CREATING SENTENCING — THE EXPERIENCE ‘DOWN-UNDER’

Sharon Mascher*

* Professor, University of Calgary Faculty of Law.

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INTRODUCTION

In Australia, the question of how best to sentence an offender convicted of an environmental crime remains a challenge. Commenting on criminal sentencing more generally, Judge Goldring of the New South Wales (NSW) District Court wrote "sentencing is the most difficult task that faces any judicial officer in the criminal justice process."[1] Reflecting on this comment in the context the sentencing of environmental offences, The Honorable Justice Pepper of the New South Wales Land and Environment Court remarked, "[i]ndeed, the time I have spent on the bench […] has done little to convince me otherwise."[2]

The traditional sanction for environmental crimes in Australia is by way of fine. Yet, this approach to environmental sentencing continues to be "variously criticised for imposing mainly fines, for imposing fines too light to deter, for imposing penalties not tailored to the offender or the offence and for not reflecting the moral repugnance of the crime."[3] As in other jurisdictions, these criticisms have been met by many Australian legislatures by both increasing maximum monetary penalties and expanding the range of sentencing tools available to the courts.

This paper looks at the availability of, and practice around, creative sentencing orders in Australia, drawing particularly on the sentencing practice in NSW.

THE PROSECUTION OF ENVIRONMENTAL OFFENCES

As in Canada, not all alleged environmental offences are prosecuted, with regulators often reserving prosecution for the most serious of breaches.[4] This approach is reflected in the NSW Environmental Protection Authority (EPA) Prosecution Guidelines, which state that even when there is sufficient evidence, "(a) … the laying of charges is discretionary, and (b) the dominant factor in the exercise of that discretion is the public interest."[5] The Guidelines also recognizes that prosecution may not always by the appropriate response. In keeping with this, the legislation provides a variety of non-

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[1] The Hon Judge J Goldring, NSW Land and Environment Court, "Facts and Statistics in the Sentencing Process" (2009) 32 Austl Bar Rev 281 at 282 & 286.

[2] The Hon Justice R Pepper, NSW Land and Environment Court, "Recent Developments in Sentencing of Environmental Offences" (Paper delivered at the Australasian Conference of Planning and Environment Courts and Tribunals, Perth, 28 August-2 September 2012) at 1.

[3] *Ibid*.

[4] S Bricknell, *Environmental Crime in Australia*, Research and Public Policy Series 109 (Canberra: Australian Institute of Criminology, 2010) at xii; *ibid* at 8.

[5] The *EPA Prosecution Guidelines* list several factors that may be considered alone or in conjunction to determine whether the public interest requires prosecution (Sydney South (NSW), Australia: Dept of Environment and Conservation (NSW) for the EPA, 2004).

prosecution options.[6] Prosecution, therefore, is used "as part of the EPA's overall strategy for achieving its objectives […] as a strategic response where it is in the public interest to do so."[7]

THE SENTENCING OF ENVIRONMENTAL OFFENCES

Sentencing Purposes

When an environmental offence is prosecuted, there are several overlapping purposes the court must consider in determining an appropriate sentence: retribution or punishment; denunciation; deterrence; protection of the community; rehabilitation of the offender; and restoration and reparation of the harm done.[8] While all are relevant, in environmental sentencing the utilitarian purpose of achieving deterrence is of particular importance. This is made explicit in the NSW EPA Prosecution Guidelines which state that "[i]n criminalising breaches of environmental laws a primary, though not the sole, aim of Parliament is deterrence."[9]

Sentencing Considerations

However, courts are required to consider a range of factors in coming to a sentencing decision, to ensure that the sentence reflects both the objective seriousness of the offence and the subjective circumstances of the defendant.[10]

In NSW, section 241 of *Protection of the Environment Operations Act* 1997 (the 'POEO Act') requires the court to consider the following five factors when imposing a penalty:

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[6] Jurisdictions throughout Australia commonly use administrative tools such as enforceable undertakings, penalty notices or civil penalty regimes as an alternative to criminal prosecution. For a discussion of these alternatives to criminal prosecution, see: *ibid* at 8-12.

[7] *EPA Prosecution Guidelines*, *supra* note 5 at [2.2.7].

[8] As the High Court of Australia said in *Veen*, "The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions." (*Veen v R* (*No 2)* [1988] HCA 14; (1988) 164 CLR 465 at 476.) In NSW, s 3A of the *Crimes (Sentencing Procedure) Act* 1999 also states these purposes. For a full discussion of these sentencing purposes in the context of environmental crime see: Hon Justice Brian J Preston, CJ Land & Environment Court of NSW, "Principles 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*, Pace University School of Law, 16-20 October 2006) at 1-12.

[9] See also: Preston, *ibid* at 40.

[10] *Veen v R (No 1)* (1979) 143 CLR 458 at 490; *Veen v R (No 2)* (1988) 164 CLR 465 at 472; *R v Scott* [2005] NSWCAA 152 at [15]. For a full discussion of these sentencing considerations see: Preston, *ibid* at 12-29.

- the extent of environmental harm caused or likely to be caused;
- the practical measures taken to prevent, control, abate or mitigate the harm;
- the reasonable foreseeability of the harm by the person who committed the offence;
- the extent to which the person who committed the offence had control over the causes that resulted in the offence; and
- whether in committing the offence, the person was complying with orders from an employer or supervisor.

The court may also have regard to other factors including:[11]

- evenhandedness;
- the principle of totality;
- the principle of proportionality;
- early entry of a plea of guilty;
- lack of prior convictions;
- genuine contrition;
- co-operation with the investigation;
- remedial measures undertaken;
- whether a repeat offence in likely; and
- any agreement voluntarily undertaken between the defendant and the regulator for environmental benefit.

Custodial Sentences and Fines

Operating as both "the upper limit on the sentencing judge's discretion"[12] and an expression of the legislative view on the "seriousness of criminal conduct",[13] the

[11] Environmental Defender's Office (New South Wales), "Court Imposed Fines and their Enforcement" (Submission to the NSW Sentencing Council, 8 June 2006) referencing G Bates, *Environmental Law in Australia* (Australia: Butterworths, 2002) at 226-227.
[12] Pepper, *supra* note 2 at 3.
[13] Preston, *supra* note 8 at 33.

maximum penalties available for an offence plays a significant role in determining the objective severity of the offence in the sentencing process.[14] In Australia, the maximum penalties for environmental offences have been increased significantly in recent years. In the POEO Act, for example, Tier 1 offences (intentional offences) now carry maximum penalties of $5 million for corporations, and $1 million and/or seven years imprisonment for individuals.[15] Strict liability offences carry maximum penalties of $1,000,000 for corporations and $250,000 for individuals, with further daily maximum penalties of $120,000 and $60,000 respectively.[16] And, as of last year, an offender convicted of polluting water, land or unlawfully transporting or disposing of waste ("the waste offences) within the last five years will face the maximum strict liability fine and, in the case of an individual, up to two years imprisonment.[17]

In Australia, the availability of the increasingly higher maximum penalties for environmental offences is often explained on the basis of a desire to achieve greater deterrence. So, for example, when the maximum penalties in the POEO Act were increased in 2005, the second reading speech introducing the Amendment Act emphasized the need to maintain the "original deterrent value" of the penalties.[18] As Lloyd J. of the NSW Land and Environment Court stated in *Director-General of the Department of Environment and Climate Change v. Taylor*:[19]

> … 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 might be minded to breach the law that such actions will be visited upon with significant consequences.

In *Bentley v. BGP Properties*,[20] the NSW Land and Environment Court also emphasized that the penalty needs to be designed not only to deter the offender but "must also serve the purpose of general or public deterrence"[21] to others who might otherwise be tempted to commit similar crimes. This is a factor of particular relevance in the context of environmental offences.[22]

However, the courts have also recognized that the concept of proportionality, together with other subjective sentencing considerations, may operate to constrain the purposes of

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[14] Pepper, *supra* note 2 at 3.
[15] POEO Act, s 119.
[16] See for example, POEO Act, s 123.
[17] POEO Act, s 144AB. This amendment was introduced by the *Protection of the Environment Operations (Illegal Waste Disposal) Act* 2013.
[18] Mr Bob Debus, Attorney General, Minister for the Environment, HANSARD, 2nd Reading Speech, 28 November 2005.
[19] [2007] NSWLEC 530 at [32].
[20] *Bentley v BGP Properties* [2006] NSWLEC 34 (6 February 2006) at [139].
[21] *Bentley*, *ibid*.
[22] *Bentley*, *ibid*.

achieving deterrence through sentencing.[23] Justice Bignold captured this sentiment in *Director-General of the Department of Land and Water Conservation v. Robson* stating: "I am mindful of […] the need for general deterrence and of the need to apply sentencing policy not unfairly (or out of proportion to the gravity of the offence in penalising the Defendant) but in furtherance of the public educative role of the criminal law."[24]

Other sentencing considerations such as evenhandedness, which requires the court to have regard to the general sentencing patterns in judicially relevant cases, may also have the effect of reducing penalties in a way that correspondingly impacts the message of deterrence.[25]

While perhaps the ultimate deterrent, custodial sentences for environmental crimes are rare in Australia and generally reserved for the most egregious of cases.[26] The much more common sentencing option in Australia is the imposition of a fine.[27] While trends suggest that the fines imposed for environmental crimes in Australia are increasing,[28] they are often only a fraction of the maximum fine available.[29]

Regardless of the level of fine imposed, monetary penalties are not always the best means to achieve deterrence or, where warranted, retribution.[30] In particular, there is concern that some defendants, and particularly corporate defendants, have the financial ability to

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[23] R Bartel, "Sentencing for Environmental Offences: An Australian Exploration (Presented at the Sentencing Conference, National Judicial College of Australia, ANU College of Law, February 2008) at 4; and Preston, *supra* note 8.

[24] *Director-General of the Department of Land and Water Conservation v MW Robson* [1998] NSWLEC 174 at [20].

[25] See G Bates, *Environmental Law in Australia*, 7th ed (Australia: LexisNexis Butterworths, 2010) at [16.83] for a discussion of the application of evenhandedness in the context of environmental sentencing.

[26] See for example: *Environmental Protection Authority v Janna* [2013] NSWLEC 41; *Environmental Protection Authority v Gardner* [1997] NSWLEC 169; *R v Moore* [2003] 1 Qld Reports 205; and *R v Dempsey* [2002] QCA 4.

[27] C Abbot, "The Regulatory Enforcement of Pollution Control Laws: The Australian Experience" (2005) 17 J Envtl L 161 at 170.

[28] Pepper, *supra* note 2 at 2. See also, David Cole "Creative Sentencing – Using the Sentencing Provisions of the South Australian Environment Protection Act to Greater Community Benefit" (2008) 25 EPLJ 94 at 95. It is difficult to identify a statistical trend because individual penalties are heavily dependent on the objective and subjective considerations that inform the sentencing decision. The NSW Land and Environment Court has created a sentencing database in an attempt to provide judges, legislatures and members of the public easier access to more nuanced information relating to environmental sentencing (The Hon B Preston, CJ, "A Judge's Perspective on Using Sentencing Databases" (Presented at the Judicial Reasoning: Art or Science Conference, Australian National University, Canberra, 7-8 February 2009)).

[29] Bricknell, *supra* note 4 at xii. Bricknell suggests that these low fines may be explained, in part, by the role of Magistrates' courts environmental sentencing as, unlike the specialist environment courts of NSW and South Australia, Magistrates' courts see environmental crimes only intermittently and lack judicial training in dealing with environmental matters.

[30] Bricknell, *ibid*.

absorb fines as a "cost of business"[31] — with the result that a fine is unlikely to serve as a deterrence to either the individual corporate offender or to corporations more generally.[32] This is a particularly so where a corporate offender stands to profit from the commission of an offence, a particular concern in Australia in relation to native vegetation clearing offences and the "waste offences" referred to above.[33] At the other end of the spectrum, the court is also unlikely to impose significant fines on individuals who do not have the capacity to pay[34] in which case the nominal fine again offers no real deterrent.

In Australia, therefore, the rationale for providing courts with alterative, creative, sentencing options is largely referenced in answer to the question — how can the sentencing of environmental crimes "provide a more socially acceptable outcome?"[35] Creative sentencing options allow the courts to "deal with situations where a fine/custodial sentence is considered either an inappropriate or an insufficient sentence."[36]

Creative Sentencing Options

While many Australian legislatures have now introduced a range of creative sentencing options into their environmental legislation, creative sentencing orders are used most commonly in Victoria and New South Wales.[37] In New South Wales, under the POEO Act the court may order that the offender do any one or more of the following:

- publicize the offence, its environmental and other consequences and any other orders made against the defendant to either a specified class of persons or generally;[38]

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[31] Pepper, *supra* note 2 at 4-5. See also, Cole, *supra* note 28 at 96.

[32] Pepper, *ibid* at 6; Cole, *ibid*; and Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC Report No 68 (Sydney: Commonwealth of Australia, 1994) at para 10.3. See also NSW EPA, "Guidelines for seeking environmental court orders" [NSW EPA "Guidelines"], online: <http://www.epa.nsw.gov.au/legislation/environ_courtorders.htm>. The Guidelines state: "It is certainly arguable that even the maximum fine available for a Tier 2 offence provides no real deterrent to a major corporation."

[33] The media release announcing the increased penalties and creative sentencing options for waste offences states: "The current penalties do not outweigh the profits from illegal activity, and as long as that remains, unscrupulous waste operators will continue to exploit the system." (Environment Minister Robyn Parker, Media Release, "NSW Government to Crack Down on Illegal Dumping (29 May 2013), online: <http://www.environment.nsw.gov.au/resources/MinMedia/MinMedia13052901.pdf>.)

[34] NSW EPA "Guidelines", *supra* note 32.

[35] Cole, *supra* note 28 at 96.

[36] NSW EPA "Guidelines", *supra* note 32.

[37] Pepper, *supra* note 2 at 6-7.

[38] POEO Act, ss 250(1)(a)-(b). See for example: *Environment Protection Authority v Queanbeyan City Council (No 3)* [2012] NSWLEC 220 (18 September 2012).

- carry out specified enhancement or restoration projects of the environment in a public place or for the public benefit, and provide financial assurances to the EPA if the EPA is a party to the proceedings;[39]

- undertake specified environmental audits;[40]

- pay a specified amount into the New South Wales Environmental Trust or to a specified organization, for the purposes of a specified project for the restoration or enhancement of the environment or for general environmental purposes;[41]

- attend specified training or courses or design specified courses for employees or contractors;[42]

- take steps to prevent, restore and abate any harm to the environment caused by the commission of the offence, to repair any resulting environmental damage and to prevent the continuance or reoccurrence of the offence;[43]

- compensate a public authority or any other person for expenses incurred or damages suffered as the result of the offence;[44]

- pay costs and expenses associated with the investigation of the offence;[45] and

- repay the monetary benefit derived from the offence.[46]

Community service order are also available to the court in appropriate situations.[47] These orders may be made in addition to, or in lieu of, any monetary penalty or custodial

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[39] POEO Act, s 250(1)(c). See for example: *Environmental Protection Authority v Yolarno Pty Ltd* [2004] NSWLEC 264 at [25].

[40] POEO Act, s 250(1)(d). See for example: *Environmental Protection Authority v Ramsay Food Processing Ltd (No 2)* [2010] NSWLEC 150.

[41] POEO Act, s 250(1)(e). See for example: *Environmental Protection Authority v Caltex Refineries (NSW) Pty Ltd* [2006] NSWLEC 335.

[42] POEO Act, ss 250(1)(f)-(g).

[43] POEO Act, s 245. See for example: *Environmental Protection Authority v Warringah Golf Club (No 2)* [2003] NSWLEC 140.

[44] POEO Act, s 246. See for example*: Environmental Protection Authority v Obaid* [2005] NSWLEC 171.

[45] POEO Act, s 248(1). See for example: *Environmental Protection Authority v Centennial Newstan Pty Ltd* [2010] NSWLEC 211.

[46] POEO Act, s 249(1).

[47] *Sentencing Procedure Act*, (NSW), s 86. The legislation prescribes 500 hours as the maximum number of community service hours (s 8(2)). See for example: *Environmental Protection Authority v Coggins* [2003] NSWLEC 111.

sentence that might otherwise be imposed and one or more orders may be made against the offender.[48]

NSW EPA Guidelines for Seeking Environmental Court Orders

The NSW EPA Guidelines for Seeking Environmental Court Orders[49] divides these sentencing options into two groups: orders aimed at restoring or preventing the recurrence of the offence; and, orders aimed at punishing or deterring offenders.

Orders Aimed at Restoring or Preventing the Recurrence of the Offence

The Guidelines place clean up orders, compensation orders, investigation costs orders, monetary benefit penalty order and environmental orders (meaning orders to restore or prevent harm to the environment) in the first group. The collective purpose of these orders is "to attempt to return the environment, and those committing/affected by the offence, to the same position it/they were in prior to the offence and also ensure that the offender takes steps to guard against future contraventions."[50]

In accordance with the Guidelines, orders for clean up or compensation will ordinarily be sought, unless the EPA determines that the defendant does not have sufficient funds. In keeping with the principle that an offender should not profit from committing an offence, monetary benefit orders together with investigation costs orders will generally also be sought. Environmental audit orders, on the other hand, are sought when the offender's "lack essential environment protection systems" or "there are ongoing failures in those systems". Again, the Guidelines make clear that this type of order is not intended to punish but rather to ensure that the offender takes steps to undertake its activities in a manner that is environmentally acceptable.

Orders Aimed at Punishing or Deterring Offenders

Together with fines and custodial sentences, publication orders and environmental service orders are classified as orders aimed at punishing or deterring offenders.

Publication orders are largely to be used as a response to the criticism that fines alone may be an inadequate deterrent for large corporations. As such, according to the Guideline, this type of order is mainly reserved for "corporate offenders as it is likely to be of the most deterrent value to them."[51] In determining whether a publication order is

[48] POEO Act, s 244.
[49] NSW EPA, "Guidelines", *supra* note 32.
[50] *Ibid*.
[51] *Ibid*.

appropriate, the EPA is also directed to consider the defendant's culpability and environmental record as well as the threatened or actual environmental harms caused by the incident. After the fact cooperation or contribution, however, are not relevant factors to consider in determining whether a publication order is appropriate. It is ordinarily the case that the order will specify that the notice be published, at a minimum, in a newspaper circulating State-wide and, in the case of public companies, in the executive summary of the companies annual report.[52]

An environmental service order allows the court to order that a specified project be carried out for the restoration or enhancement of the environment in a public place or for the public benefit. While the result is to deliver a benefit to the public, the Guidelines makes clear that such an order is made for the purposes of punishment or deterrence. As such, a publication order will always be sought in conjunction with an environmental service order so that it is understood the project is being carried out because of the commission of the offence, rather than, for example, the offender "simply being a good citizen."[53] Such an order will only be sought from the court when an appropriate project can be found in the vicinity of the offence, and then only if the offender has the ability, means, and willingness to carry out the project. Only projects with easily measured outcomes will be considered suitable.[54]

Creative Sentencing in Practice

In 2012-13, six publication orders, two environmental service orders, and thirteen compensation orders (relating to investigation costs) were made in relation to prosecutions under the POEO Act. Some of these orders were made in relation to a single offence.

For example, in *Environment Protection Authority v. Queanbeyan City Council (No. 3)*,[55] following a guilty plea against subsection 120(1) of the POEO Act for pollution of water, following the release of sewage into the Queanbeyan River, the offender was Ordered to pay $80,000 to Murrumbidgee CMA to fund the Numeralla East Landscape Project, to publicise details of the offence in *The Sydney Morning Herald*, *The Canberra Times* and *Queanbeyan Age* and to pay investigation costs of $1,189.

CREATIVE SENTENCING GOING FORWARD

Last year, the NSW EPA reviewed alternative sentencing mechanisms and environmental penalties in NSW and other Australian and New Zealand jurisdictions. According to its

[52] *Ibid*.
[53] *Ibid*. See also, Preston, *supra* note 8 at 38.
[54] *Ibid*.
[55] [2012] NSWLEC 220.

2012-2013 Annual Report, the review found that while the range of alternative sentencing mechanisms is similar, jurisdictions also used approaches such as restorative justice and civil penalties.[56] Following the review the EPA is said to have "identified that there are a range of actions it can implement to ensure a wider range of responses and sanctions are available for environmental offences in NSW."[57]

As creative sentencing orders often focus on both deterring environmental harm and resorting the environment where harm has occurred, the focus is not only on the offender but increasingly also the victim of the environmental crime — whether this be an individual, the community at large, including future generations, or the environment itself. This focus on the victim coincides with the concept of restorative justice — which provides an opportunity for the offender and a victim, each participating voluntarily, to meet and together decide on how to address the issues arising from the commission of the crime. When this process is initiated following a finding of plea of guilty, but prior to sentencing, it plays a role in directing the discretion of the court in the sentencing decision.

In 2007, Preston J. of the NSW Land and Environment Court introduced the concept of restorative justice as an option in the sentencing process in *Garrett v. Williams.*[58] In this case, the offender agreed to a restorative justice conference after entering a plea of guilty for knowingly causing or permitting destruction of Aboriginal objects contrary to section 90 of the *National Parks and Wildlife Act* 1994 (NSW). Since this decision, Preston J. has continued to comment on the role that restorative justice could play in allowing the broader community, future generations and the environment to participate as victims of environmental crime in restorative processes.[59] With future generations and the environment represented by "surrogate victims" to vocalize their claims,[60] many of the existing tools and creative sentencing options already available to the court can be used to deliver these "restorative outcomes". For example, a restorative outcome may require the offender to take action to prevent, control or mitigate the harm caused to the environment by the commission of the offence — which could be implemented by the sentencing court making an order for restoration or prevention of harm in a manner consistent with the

[56] NSW Environment Protection Agency, *Annual Report 2012-13* (October 2013) at 15 [*Annual Report 2012-13*]. For a discussion of New Zealand, a jurisdiction which has proactively incorporated restorative justice into its environmental sentencing processes, see: M Hamilton, "Restorative Justice Intervention in an Environmental Law Context: *Garrett v Williams*, Prosecutions under the *Resource Management Act* 1991 (RMA), and Beyond" (2008) 25 EPLJ 263.

[57] *Annual Report 2012-13*, *ibid*.

[58] *Garrett v Williams* (2007), 1551 LGERA 92. See also: Hamilton, *supra* note 56.

[59] Hon Justice B Preston, "The Use of Restorative Justice for Environmental Crime" (2011) 35 Criminal Law Journal 136.

[60] Preston, *ibid* at 147-149.

restorative outcome.[61] Similarly, compensation orders for environmental harm, environmental audit orders or environmental service orders could also be employed.

More than achieving the purposes of retribution or deterrence, Preston J. notes that the use of restorative processes may allow a more holistic approach to environmental crime, with the potential to transform relationships and behaviors and provide a means to empower and give a voice to the broader community and the environment as a victim of environmental crime.[62] It remains to be seen whether restorative justice mechanisms will be adopted more fully in the creative sentencing process going forward.

[61] Preston, *ibid* at 152-153.
[62] Preston, *ibid* at 155-158.