosecution and the offender. Therefore, as an alternative to criminal proceedings, the EPA can negotiate a civil penalty directly with the offending individual or company. Alternatively, the EPA can apply to a court for an order that the person pay to the EPA a specified amount by way of civil penalty. The benefits from these schemes include the provision of more timely responses for less serious contraventions of the protective environmental statutes; enhanced environmental protection through the application of a less demanding civil onus of proof; and the burden of calculating the penalty

[43] *Environment Protection Act* 1970 (Vic), s 67D.
[44] Victorian Environment Protection Authority, above n 26.
[45] *Environment Protection (Miscellaneous) Amendment Act* 2005 (SA).

shifts from the court to the enforcement authority resulting in significant gains in curial efficiency.[46]

Motivating Factors

The recent trends towards tougher penalties for environmental crimes and more flexible sentencing options, including alternatives to prosecution, reflect a number of underlying factors. First, a shift in focus away from the offender and towards the nature of the offence and an emphasis on the redress afforded to the victim, a movement that mirrors reforms in other areas of sentencing law, and second, a greater understanding of the real impacts of environmental harm.

Expanding the Notion of Environmental Harm

Curiously, in some instances, harsher penalties are being imposed by the courts absent any increase in statutory maximums. This is demonstrated by recent sentences imposed for breaches of s 12(1) of the *Native Vegetation Act* 2003 (NSW), which have increased despite no recent change being made to the maximum penalty of $1,100,000. Why? One answer lies in a more profound appreciation of the concept of environmental harm that has emerged in recent years.

The objective seriousness of an offender's actions is a paramount factor to be considered in determining the penalty to be imposed for the commission of an environmental crime. For environmental offences, the harm caused to the environment by the offending action plays a large part in the classification of the seriousness of the crime and, where the harm is substantial, may constitute an aggravating factor.

With the mainstreaming of environmental concepts such as ecologically sustainable development, inter-generational equity and the precautionary principle,[47] both at the international and the local level, there is an increasing recognition of the true scale of damage that a particular instance of environmental harm can cause. Such harm can

[46] Rosemary Martin, above n 25, p 42.
[47] See *Bentley v BGP Properties Pty Limited* (2006) 145 LGERA 234 per Preston CJ at [56]-[63].

include not only direct harm to a particular species, but also indirect harm to its habitat and, in turn, the wider ecosystem, particularly its functioning and processes. Environmental harm can be point source or diffuse, isolated or cumulative. Its effects may be felt in the short- or long-term. This is why many jurisdictions now recognise that, when assessing environmental harm, the potential for risk of harm must be taken into account, together with the actual harm caused by the unlawful conduct. The imposition of tougher sentences for the commission of environmental crimes may therefore be seen as an incidence of the increasing recognition of the true consequences of unlawful environmental conduct.

Moreover, environmental laws, for example, pollution laws, have previously been enacted primarily to protect against adverse impacts of pollution events upon humans. Increasingly, however, it is being recognised that all species and ecosystems have a role to play in promoting the health and wellbeing of the planet and its inhabitants, and that all species and ecosystems have inherent rights of their own. As Dr Robyn Bartel has observed:[48]

> …notions of the public good have come to include the interests of non-human nature. Aided by scientific recognition of the connections between humans and all other beings there has been a shift from the protection of humans from environmental degradation to the protection of the environment from humans, for both parties sakes.

For instance, laws that prioritise environmental protection over alternative land uses often act in direct opposition to the historical inertia of past land management practices. Thus laws prohibiting the clearing of native vegetation have been enacted following a history of land management that promoted clearing for agricultural pursuits. [49] The *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) imposes restrictions on activities occurring on private land that were, until its enactment, otherwise lawful. Many of these restrictions challenge the rights that traditionally attach to private property.[50] As a consequence, the regulatory will to enforce such laws can be politically fraught. A strong element of deterrence must be embedded in any sanction to ensure compliance with the Act.

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[48] Robyn Bartel, "Sentencing for environmental offences: an Australian exploration", *paper presented at the Sentencing Conference, National Judicial College of Australia, ANU* (February 2008), p 2.
[49] Robyn Bartel, ibid, p 8.
[50] Rosemary Martin, above n 25, p 44.

Focusing on the Victims of the Crime

Alternative sentencing orders that facilitate the reparation of the environment parallel sentencing reforms that focus on the victims of crime that, in the case of environmental offences, include not only the environment itself, but the wider community, including future generations, rather than the offender.[51] As Preston J has observed (footnotes omitted):[52]

> In environmental cases, the victims of crime can include individuals whose health, safety, comfort or repose may have been impacted by the commission of the offence. This is particularly applicable where the offence involves pollution, especially of air or water…
>
> More commonly the victim of environmental offences is the community at large and not specific members of it. Natural resources such as the air, waterways and forests, can be seen to be held in trust by the state and for the benefit and use of the general public. Where the commission of an offence impacts adversely on those natural resources, the victims are the members of the public who are beneficiaries of the public trust. Concepts of inter-generational equity would extend the class of beneficiaries to include not only the present generation but also future generations.
>
> The victims of environmental crime can also be seen to be the non-human members of the community of life on earth –the environment.

Orders directing the offender to repair or restore the environment, and orders directing offenders to pay money towards projects that are directed back into the affected community, provide a mechanism by which prosecuting authorities and courts can seek to ensure those directly and indirectly affected by the commission of an environmental crime receive some form of compensation for their loss.

In New Zealand a "restorative justice" model has been adopted whereby justice to the victim becomes the central goal of the sentencing process. Restorative justice has been, to date, less frequently employed in Australia as a mechanism to deal with the commission of environmental offences but there is no reason why it cannot be a vehicle for intervention in appropriate cases. In New South Wales Preston J has

[51] New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003); The Hon Justice Brian Preston, above n 17, p 10; The Hon Justice Brian Preston, "The Use of Restorative Justice for Environmental Crime", *paper presented at the EPA Victoria Seminar on Restorative Environmental Justice, Melbourne* (22 March 2011), pp 8-12.

[52] The Hon Justice Brian Preston, "The Use of Restorative Justice for Environmental Crime", ibid, pp 10-11.

identified potential scope for its use in respect of air and water pollution offences under the POEO Act, although legislative amendment may be required to fully utilise it.[53]

Achieving Sentencing Objectives

At this point the objectives of sentencing should be revisited. Although they differ slightly between jurisdictions, these differences are immaterial. As discussed in detail by Judge Cole these objectives are as follows:[54]

- punishment;
- deterrence;
- rehabilitation;
- retribution;
- community protection; and
- denunciation.

The recent developments in sentencing for environmental offences discussed above plainly, in my view, encourage and facilitate the attainment of the objectives of sentencing that Judge Cole has outlined in her paper.

But care must be taken not to over emphasise the elements of punishment and deterrence when imposing sanctions for environmental crimes, lest other recognised aims of sentencing, such as rehabilitation, will be diminished.[55]

A tension has also been identified, with the imposition of harsher penalties for environmental offences, between the principle of proportionality and that of general

[53] The Hon Justice Brian Preston, ibid. See also Mark Hamilton, "Restorative justice intervention in an environmental law context: Garrett v Williams, prosecutions under the Resource Management Act 1991 (NZ), and beyond" (2008) 25 *Environmental and Planning Law Journal* 263.
[54] See *Crimes (Sentencing Procedure) Act* 1999, s 3A (NSW), *Sentencing Act* 1991 (Vic), s 5(1), *Penalties and Sentences Act* 1992 (Qld), s 9, *Sentencing Act* 1997 (Tas), s 3, *Crimes (Sentencing) Act* 2005 (ACT), s 7 and *Sentencing Act* 1995 (NT), s 5.
[55] John Nicholson SC, "Sentencing – good, bad and indifferent" (2012) 36 *Criminal Law Journal* 205, p 208.

deterrence.[56] Proportionality requires that the overall punishment must be proportionate to the gravity of the offending behaviour. General deterrence, on the other hand, is focused on discouraging potential offenders from offending. The potential for there to be a conflict exists to the extent that, in order for a sentence to be an effective deterrent to others, the sentence imposed must not be so severe that it becomes disproportionate to the particular circumstances of the offence.[57]

Alternative sentencing options have the capacity to mitigate the potential for such conflicts to arise by permitting courts to be more flexible when sentencing. Accordingly, a publication order can be imposed where a fine is insufficient to deter a corporate offender from committing an environmental offence. It also acts to publicly denounce the conduct, thereby achieving the goal of general deterrence. Restoration and rehabilitation orders can be imposed to achieve a wider level of community protection against environmental offences insofar as the orders seek to rectify damage done to species and ecosystems upon which the public ultimately depend. The utilisation of alternative sentencing approaches by courts thereby allows 'the punishment to fit the crime'.

Remaining Issues

Despite recent reforms in sentencing for environmental offences, difficulties remain in 'fitting the punishment to the crime'.

Achieving Consistency in Sentencing

With the introduction of alternative sentencing options for environmental offences, the sentencing process has arguably become less structured, complicating the task of achieving consistency in sentencing. The importance of ensuring consistency in sentencing has long been emphasised by the courts. In *Wong v The Queen*[58] Gleeson CJ remarked:[59]

[56] Victorian Sentencing Advisory Council, *Sentencing Matters – Does Imprisonment Deter, a Review of the Evidence* (April 2011), p 10.
[57] John Nicholson SC, above n 55, p 213.
[58] (2001) 207 CLR 584.
[59] Ibid at [6].

> The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in a like manner. The administration of criminal justice works as a system, not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.

Consistency in sentencing is important because it allows the community to understand the range of sentences that may be imposed for a particular offence and assists judges in determining an appropriate sentence. Disparity in sentencing may be an indicator of appealable error.[60]

Consistency in sentencing is more likely to be achieved when sentencing judges have ready access to information on the sentences imposed by other judges in similar cases for similar offences.[61]

Databases for sentencing statistics have been established in New South Wales and at the Commonwealth level. The provision of sentencing statistics makes the law more accessible and transparent to the public.[62] However, such statistics must be treated with caution. Limitations of the reliance on sentencing statistics have been articulated in many recent cases.[63] As Spigelman CJ in *R v Bloomfield* cautioned:[64]

> (i) The sentence to be imposed depends on the facts of each case and for that reason bald statistics are of limited use.
> (ii) Statistics may be less useful than surveys of decided cases, which enable some detail of the specific circumstances to be set out for purposes of comparison.
> (iii) Caution needs to be exercised in using sentencing statistics, but they may be of assistance in ensuring consistency in sentencing.
> (iv) Statistics may provide an indication of general sentencing trends and standards.

[60] *Green v The Queen; Quinn v The Queen* (2011) 244 CLR 462.
[61] Australian Law Reform Commission (ALRC) Report 103: *Same Crime, Same Time: Sentencing of Federal Offenders* (Australian Government, Canberra, 2006); The Hon Justice Brian Preston and Hugh Donnelly, above n 27, p 7.
[62] The Hon Justice Brian Preston and Hugh Donnelly, above n 27, p 10.
[63] See *Holohan v R* [2012] NSWCCA 105 at [51]; *DPP (Cth) v De La Rosa* (2010) 243 FLR 28 at [303]–[305]; *Hili v The Queen* (2010) 242 CLR 520 at [53]–[54]. However, the New South Wales Court of Criminal Appeal recently held in *Lawson v R* [2012] NSWCCA 56 that a sentencing judge's failure to take into account sentencing statistics did not constitute a reviewable error. See The Hon Justice Peter McClellan AM, "Sentencing in the 21st Century" (paper presented at the Crown Prosecutors' Conference, Pokolbin, Hunter Valley, 10 April 2012), pp 25-26.
[64] (1998) 44 NSWLR 734 at 738-739.

(v) Statistics may indicate an appropriate range, particularly where a significant majority or a small minority fall within a particular range. Also when a particular form of sentence such as imprisonment is more or less likely to have been imposed.
(vi) Statistics may be useful in determining whether a sentence is manifestly excessive or manifestly inadequate.
(vii) Statistics are less likely to be useful where the circumstances of the individual instances of the offence vary greatly, such as manslaughter.
(viii) The larger the sample the more likely the statistics are to be useful.

The final factor is particularly relevant in respect of environmental offences, where sample sizes are generally small. Further, care must be taken when analysing statistical data collected over periods during which statutory maximum penalties have been altered, typically by way of increase.

Continuing Imposition of Low Monetary Penalties

Despite a trend in most jurisdictions of strengthening penalties for environmental offences, the fines imposed nevertheless remain low, especially relative to the maximum statutory penalty limits.[65] This is problematic because, if for no other reason, low fines tend not to achieve the desired deterrent effect.

One reason for this may be because, in most Australian jurisdictions, prosecutions for environmental offences occur in the lower courts. Most prosecutions are, as Judge Cole has noted, summary in nature. Furthermore, the offences are not prosecuted within the framework of a specialist 'green' court system (or bench). Hence lower penalties are imposed because the court has neither routine exposure to such offences nor the necessary expertise and training in environmental crime.[66] The result is inconsistent, and lower, patterns of sentencing for conduct that would attract a greater degree of reprobation by a specialist environmental court.[67]

Further, jurisdictional limits on monetary awards can constrain the imposition of higher statutory penalties for environmental offences. Despite the New South Wales Court of Criminal Appeal's warning in *R v Doan,*[68] these limits operate, in practice, as

[65] Samantha Bricknell, above n 10, p 20.
[66] Samantha Bricknell, above n 10, p 19.
[67] The Hon Justice Brian Preston and Hugh Donnelly, above n 27.
[68] (2000) 50 NSWLR 115 at 123. See also The Hon Justice Brian Preston, above n 17, p 15.

a fetter on the maximum penalty lower courts will award. For example, prior to 2006 the power of the South Australian Environment, Resources and Development Court to impose a fine for an offence against the *Environment Protection Act* 1993 (SA) was subject to a jurisdictional limit of $120,000. Notwithstanding that a maximum fine of up to $2,000,000 was available under the *Environment Protection Act* for serious offences, a fine of $120,000 was imposed only once.[69] The reasonable inference is that the Court routinely calculated the appropriate penalty to be imposed by reference to the jurisdictional limit rather than the available maximum statutory penalty for the offence in question.[70] The South Australian government has sought to address this issue by increasing the jurisdictional limit of the Environment, Resources and Development Court to $300,000.[71]

Likewise in New South Wales, where many environmental prosecutions are determined in the Local Court, the jurisdictional limit of that Court is $100,000.[72] The offence of water pollution by a corporation, contained in s 120(1) of the POEO Act, however, attracts a maximum penalty of $5,000,000 for an offence committed wilfully and $1,000,000 for an offence committed negligently. Of the 46 cases heard in the Local Court for breach of this provision between 1998 and 2011, the penalties ranged between $100 and $5,000, with a third of cases (37%) attracting a penalty of between $1,000 and $2,000. By contrast, of the 14 cases heard in the Land and Environment Court over the same period for the same offence, the penalties imposed were between $7,000 and $50,000, with the majority of offenders (87%) fined between $10,000 and $30,000.[73]

Conclusion

To summarise, recent developments in sentencing for environmental crime reveal a willingness on the part of legislatures to utilise a mix of responses to ensure that

[69] *Director of Public Prosecutions v TransAdelaide* [2004] SAERDC 92.
[70] David Cole, "Creative sentencing – Using the sentencing provisions of the South Australian Environment Protection Act to greater community benefit" (2005) 25 *Environmental and Planning Law Journal* 94, p 98.
[71] *Environment, Resources and Development Court (Jurisdiction) Amendment Act* 2006 (SA) (No 11 of 2006, commenced 12 October 2006).
[72] Pursuant to s 29 of the *Local Court Act* 2007 (NSW), the jurisdictional limit of the Local Court is $100,000, when sitting in its General Division, and $10,000, when sitting in its Small Claims Division.
[73] Judicial Information Research, Sentencing Statistics, accessed July 2012.

offenders are punished appropriately and to ensure that appropriate environmental outcomes are achieved. The range of options now available to regulatory agencies and sentencing judges facilitates the imposition of sentences that can be tailored to the offence and to the offender. Overall, these alternative sentencing options reflect a greater understanding of the consequences of environmental crime.

There is, as always, more work to be done. While maximum statutory penalties are high, the fines imposed by courts remain, on the whole, low. And as environmental offences proliferate in the future, further reform will be necessary in order to ensure that the objects of sentencing are met.