

Principled Sentencing for Environmental Offences

by

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A INTRODUCTION

The making of laws is not an end in itself. Laws are to be complied with. If laws are not complied with, the rule of law breaks down. There must be a substantial level of enforcement otherwise the rule of law becomes devoid of meaningful content.¹

Compliance with and enforcement of law is also necessary for the achievement of ecologically sustainable development. The courts have a critical role in ensuring compliance, support for governance, and sustainable development.²

One important way of enforcing the law is through the criminal justice system. Sentencing is an important part of the criminal justice system and the upholding of the rule of law. Determining appropriate punishment for criminal conduct is a difficult but vital task.

The task is discretionary, but the discretion is structured. Within the last three decades, the degree of structuring has increased. This corresponds with an increasing disenchantment of the community, the executive and the legislature with the sentencing decisions of the courts. The structures include prescribing the maximum (and sometimes the minimum) penalties that may be imposed for different offences, and the sentencing considerations that must be taken into account.

The structuring also involves specifying the purposes for which sentences may be imposed. The purposes reflect different penal philosophies. There is no statutory guidance as to which purpose or purposes of sentencing should be pursued for different types of offences or criminal conduct. That choice is left to the discretion of the sentencer.

The discretion must be exercised judicially. This involves understanding the nature of the offence, the particular objective and subjective circumstances, its relative seriousness compared to other offences of similar and different types, and the personal circumstances of the offender.

This paper outlines the purposes of sentencing, the sentencing considerations and the sentencing options available for environmental offences. I have focused on sentencing for environmental offences in New South Wales, Australia, although the discussion may be of broader application.

B PURPOSES OF SENTENCING

Introduction

Both the common law and now sentencing procedure statutes enunciate the purposes for which a court may impose a sentence on an offender. These purposes of sentencing include:

- (a) *Retribution*: ensuring that an offender is adequately punished for the offence³ and that the offender is held accountable for his or her actions;⁴

¹ J J Spigelman, "The Rule of Law and Enforcement", an address to the ICAC-Interpol Conference, Hong Kong, 22 January 2003, p 2.

² J E Gicheru, "Environmental Law and Access to Environment Justice", an address to the Kenya National Judicial Colloquium, Mombasa, Kenya, 10 January 2006, p 3.

³ s 3A(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

⁴ s 3A(e) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

- (b) *Denunciation*: denouncing the conduct of the offender;⁵
- (c) *Deterrence*: deterring both the offender (individual or special deterrence) and other persons (general or public deterrence) from committing similar offences;⁶
- (d) *Protection of the community*: protecting the community from the offender and from crime;⁷
- (e) *Rehabilitation*: promoting the rehabilitation of the offender;⁸
- (f) *Restoration and reparation*: recognising the harm done to the victims of the crime and the community;⁹

These purposes of sentencing overlap. None of the purposes should be considered in isolation from the others when determining the appropriate sentence in a particular case. The purposes do, however, point in different directions.¹⁰

Retribution and denunciation

Satisfaction of the retributive desires of the community is an important feature of the sentencing process.

Retribution concerns morality in a number of ways. First, it recognises that the community views crime as immoral and punishment for crime as morally right. It is morally right and just that those who commit wrongs should be punished.¹¹ The sentence of the court is an expression of the community's disapproval of the criminal conduct and of those who perpetrate it. Wrong-doing and wrong-doers must be censured.¹² The imposition of a sanction is justified by the communal sense of the rightness or fairness of imposing the sanction.

Secondly, the more morally reprehensible the crime, the more severe the sentence should be.¹³ In determining the moral reprehensiveness of the crime, the court is entitled to and ought to take into account the moral outrage of the community in relation to certain types of criminal conduct, notably serious offences.¹⁴

The community can be seen to have delegated to the court the task of identifying, assessing and weighing the outrage and revulsion that an informed and responsible public would have to criminal conduct. The court's duty is to take that outrage and revulsion into account in the sentencing process. If the court fails to responsibly

⁵ s 3A(f) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

⁶ s 3A(b) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

⁷ s 3A(c) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

⁸ s 3A(d) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

⁹ s 3A(g) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

¹⁰ *Veen v R (No. 2)* (1988) 164 CLR 465 at 476

¹¹ J Rawls, "Two Concepts of Rules" (1955) 64(1) *The Philosophical Review* 3 at 4-5; H L A Hart, *Punishment and Responsibility*, Clarendon Press, Oxford, 1968, p 231.

¹² R G Fox and A Freiberg, *Sentencing, State and Federal Law in Victoria*, 2nd ed, Oxford University Press, 1999, p 204.

¹³ J Rawls, "Two Concepts of Rules" (1955) 64(1) *The Philosophical Review* 3 at 4-5; H L A Hart, *Punishment and Responsibility*, Clarendon Press, Oxford, 1968, p 231.

¹⁴ *R v Nichols* (1991) 57 A Crim R 391 at 395; *Inkson v R* (1996) 88 A Crim R 334 at 344-345, 352 and 355-357.

discharge the duty that has been entrusted to it by the community, public confidence in the system of justice will be eroded.¹⁵

Environmental offences are crimes; they are not mere administrative breaches.¹⁶ The community views pollution and other environmental offences as extremely serious.¹⁷ Criminal provisions express the community's moral condemnation of environmental harm.¹⁸

Thirdly, the morality of retributive responses results in the principle of "proportionality" or "just deserts" or "commensurate deserts". This principle is that the severity of punishment should be commensurate with the seriousness of the criminal conduct. Grave (and more morally repugnant) offences merit severe penalties. Minor (and less morally repugnant) misdeeds deserve lenient punishments. Disproportionate penalties, such as severe sanctions for minor wrongs or lenient sanctions for grave wrongs, are undeserved.¹⁹

The concept of proportionality can operate as a constraint on utilitarian purposes of sentencing such as deterrence.

The principle of proportionality can be understood in two senses, ordinal and cardinal proportionality. Ordinal proportionality concerns the relative seriousness of offences compared to other offences. Cardinal proportionality relates the ordinal ranking to a scale of punishments, and requires that the penalty should not be out of proportion to the gravity of the crime involved.²⁰

The major requirement within the general principle of proportionality is ordinal proportionality. This concerns how a crime should be punished compared to similar criminal acts and other crimes of a more or less serious nature. Crimes should be ranked according to their relative seriousness, as determined by the harm done or risked by the offence and by the degree of culpability of the offender. Ordinal proportionality is concerned with preserving a correspondence between the relative seriousness of the offence and the relative severity of the sentence.²¹

¹⁵ *Inkson v R* (1996) 88 A Crim R 334 at 345; see also *R v Geddes* (1936) 36 SR (NSW) 554 at 555; (1936) 53 WN (NSW) 157 at 158.

¹⁶ *R v United Keno Mines Ltd* (1980) 1 YR 299; 10 CELR 43 at [9]; *R v Anglian Water Services Ltd* [2004] 1 Cr App R (S) 62, [2004] JPL 458 at [12], [14]; *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419 (10 July 2006) at [226]. See further discussion below on the objective gravity of the offence.

¹⁷ B Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions" (1982-1983) 56 S Cal L Rev 1141 at 1151 and footnote 29; M W Schneider, "Criminal Enforcement of Federal Water Pollution Laws in an Era of Deregulation" (1982) 73(2) J Crim L & Criminology 646 at 665; D Chappell and J Norberry, "Deterring Polluters: The Search for Effective Strategies" (1990) 13 UNSWLJ 97 at 98-99, 100-101, 104; *Brimble v Epping Rubber Company Pty Ltd* [1990] NSWLEC 94 (17 August 1990); *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34 (6 February 2006) at [145], [149].

¹⁸ M Grekos, "Environmental fines – all small change?", [2004] JPL 1330 at 1332, 1338. See also S Hedman, "Expressive Functions of Criminal Sanctions in Environment Law" (1991) 59 Geo Wash L Rev 889 at 896 and Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95, 5 December 2002, p 113.

¹⁹ A von Hirsch, *Doing Justice: The Choice of Punishments*, Hill and Wang, New York, 1976, p 66.

²⁰ A Ashworth, *Sentencing and Criminal Justice*, 4th ed, Cambridge University Press, Cambridge, 2005, pp 84-85.

²¹ A Ashworth, "Desert" in A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy*, Hart Publishing, Oxford, 2nd edition, 1998, p 143.

The principle of proportionality operates as a limiting, but not as a defining, principle in determining the appropriate sentence. The principle limits the maximum and the minimum of the sentence that may properly be imposed.²²

There is a fourth way in which retribution concerns morality. This is to reflect the community's concept of fairness. This sense is applicable to economic crime in general and corporate crime in particular. Environmental offences fall into these categories in many instances. Weiler expresses this sense of retribution as follows:

“A system of rules has been established, substantial compliance with which is necessary for a decent community life for all. Yet some are tempted to pursue their own private interests even though this involves a breach of that legal system. Accordingly, while taking the benefits of the self-restraint of others, they do not make the reciprocal sacrifice demanded of them. As a result they obtain an unfair advantage in the distribution of the benefits from life within that legal system. Punishment is necessary to remove that unjust enrichment from the offender and so secure a just equilibrium on behalf of those who were willing to be law abiding. I believe that it is the removal of this extra advantage from offenders, rather than the satisfaction of the sense of grievance of their victims, which is the chief rational support of this retributive justification of punishment.”²³

The concept of retribution, expressed in these terms, accords fairness not only to the offender, but to the offender's competitors who have incurred the costs of operating lawfully.

Deterrence

Deterrence is one of the several rationales of punishment that has a preventative aim. Incapacitation and rehabilitation are two others.

Deterrence can operate at the level of the individual offender or the public. Individual or specific deterrence is concerned with preventing the particular offender being sentenced from reoffending. General deterrence is concerned with preventing members of the public from committing the kind of offence committed by the offender being sentenced.

It is the duty of the court to see that the sentence that is imposed will operate as a powerful factor in preventing the commission of similar crimes by those who might otherwise be tempted by the prospect that only light punishment will be imposed.²⁴

A sentencing system based on individual deterrence would need to ensure that the sentencing court has detailed information on the character, sentences and previous

²² N Morris, “Desert as a Limiting Principle” in A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy*, 2nd ed, Hart Publishing, Oxford, 1998 p 180; and *Veen v R (No. 2)* (1988) 164 CLR 465 at 491 and R G Fox and A Frieberg, *Sentencing, State and Federal Law in Victoria*, 2nd ed, Oxford University Press, 1999, p 221.

²³ P C Weiler, “The Reform of Punishment” in Law Reform Commission of Canada, *Studies on Sentencing*, Information Canada, Ottawa, 1974, p 173. See also J M P Weiler, “Why do we punish? The case for retributive justice” (1978) 12 U Brit Colum L Rev 295 at 314-315; B Fisse, “Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions” (1982-1983) 56 S Cal L Rev 1141 at 1169, 1171 and 1180.

²⁴ *R v Rushby* [1977] 1 NSWLR 594 at 597-598.

record of the particular offender. The court needs to calculate what sentence would be necessary to deter the particular offender.²⁵

Punishment may need to be increased substantially for persistent offenders, both in terms of type (such as imposing a custodial sentence if non-custodial sentences have failed to deter in the past) and severity of sentence (such as quantum of fine or length of custodial sentence).²⁶ The main determinate of sentencing would be the offender's propensity to reoffend rather than the seriousness of the offence.²⁷

A sentencing system based on specific deterrence would give no appearance of consistency, since each sentence would be especially calculated so as to influence the individual offender involved.²⁸

An approach based on individual deterrence is rarely adopted as the primary rationale of a sentencing system. However, it may inform sentencing for persistent offenders.²⁹

Specific deterrence may also be appropriate for corporate offenders to catalyse rehabilitation. The message conveyed by the sentence is not only to refrain from committing the offence, but also to take such steps as are necessary to guard organisationally against repetition. This may involve crime prevention, policies, disciplinary controls and changes in standard operating procedures.³⁰

More significant than specific deterrence, both for criminal conduct generally and environmental offences in particular, is the purpose of general deterrence³¹.

General deterrence has a consequential or utilitarian rationale. Punishment is justified if the benefit (in terms of general deterrence) would outweigh the cost to the offender punished. The sentence of a court should be calculated to deter others from committing the offence, no more and no less. The assumption is that citizens are rational and will adjust their conduct according to the disincentives provided by sentences.³²

Some scepticism has been expressed regarding the capacity of criminal sanctions to deter street criminals³³. Doubt has also been expressed about whether and how much marginal or extra deterrence is achieved by increasing the certainty or severity of criminal sanctions³⁴. Nevertheless, the courts and the criminal justice system

²⁵ A Ashworth, "Deterrence" in A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on theory and policy*, 2nd ed, Hart Publishing, Oxford, 1998, p 45.

²⁶ A Ashworth, *Sentencing and Criminal Justice*, 4th ed, Cambridge University Press, Cambridge, 2005, p 75.

²⁷ A Ashworth, *Sentencing and Criminal Justice*, 4th ed, Cambridge University Press, Cambridge, 2005, p 75; and Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC Issues Paper 29, 2005, para 7.8.

²⁸ A Ashworth, "Deterrence" in A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy*, 2nd ed, Hart Publishing, Oxford, 1998, at p 45.

²⁹ A Ashworth, *Sentencing and Criminal Justice*, 4th ed, Cambridge University Press, Cambridge, 2005, p 75.

³⁰ B Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions" (1982-1983) 56 S Cal L Rev 1141 at 1160-1163, 1166.

³¹ *R v Bata Industries Ltd* (1992) 9 OR (3d) 329, 7 CELR (NS) 245 at [184]; *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 at 503.

³² A Ashworth, *Sentencing and Criminal Justice*, 4th ed, Cambridge University Press, Cambridge, 2005, p 75.

³³ See, for example, J McGuire, "Deterrence in sentencing: Handle with care", (2005) 79 ALJ 448.

³⁴ A von Hirsch, AE Bottoms, E Burney and PO Wilkstrom, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*, Hart Publishing, 1999, pp 47-48 and A Frieberg, "Bayonets, Tigers

assume that penalties operate efficaciously as a deterrent.³⁵ Further, there is by and large a consensus on the efficacy of deterrence, both individual and general, in white-collar crime.³⁶ White-collar crime includes most environmental offences. Evidence suggests deterrence does work in relation to environmental offences.³⁷

In relation to white-collar crime committed by corporate offenders, the ultimate corporate purpose is to turn a profit. Corporations employ persons who attempt to weigh the financial consequences of any given action. Corporate officers are unlikely to engage in activities that they think will be unprofitable. Corporations are probably economically irrational only to the extent they are mismanaged.³⁸

Courts have repeatedly stated that the sentence of the court needs to be of such magnitude as to change the economic calculus of persons in relation to compliance with environmental laws.³⁹ It should not be cheaper to offend than to prevent the commission of the offence.⁴⁰ Environmental crime will remain profitable until the financial cost to offenders outweigh the likely gains.⁴¹ The amount of the fine must be substantial enough so as not to appear as a mere licence fee for illegal activity. The sentence must create a disincentive to the harm envisioned by the statute.⁴²

General deterrence has been explained in terms of an economic theory of criminal behaviour. A person will commit a crime if the expected net benefit of doing so exceeds the expected net benefit of behaving lawfully. In calculating the expected net benefit of offending, account must be taken not only of the likely punishment but also of the probability of being detected.⁴³ Deterrence operates on the basis that the severity of the likely punishment multiplied by the probability of detection and punishment should be greater than the benefit to the offender of offending. The effectiveness of deterrence will be mediated by the offender's perception of the likely severity of sentence, probability of detection and punishment, and benefit to the offender of offending.⁴⁴

and Other Enforcement Dilemmas", National Road Transport Commission, *Achieving Compliance Through Strategic Enforcement*, Gold Coast, Queensland (2002).

³⁵ In *R v Wong; R v Leung* (1999) 48 NSWLR 340 at 363 [127] the New South Wales Court of Criminal Appeal held that "the fact that penalties operate as a deterrent is a structural assumption of our criminal justice system. Legislation would be required to change the traditional approach of the courts in this matter".

³⁶ J Braithwaite and G Geis, "On Theory and Action for Corporate Crime Control" (1982) 28 *Crime & Delinquency* 292 at 302-305; D Chappell and J Norberry, "Deterring Polluters: The Search for Effective Strategies" (1990) 13(1) *UNSWLJ* 97 at 103, 116.

³⁷ J D Silberman, "Does Environmental Deterrence Work? Evidence and Experience Say Yes, But We Need to Understand How and Why", (2000) 30 *Environmental Law Reporter* 10523.

³⁸ J Swaigen and G Bunt, *Sentencing in Environmental Cases*, Law Reform Commission of Canada, Ottawa, 1985, p 13 and see also J Braithwaite and G Geis, "On Theory and Action for Corporate Crime Control", (1982) 28 *Crime & Delinquency* 292 at 302.

³⁹ *Axer Pty Ltd v Environment Protection Authority* (1993) 113 *LGERA* 357 at 359-360; *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34 (6 February 2006) at [156], [157]; *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419 (10 July 2006) at [229].

⁴⁰ Sentencing Advisory Panel (UK), "Environmental Offences: The Panel's Advice to the Court of Appeal", 1 March 2000, para 16; *R v Anglian Water Services Ltd* [2004] 1 Cr App R (S) 62, [2004] *JPL* 458 at [31].

⁴¹ M Watson, "Environmental Offences: the Reality of Environmental Crime", (2005) 7(3) *Environmental Law Review* 190 at 199-200; *Walker v Eves* (1976) 13 *SASR* 249 at 250; *Piva v Brinkworth* (1992) 59 *SASR* 92 at 96.

⁴² *R v Bata Industries Ltd* (1992) 9 OR (3d) 329, 7 *CELR* (NS) 245 at [187].

⁴³ See G S Becker, "Crime and Punishment: An Economic Approach", (1968) 67 *Journal of Political Economy* 169; A Heyes, "Implementing Environmental Regulation: Enforcement and Compliance", (2000) 17(2) *Journal of Regulatory Economics* 107; A Ogus and C Abbot, "Sanctions for Pollution: Do we have the Right Regime" (2002) 14(3) *Journal of Environmental Law* 283 at 289-290.

⁴⁴ A von Hirsch, AE Bottoms, E Burney and PO Wilkstrom, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*, Hart Publishing, 1999, p 46; A Frieberg, "Bayonets, Tigers and Other

The economic function of punishment is to make offenders internalise the external cost of their activities (environmental, social and economic costs). This is done by imposing a fine (and/or other penalties) such that the expected cost of punishment of the crime to the offender is equal to the external cost of the crime.⁴⁵

To improve the effectiveness of sentences as a deterrent, sentences need to be publicised.⁴⁶ Publication of sentences influences the perception of potential offenders in relation to severity of sentence and the probability of being detected and punished. Where potential offenders are made aware of substantial risks of being punished, many are induced to desist.⁴⁷ Publication also increases the criminal stigma associated with the offence. This is particularly applicable to corporate offenders, who are susceptible to criminal stigma.⁴⁸ One means is by the court making an order that the offender:

- (a) take specified action to publicise the offence (including the circumstances of the offence) and its environmental and other consequences and any other orders made against the person;⁴⁹ or
- (b) 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).⁵⁰

Protection of the community

Protection of the community is the second purpose of sentencing with a preventative aim. As mentioned above, one way of protecting the community is by incapacitation

Enforcement Dilemmas", National Road Transport Commission, *Achieving Compliance Through Strategic Enforcement*, Gold Coast, Queensland (2002) and J D Silberman, "Does Environmental Deterrence Work? Evidence and Experience Say Yes, But We Need to Understand How and Why", (2000) 30 *Environmental Law Reporter* 10523 at note 42 in that article.

⁴⁵ R A Posner, "Retribution and Related Concepts of Punishment" (1980) 9 *The Journal of Legal Studies* 71 at 73.

⁴⁶ J D Silberman, "Does Environmental Deterrence Work? Evidence and Experience Say Yes, But We Need to Understand How and Why", (2000) 30 *Environmental Law Reporter* 10523 at notes 47 and 48 in that article.

⁴⁷ A von Hirsch, AE Bottoms, E Burney and PO Wilkstrom, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*, Hart Publishing, 1999, p 47.

⁴⁸ J Braithwaite and G Geis, "On Theory and Action for Corporate Crime Control" (1982) 28 *Crime & Delinquency* 292 at 301-302; B Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions" (1982-1983) 56 *S. Cal L Rev* 1141 at 1147, 1153, 1154, 1156, 1166, 1220, 1229, 1230, 1240. See also B Fisse, "The Use of Publicity as a Criminal Sanction against Business Corporations" (1971-1972) 8 *Melb UL Rev* 107; M Rankin and P Finkle, "The Enforcement of Environmental Law: Taking the Environment Seriously" (1983) 17 *U Brit Colum L Rev* 35 at 49; D Chappell and J Norberry, "Deterring Polluters: The Search for Effective Strategies", (1990) 13 *UNSWLJ* 97 at 108; A Ogus and C Abbott, "Sanctions for Pollution: Do we Have the Right Regime?" (2002) 14(3) *J Envtl L* 283 at 287; M Grekos "Environmental fines – all small change?" [2004] *JPL* 1330 at 1336; C Abbot, "The Regulatory Enforcement of Pollution Control Laws: The Australian Experience", (2005) 17 *J Envtl L* 161 at 174; *R v Bata Industries Ltd* (1992) 9 OR (3d) 329, 7 *CELR* (NS) 245 at [203]; *Environment Protection Authority v Incitec Ltd* [2003] *NSWLEC* 381 (1 October 2003) at [61]; *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] *NSWLEC* 419 (10 July 2006) at [242].

⁴⁹ See s 250(1)(a) of the *Protection of the Environment Operations Act* 1997 (NSW) and s 67AC(2)(a) of the *Environment Protection Act* 1970(Vic).

⁵⁰ See s 250(1)(b) of the *Protection of the Environment Operations Act* 1997 (NSW) and s 67AC(2)(b) of the *Environment Protection Act* 1970(Vic).

of the offender. Incapacitation seeks to protect the community by dealing with the offender in such a way as to reduce substantially the offender's ability to commit a further offence, often for a substantial period of time.⁵¹ Incapacitation takes away from the offender the physical power of offending.

Incapacitation can take various forms. Imprisonment of an individual offender is a common incapacitative punishment.

Incapacitation orders prevent the offender from conducting some activity that constitutes or affords the opportunity to commit the offence. Incapacitation orders for natural persons include preventing a person from driving or being a company director.⁵² Incapacitation orders for corporations can take the form of dissolution or disqualification. Dissolution involves the winding up of the corporation. Disqualification involves preventing a corporation from carrying out certain commercial, trading or investment activities.⁵³ In an environmental context, a form of disqualification would be the suspension or revocation of an environment protection licence.⁵⁴

Incapacitation has the same aim as rehabilitation, namely the prevention of crime. The means, however, differ. Rehabilitation involves changing the offender's habits or attitudes so that the offender becomes less criminally inclined. Incapacitation presupposes no such change. Instead, obstacles are interposed to impede the person from reoffending.⁵⁵

Incapacitation has usually been sought through predicting the offender's likelihood of reoffending. Persons considered more likely to reoffend (recidivists) are to be restrained, for example, by imposition of a term of imprisonment rather than by a non-custodial sentence or by imposing a term of imprisonment of a longer duration than the offender would otherwise have received.⁵⁶

Incapacitation, by its focus on the protection of the community, puts the needs of the community ahead of concern for the welfare of the offender.⁵⁷ This prioritisation is relevant in environmental cases where there is an evident need to protect the community from environmental crime.

⁵¹ Australia Law Reform Commission, *Sentencing of Federal Offenders*, Issues Paper 29, 2005, para 7.7 and A Ashworth, *Sentencing and Criminal Justice*, 4th ed, Cambridge University Press, Cambridge, 2005, p 80.

⁵² A Ashworth, *Sentencing and Criminal Justice*, 4th ed, Cambridge University Press, Cambridge, 2005, p 80.

⁵³ A Luzung and J Waugh, "Sentencing of Corporate Offenders", a paper presented to the Australian and New Zealand Society of Criminology Conference – Controlling Crime: Risks and Responsibilities, Sydney, Australia, 2 October 2003, p 3. See also J Braithwaite and G Geis, "On Theory and Action for Corporate Crime Control" (1982) 28 *Crime & Delinquency* 292 at 307-308;

⁵⁴ Sections 79 and 82 of the *Protection of the Environment Operations Act 1997* (NSW) and s 20(a) of the *Environment Protection Act 1970* (Vic) permit the appropriate regulatory authorities (including the Environment Protection Authority and the Minister) to suspend or revoke a licence. See C Abbott, "The Regulatory Enforcement of Pollution Control Laws: The Australian Experience" (2005) 17 *J Env'tl L* 161 at 167. Courts do not have that power in sentencing.

⁵⁵ A von Hirsch, "Incapacitation", in A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy*, 2nd ed, Hart Publishing, Oxford, 1998 p 88.

⁵⁶ A von Hirsch, "Incapacitation", in A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy*, 2nd ed, Hart Publishing, Oxford, 1998 p 88.

⁵⁷ J Swaigen and G Bunt, *Sentencing in Environmental Cases*, Law Reform Commission of Canada, Ottawa, 1985, p 9.

Environmental offences concern the public welfare. They involve a shift of emphasis from the protection of individual interests to the protection of public and social interests.⁵⁸

Sentencing for environmental offences has as a purpose protecting these public and social interests in the environment.⁵⁹ By the court recognising the importance of the purpose of protecting the community, the court underlines the serious nature of the environmental offence and prevents its trivialisation. Such recognition also supports the use of strong deterrents and punishments, even in the absence of serious harm to individuals or to the environment.⁶⁰

Rehabilitation

Rehabilitation is the third of the sentencing purposes that has a preventative aim. Prevention of crime is achieved by the reform and rehabilitation of the offender. By changing an offender's personality, outlook, habits or opportunities, the offender is made less inclined to commit crimes.⁶¹

Sometimes, the focus is on modification of the offender's attitudes and behavioural problems. Other times, the aim is to provide education or skills, so as to enable the offender to find occupations other than crime, or the means of carrying out an occupation lawfully rather than unlawfully.⁶²

Rehabilitation can apply both to individuals as well as corporations. Mechanisms to bring about corporate rehabilitation might include: "consent decrees negotiated with regulatory agencies; probation orders placing the corporation under the supervision of an auditor, environmental expert, or other authority who would ensure that an order to restructure compliance systems was carried out; or suspended sentencing of convicted corporations by the courts, contingent on their producing a report on the weakness of their old compliance systems and implementing new ones".⁶³

In an environmental context, the reform and rehabilitation might be achieved by a sentencing court making orders that the offender:

- (a) carry out a specified environmental audit of activities carried on by the offender;⁶⁴
- (b) attend, or cause employees or contractors of the offender to attend, a training or other course specified by the court;⁶⁵ or

⁵⁸ *R v City of Sault Ste Marie* [1978] 2 SCR 1299; 85 DLR (3d) 161 at 172 [28]; *R v Bata Industries Ltd* (1992) 9 OR (3d) 329, 7 CELR (NS) 245 at [181].

⁵⁹ J Swaigen and G Bunt, *Sentencing in Environmental Cases*, Law Reform Commission of Canada, Ottawa, 1985, pp 9-10; and see *Gittany Constructions Pty Limited v Sutherland Shire Council* [2006] NSWLEC 242 (10 May 2006) at [193].

⁶⁰ J Swaigen and G Bunt, *Sentencing in Environmental Cases*, Law Reform Commission of Canada, Ottawa, 1985, p 9.

⁶¹ A von Hirsch, "Rehabilitation", in A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy*, 2nd ed, Hart Publishing, Oxford, 1998, p 1.

⁶² A Ashworth, *Sentencing and Criminal Justice*, 4th ed, Cambridge University Press, Cambridge, 2005, p 82.

⁶³ J Braithwaite and G Geis, "On Theory and Action for Corporate Crime Control" (1982) 28 *Crime & Delinquency* 292 at 310-311. See also B Fisse and J Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1986-1988) 11 *Syd L Rev* 468 at 500-501.

⁶⁴ See s 250(1)(d) of the *Protection of the Environment Operations Act 1997* (NSW).

⁶⁵ See s 250(1)(f) of the *Protection of the Environment Operations Act 1997* (NSW).

- (c) establish, for employees or contractors of the offender, a training course of a kind specified by the court.⁶⁶

Restoration and Reparation

In the last 25 years, there has been an increasing recognition of the rights and needs of the victims of crime. This has manifested itself in a number of ways. One is the increased attention to victims' rights in the criminal justice system, including granting a victim the right to make a victim impact statement to the sentencing court about the offence.⁶⁷

A victim impact statement enables a victim to state to the court the personal harm suffered by the victim as a direct result of the crime for which sentence is being passed⁶⁸. The statement may be received and taken into account as evidence of the harm caused by the offence and, in that way, as evidence relevant to the determination of a punishment by sentence.⁶⁹ However, the statement cannot include comments on the evidence given in the trial, the findings of fact that should be made, the particular approach to determining what aspect of punishment is important or the particular sentence that should be imposed.⁷⁰ The attitude of the victim, whether of vengeance or forgiveness, cannot interfere with a proper exercise of the sentencing discretion. Sentencing proceedings are not a private matter between the victim and the offender.⁷¹

Another recognition of the rights and needs of the victims of crime is the concept of restorative justice, whereby justice to the victim becomes a central goal of the criminal justice system and of sentencing.⁷²

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. These impacts on the victims may legitimately be taken into account.⁷³ Victims could also include owners of private property adversely affected by the commission of an offence.⁷⁴

⁶⁶ See s 250(1)(g) of the *Protection of the Environment Operations Act 1997* (NSW).

⁶⁷ see *Victims Rights Act 1996* (NSW) and ss 26-30A of the *Crimes (Sentencing Procedure) Act 1999* (NSW)

⁶⁸ s 26 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

⁶⁹ *R v Slack* [2004] NSWCCA 128 (7 May 2004) at [60]; *R v Wilson* [2005] NSWCCA 219 (17 June 2005) at [26].

⁷⁰ *R v Walsh, R v Sharp* (2004) 142 A Crim R 140 at [35]; *R v Newman, R v Simpson* (2004) 145 A Crim R 361 at [82].

⁷¹ *R v Palu* (2002) 134 A Crim R 174 at 183-184 [37]; *R v Newman, R v Simpson* (2004) 145 A Crim R 361 at 380 [80] - 381 [81].

⁷² A Ashworth, *Sentencing and Criminal Justice*, 4th ed, Cambridge University Press, Cambridge, 2005, p 88.

⁷³ For example, in *Environment Protection Authority v Gardner* [1997] NSWLEC 212 (7 November 1997), Lloyd J took into account the grave health risk posed by the offender's conduct in wilfully pumping untreated effluent into a river in which oysters were farmed. In *Environment Protection Authority v Hochtief AG* [2006] NSWLEC 200 (28 April 2006) at [99], Biscoe J took into account the interference with the amenity of residents caused by emission of loud noise from construction works.

⁷⁴ For example, in *Auckland City Council v North Power Ltd* [2004] NZRMA 354, the offence involved the illegal clearing of native vegetation on private property. McElrea DCJ held that the property owners affected were victims of the crime and a victim impact statement ought to have been before the sentencing court: at 361 [26]. The interests of the victims were taken into account in sentencing: at 363 [37]-364 [41], 365 [48]. See further FWM McElrea, "The Role of Restorative Justice in RMA Prosecutions", (2004) 12(3) *Resource Management Journal* 1 at 10-11.

More commonly, the victim of environmental offences is the community at large and not specific members of it.⁷⁵ Natural resources such as the air, waterways and forests, can be seen to be held in trust by the state for the benefit and use of the general public.⁷⁶ Where the commission of an offence impacts adversely on those natural resources, the victims are the members of the public who are the 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.

An offence will be objectively more serious if it involves harm to victims than if it does not, and if it involves greater harm than lesser harm, having regard to the character, extent and other features of the harm including the number of victims. The severity of the sentence should reflect these factors.

Where the victims are individuals, the extent to which the offender has committed to restorative processes, will be relevant to sentencing. Restorative processes include the offender participating in a restorative conference with victims. This involves the offender making an apology, taking responsibility and being held accountable for their actions, acknowledging victims' concerns, and agreeing to try and meet those concerns by making reparation.⁷⁷

The type of sentence may also be influenced by concepts of restorative justice. A sentencing court, in order to achieve restoration and reparation, may make a variety of sentencing orders against an offender, including:

- (a) for the prevention and restoration of any harm to the environment caused by the commission of the offence;⁷⁸
- (b) for the payment of costs and expenses incurred by a public authority in preventing and restoring any harm to the environment caused by the commission of the offence;⁷⁹
- (c) for the payment of compensation to any person who has suffered loss or damage to property by reason of the commission of the offence;⁸⁰
- (d) for the payment of costs and expenses of a regulatory authority incurred in investigation of the offence;⁸¹

⁷⁵ *Selwyn Mews Ltd v Auckland City Council* (High Court of New Zealand, Auckland, CRI-2003-404-159-161, 30 April 2004, Randerson J) at [36].

⁷⁶ This is the public trust doctrine. See discussion in B J Preston, "The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific", (2006) 9 APJEL 105.

⁷⁷ Two examples of cases in which restorative justice principles were applied for environmental offences are *Auckland Regional Council v Times Media Ltd* (District Court, Auckland, CRN 2084004885, 16 June 2003, McElrea DCJ) and *Waikato Regional Council v Huntly Quarries Ltd* (District Court, Auckland, CRN 2024011394, 30 October 2003, McElrea DCJ). See further FWM McElrea, "The Role of Restorative Justice in RMA Prosecutions" (2004) 12 (3) *Resource Management Journal* 1 at 12-14. See s 9 of *Victims Rights Act 2002* (NZ).

⁷⁸ See s 245 of the *Protection of the Environment Operations Act 1997* (NSW).

⁷⁹ See s 246 of the *Protection of the Environment Operations Act 1997* (NSW).

⁸⁰ See s 246(1)(b) of the *Protection of the Environment Operations Act 1997* (NSW).

⁸¹ See s 248(1) of the *Protection of the Environment Operations Act 1997* (NSW).

- (e) for the carrying out of a specified project for the restoration or enhancement of the environment in a public place or for the public benefit;⁸²
- (f) for the payment of a specified amount to an environmental trust or a specified environmental organisation for the purpose of a specified project for the restoration or enhancement of the environment or for general environmental purposes;⁸³ or
- (g) for the provision of a financial assurance to the relevant regulatory authority to secure performance of any order to carry out a specified work or program for the restoration or the enhancement of the environment.⁸⁴

C SENTENCING CONSIDERATIONS

The sentence imposed by the court must reflect both the objective gravity or seriousness of the offence and the personal or subjective circumstances of the defendant.⁸⁵

Objective gravity of the offence

The primary factor to consider is the objective gravity or seriousness of the offence.⁸⁶

The objective gravity or seriousness of the crime fixes both the upper and lower limits of proportionate punishment. It fixes the upper limit because a sentence should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances.⁸⁷ It fixes the lower limit because allowance for the subjective factors of the case, particularly of the offender, cannot produce a sentence which fails to reflect the objective gravity or seriousness of the offence⁸⁸ or the objectives of punishment such as retribution and general and individual deterrence.⁸⁹

In determining the objective gravity or seriousness of the offences, the factors to which a court may have regard include: the nature of the offence; the maximum penalty for the offence; the prevalence of the offence; the objective harmfulness of the offence; the offender's state of mind in committing the offence; the reasons for the offender committing the offence; the foreseeability of the risk of harm; the practical measures that could have been taken to prevent the risk of harm; the control the offender had over the causes of the offence; whether the offender was complying with orders; and the surrounding circumstances.

⁸² See s 250(1)(c) of the *Protection of the Environment Operations Act 1997* (NSW).

⁸³ See s 250(1)(e) of the *Protection of the Environment Operations Act 1997* (NSW).

⁸⁴ See s 250(1)(h) of the *Protection of the Environment Operations Act 1997* (NSW).

⁸⁵ *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] NSWCCA 152 (18 April 2005) at [15].

⁸⁶ *Lawrenson Diecasting Pty Limited v WorkCover Authority of New South Wales (Inspector Ch'ng)* (1999) 90 IR 464 at 474, 475 and *Fletcher Construction Australia Limited v WorkCover Authority of New South Wales (Inspector Fisher)* (1999) 91 IR 66 at 77-80.

⁸⁷ *Veen v R (No 2)* (1988) 164 CLR 465 at 472, 485-486, 490-491 and 496; *Baumer v R* (1988) 166 CLR 51 at 57-58; *Hoare v R* (1989) 167 CLR 348 at 354; *R v McNaughton* [2006] NSWCCA 242 (11 August 2006) at [15].

⁸⁸ *R v Dodd* (1991) 57 A Crim R 349 at 354; *R v Nicols* (1991) 57 A Crim R 391 at 395; *R v Allpass* (1993) 72 A Crim R 561 at 563; *R v Murray* (unreported, NSW Court of Criminal Appeal, 29 October 1997) at pp 6-7 per Barr J with whom Newman J agreed; *R v Whyte* (2002) 55 NSWLR 252 at 277 [156]-[158]; *R v Scott* [2005] NSWCCA 152 (18 April 2005) at [15] and *R v McNaughton* [2006] NSWCCA 242 (11 August 2006) at [15].

⁸⁹ *R v McGourty* [2002] NSWCCA 335 (13 August 2002) at [34] and [35].

Nature of offence

The objective seriousness of an environmental offence is illuminated by the nature of the statutory provision, contravention of which constitutes the offence, and its place in the statutory scheme.⁹⁰ A proper understanding of the purpose of creating the offence is assisted by consideration of the objects of the statute.⁹¹

A fundamental consideration, of particular relevance to environmental offences, is the degree by which, having regard to the maximum penalties provided by the statute in question⁹², the offender's conduct would offend against the legislative objective expressed in the statutory offence.⁹³

Many environmental statutes prohibit conduct that is likely to affect the environment or components of it, but enable a person to be relieved of the prohibition by applying for and obtaining approval from the relevant regulatory authority. The application for approval may involve the undertaking of and furnishing to the regulatory authority of an environmental impact assessment of the conduct for which approval is sought.

Planning, pollution control and biodiversity conservation statutes are illustrations of statutes exhibiting such a regulatory regime.⁹⁴

Statutory provisions requiring prior environmental impact assessment and approval are linchpins of such environmental statutes. An offence against such provisions thwarts the attainment of the objects of those statutes, including ecologically sustainable development.⁹⁵

There is a need for the upholding of the integrity of the regulatory system. The system depends on persons first, taking steps to ascertain when approval is required for conduct likely to affect the environment, secondly, making application in the appropriate form and manner (including environmental impact assessment) and obtaining any approval so required before undertaking the conduct and, thirdly, complying with the terms and conditions of the approval in undertaking the conduct.⁹⁶

Offences which undermine the integrity of the regulatory system are objectively serious. Use of the criminal law ensures the credibility of the regulatory system.

⁹⁰ *Environment Protection Authority v Coe Drilling Australia Pty Ltd* [2005] NSWLEC 719 (5 December 2005) at [128], [129], [133] and *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34 (6 February 2006) at [51]-[71], [168]-[169] and *Environment Protection Authority v Ballina Council* [2006] NSWLEC 289 (5 May 2006) at [72]-[76].

⁹¹ *Environment Protection Authority v Le Dome Pty Ltd* (2002) 125 LGERA 121 at 132 [80]; *Environment Protection Authority v Coe Drilling Australia Pty Ltd* [2005] NSWLEC 719 (5 December 2005) at [132].

⁹² See discussion below on maximum penalty.

⁹³ *R v Peel* [1971] 1 NSWLR 247 at 262.

⁹⁴ Examples are (planning) *Environmental Planning and Assessment Act 1979* (NSW), (pollution control) *Protection of the Environment Operations Act 1997* (NSW), (biodiversity conservation) *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and *National Parks and Wildlife Act 1974* (NSW).

⁹⁵ *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34 (6 February 2006) at [65]-[71], [168], [169].

⁹⁶ *Mosman Municipal Council v Menai Excavations Pty Ltd* (2002) 122 LGERA 89 at 97 [35]; *Bankstown City Council v Taouk Constructions Pty Ltd* [2004] NSWLEC 402 (23 April 2004) at [18]-[21]; *Sutherland Shire Council v Turner* [2004] NSWLEC 774 (18 June 2004) at [24]; *Byron Shire Council v Fletcher* (2005) 143 LGERA 155 at 165 [60]; *Gittany Constructions Pty Ltd v Sutherland Shire Council* [2006] NSWLEC 242 (10 May 2006) at [104]-[105]; *Advanced Arbor Services Pty Ltd v Strathfield Municipal Council* [2006] NSWLEC 485 (8 August 2006) at [94].

Maximum penalty

The maximum statutory penalty is of great relevance in determining the objective gravity of the offence. As was stated in *Camilleri's Stock Feeds Pty Limited v Environment Protection Authority*⁹⁷ "the maximum penalty for an offence reflects the 'public expression' of parliament of the seriousness of the offence".⁹⁸

The maximum penalties for many environmental offences are very high and underscore the criminality involved. Two examples come from New South Wales. Under the *Protection of the Environment Operations Act 1997* (NSW) offences are classified by seriousness in three tiers.⁹⁹ Tier 1 offences, the most serious, involve *mens rea* as an element of the offence, tier 2 offences involve strict liability and tier 3 offences, the least serious, involve absolute liability. The maximum penalty for a tier 1 offence committed wilfully is \$5,000,000 for a corporation and \$1,000,000 for an individual and for a tier 1 offence committed negligently is \$2,000,000 for a corporation and \$500,000 for an individual. The maximum term of imprisonment for an individual who commits a tier 1 offence is 7 years for an offence committed wilfully and 4 years for an offence committed negligently. Either or both of the penalties of fine and imprisonment can be imposed on individuals.¹⁰⁰ For Tier 2 offences, the maximum penalty is \$1,000,000 for a corporation and \$250,000 for an individual.¹⁰¹ For planning and development offences under the *Environmental Planning and Assessment Act 1979* (NSW), the maximum penalty for offences that involve strict liability is \$1,100,000 for any offender, whether a corporation or an individual.¹⁰²

Although the maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which the penalty is prescribed,¹⁰³ that does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case. Ingenuity can always conjure up a case of greater heinousness.¹⁰⁴

Where parliament has increased the maximum penalty for an offence, higher penalties ordinarily will result for the offence.¹⁰⁵ Parliament in New South Wales has increased the maximum penalties for environmental offences repeatedly. An illustration is the increase in the maximum penalties for strict liability pollution offences committed by a corporation from \$125,000¹⁰⁶ to \$250,000¹⁰⁷ to \$1,000,000¹⁰⁸ within ten years. However, it does not follow that for every offence committed after the maximum penalty has been increased, the increase in penalty will be by the same multiple as the increase in the maximum penalty.¹⁰⁹

⁹⁷ (1993) 32 NSWLR 683 at 698.

⁹⁸ See also *R v H* (1980) 3 A Crim R 53 at 65; *R v Oliver* (1980) 7 A Crim R 174 at 175; *Gibson v The Queen* (1991) 172 CLR 353 at 364; *Capral Aluminium Ltd v WorkCover Authority of NSW* (2000) 49 NSWLR 610 at 633 and *Markarian v The Queen* (2005) 79 ALJR 1048 at 1056 [30], [31].

⁹⁹ s 114 of the *Protection of the Environment Operations Act 1997* (NSW).

¹⁰⁰ s 119 of the *Protection of the Environment Operations Act 1997* (NSW).

¹⁰¹ s 152 of the *Protection of the Environment Operations Act 1997* (NSW).

¹⁰² s 126 of the *Environmental Planning and Assessment Act 1979* (NSW).

¹⁰³ See *Ibbs v R* (1987) 163 CLR 447 at 451-452.

¹⁰⁴ *Veen v R (No 2)* (1988) 164 CLR 465 at 478 and *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 698.

¹⁰⁵ *R v Slattery* (1996) 98 A Crim R 519 at 524.

¹⁰⁶ Under the former *Environmental Offences and Penalties Act 1989* (NSW).

¹⁰⁷ Under the *Protection of the Environment Act 1997* (NSW) when enacted.

¹⁰⁸ Under the *Protection of the Environment Operations Amendment Act 2005* which commenced on 1 May 2006.

¹⁰⁹ *Cabonne Shire Council v Environment Protection Authority* (2001) 115 LGERA 304 at 312 [37] and *Environment Protection Authority v Middle Harbour Constructions Pty Limited* (2002) 119 LGERA 440 at 444.

If the proceedings for an offence are brought in a court of limited jurisdiction, such as the Local Court, a jurisdictional limit may be applied by the statute creating the offence. This jurisdictional limit should not be confused with the maximum penalty for the offence. Notwithstanding the existence of a jurisdictional limit, the maximum penalty for an offence remains that prescribed in the statute. In *R v Doan*,¹¹⁰ the Court of Criminal Appeal stated that a statutory provision imposing a ceiling on the maximum sentence that may be imposed by the Local Court is a jurisdictional maximum and not a maximum penalty for any offence triable within that jurisdiction. The Local Court should impose a penalty reflecting the objective seriousness of the offence, tempered if appropriate by subjective circumstances, taking care only not to exceed the maximum jurisdictional limit.¹¹¹

Prevalence of offence

Prevalence of crime of a certain class is a relevant consideration when deciding an appropriate level of sentence.¹¹² Prevalence may refer to:

- (a) a situation in which a particular crime occurs with such frequency that it has a salience beyond those immediately affected by the crime, which impacts on society by changing patterns of behaviour out of a sense of apprehension;¹¹³ and
- (b) the incidence of a particular crime increasing over a period of time leading to an increase in the weighting of general deterrence.¹¹⁴

A recent example of a particular type of crime that has been noted by a sentencing court to be prevalent is the lopping and felling of trees especially to improve views.¹¹⁵

Objective harmfulness of offence

Even where harm is not an element of the crime, the objective harmfulness of the offender's actions is relevant to determining the seriousness of the crime. Environmental crime can have environmental, social and economic impacts.

Environmental impacts include direct harm to an animal or plant as well as indirect harm to their habitat. Harm to an animal or plant not only adversely affects that animal or plant, it also affects other biota that have ecological relationships to that animal or plant.¹¹⁶ Harm therefore includes interference with ecological structure, functioning and processes.

¹¹⁰ (2000) 50 NSWLR 115 at 123.

¹¹¹ See also *Ebacarb Pty Ltd v Environment Protection Authority* (2003) NSWLEC 411 (2 December 2003) at [9]-[11]; *Carlino v Leichhardt Municipal Council* (2005) 144 LGERA 235 at [25], [26]; *Cameron v Eurobodalla Shire Council* [2006] NSWLEC 47 (13 February 2006) at [36]; *Byres v Leichhardt Municipal Council* [2006] NSWLEC 82 (13 February 2006) at [66]; and *Gittany Constructions Pty Limited v Sutherland Shire Council* [2006] NSWLEC 242 (10 May 2006) at 114.

¹¹² *R v Cuthbert* (1967) 86 WN (Pt 1) (NSW) 272 at 278; *R v Hayes* [1984] 1 NSWLR 740 at 742-743, 743-744; *R v Henry* (1999) 46 NSWLR 346 at 366 [86]; *R v Bata Industries Ltd* (1992) 9 OR (3d) 329, 7 CELR (NS) 245 at [181].

¹¹³ *R v Henry* (1999) 46 NSWLR 346 at 366 [87].

¹¹⁴ *R v Henry* (1999) 46 NSWLR 346 at 367 [88].

¹¹⁵ *Cameron v Eurobodalla Shire Council* [2006] NSWLEC 47 (13 February 2006) at [82]-[84]; and see Sydney Morning Herald, 22 February 2006, p 1; and 2 March 2006, p 4.

¹¹⁶ *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34 (6 February 2006) at [174] and *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419 (10 July 2006) at [146].

Social impacts can include diminution in the value of the environment for the community or persons in it, such as the amenity, recreational, aesthetic, cultural, heritage, scientific or educational value.¹¹⁷ A deteriorated environment may have a disproportionate, adverse effect on socially and economically disadvantaged persons.

Economic impacts can include impacts on industry, businesses and employment, such as those dependant on waters that are polluted, fish breeding areas that are harmed, crops that are polluted, or environments visited by tourists that are harmed.

In assessing harmfulness, not only the actual harm but also the potential or risk of harm should be taken into account.¹¹⁸

Harm should not be limited to measurable harm such as actual harm to human health. It can also include a broader notion of reduction in the quality of life.¹¹⁹

Harm needs to be evaluated in terms of its spatial and temporal ambit.¹²⁰ Indeed the broader spatial and temporal dimensions of the harm caused by environmental offences is a feature that distinguishes such conduct from more traditional crimes.¹²¹

Harm can be direct or indirect, point-source or diffuse, individual or cumulative, short-term or long-term. Environmental harm can exhibit latency. There can be a significant delay between conduct such as exposure and the manifestation of harm.¹²² Activities that contribute incrementally to the gradual deterioration of the environment, even when they cause no discernible direct harm to human interests, should also be treated seriously.¹²³

Harm needs also to be viewed in its broader context. Environmental crime can be part of a wider problem, with ramifications provincially, nationally and internationally. The conservation of biodiversity including threatened species, preservation of world heritage and climate change are examples of bigger picture issues.

The culpability of the defendant depends in part on the seriousness of the environmental harm. Sentencing courts have exercised their discretion in relation to penalty on the principle that the more serious the lasting environmental harm involved, the more serious the offence and, ordinarily, the higher the penalty.¹²⁴ If the harm is substantial, this objective circumstance is an aggravating factor.¹²⁵

¹¹⁷ For example, in *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 at 509 the impact on passive recreational uses of the stream was taken into account.

¹¹⁸ *Axer Pty Ltd v Environment Protection Authority* (1993) 113 LGERA 357 at 366 and *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34 (6 February 2006) at [175].

¹¹⁹ A number of courts have held that the concept of life extends beyond absence of physical elimination to the activity of living in an environment of a certain quality. The denial of a wholesome and ecologically sound environment is a deprivation of life: see *West Pakistan Salt Miners Labour Union v The Director, Industries and Mineral Development, Punjab, Lahore* 1994 SCMR 2061; *Zia v WAPDA* PLD 1994 SC 693; *Oposa v Secretary of the Department of Environment and Natural Resources* 33 ILM 173 (1994); *Waweru v Republic of Kenya*, High Court of Kenya, Misc. Civil Application No. 118 of 2004, 2 March 2006.

¹²⁰ *R v Yorkshire Water Services Ltd* [2002] 2 Cr App R (S) 13, [2002] Env LR 18 at [17].

¹²¹ R J Lazarus "Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law" (1995) 83 Geo LJ 2407 at 2420.

¹²² R J Lazarus, "Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law" (1995) 83 Geo LJ 2407 at 2421.

¹²³ J Swaigen and G Bunt, *Sentencing in Environmental Cases*, Law Reform Commission of Canada, Ottawa, 1985, p 4.

¹²⁴ *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 701; *R v Moore* [2003] 1 Qd R 205 at 208 [10], 210 [19]; *R v Yorkshire Water Services Ltd* [2002] 2 Cr App R(S)

Harm to an environment that has ecological, scientific, recreational, educational, amenity, aesthetic, cultural, heritage or other value will be more substantial than if the environment lacks such value. Ordinarily, it would be reasonable to expect that the higher the value of the environment, the more substantial will be the harm caused to that environment. This does not mean that an offender should be given any advantage by way of mitigation simply because the environment harmed by the offender's conduct was already disturbed or modified.¹²⁶ Indeed, a disturbed or modified environment might be less resilient to further disturbance caused by the offence.

The objective harmfulness of the offence can also be evaluated in terms of the concept of ecologically sustainable development. One of the elements or principles of ecologically sustainable development is that a person carrying out a development should bear the full costs of any damage caused, whether environmental, social or economic, to other persons or the environment. Because the damage caused is external to the person carrying out the development, the costs of such damage are referred to as external costs. Ecologically sustainable development promotes the internalisation of these external costs – the bringing back of these costs to the person carrying out the development. They become a cost of carrying out of the development and become reflected in the cost of goods or services provided.

Where the commission of an offence results in external costs (environmental, social or economic) being suffered, these costs contribute to the objective harmfulness of the offence. A court, in sentencing for the offence, can take into consideration these external costs. The greater the external costs are, the more substantial the harm and the greater the objective gravity of the offence will be. The greater the objective gravity of the offence, according to the principle of proportionality, the more severe the punishment should be.

The court may not be able, by its sentence, to capture all of the external costs. The sentence is bounded by the maximum statutory penalty and must reflect other sentencing considerations, including the personal factors favourable to the offender.

Nevertheless, the court may properly be able to reflect the external costs in its sentence and by that means, in part, bring back the external costs to the offender. In this way, the offender is made to pay, at least in part, for the costs of the damage caused or continuing to be caused, by the offence.

A court can bring back these external costs to the offender in a variety of ways. Where there is on-going environmental harm caused by the offender's conduct the court could make an order that the offender clean up any pollution and restore the environment as far as practicable to the condition it was in before being polluted, or

13; [2002] Env LR 18 at [17]; *Selwyn Mews Ltd v Auckland City Council*, (High Court of New Zealand, CRI-2003-404-159-161, 30 April 2004, Randerson J at [38]; *Auckland City Council v North Power Ltd* [2004] NZRMA 354 at 363 [35], [36], 370 [72], 371 [72].

¹²⁵ s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act* 1999.

¹²⁶ *State Pollution Control Commission v White Wings Ltd* (unreported, Land and Environment Court, No 50129 of 1991, Bignold J, 1 November 1991) at p 4; *Environment Protection Authority v Ecolab Pty Ltd* (2002) 123 LGERA 269 at 273 [14]; *Environment Protection Authority v Coggins* (2003) 126 LGERA 219 at 224 [18]; *Environment Protection Authority v Abigroup Contractors Pty Ltd* [2003] NSWLEC 342 (15 December 2003) at [24]; *Auckland City Council v North Power Ltd* [2004] NZRMA 354 at 363 [34]; *Environment Protection Authority v Arenco Pty Ltd* [2006] NSWLEC 244 (9 May 2006) at [26]; *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419 (10 July 2006) at [149], [157(a)]. See also P de Prez, "Excuses, excuses: The ritual trivialisation of environmental prosecutions" (2000) 12(1) *J Envtl L* 65 at 72-74.

pay for the costs of others doing so. Where irremediable harm has been caused by the offender's conduct, such as death of biota and damage to ecosystem structure and functioning, the court could fix a penalty that reflects and is proportionate to that harm.¹²⁷ The court could order reparation by way of ordering the offender to carry out a project for the restoration or enhancement of another environment or to pay an amount to an environmental trust or specified organisation for the purpose of a project for the restoration or enhancement of the environment. By these means, the offender is made to bear the costs of restoration and reparation of the environment harmed by the offender's conduct.

State of mind of offender

Many environmental offences are strict liability offences and hence mens rea is not an element of the offence.¹²⁸ Nevertheless, the state of mind of an offender at the time of the offence can have the effect of increasing the seriousness of the crime. A strict liability offence that is committed intentionally or negligently will be objectively more serious than one which is committed unintentionally or non-negligently.¹²⁹ The more culpable the state of mind, the more severe the punishment ought to be. Culpability turns on the offender's purpose, the extent of the offender's knowledge of the circumstances surrounding the conduct, the conduct itself, its results and the reason for the offender's behaviour.¹³⁰

A large measure of premeditation will make the offence more serious than if it is committed on the spur of the moment.¹³¹

A failure to heed advice or warnings, including from regulatory authorities, will be an aggravating feature.¹³²

Reasons for committing the offence

The criminality involved in the commission of the offence is to be measured not only by the seriousness of what actually occurred, but also by reference to the reasons for its occurrence.¹³³

¹²⁷ *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 at 502; *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34 (6 February 2006) at [15]; *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419 (10 July 2006) at [230].

¹²⁸ For example offences against s 125(1) of the *Environmental Planning and Assessment Act 1979* (NSW) and Tier 2 offences under the *Protection of the Environment Operations Act 1997* (NSW). As to the former, see *Power v Penthill House Pty Ltd* (1993) 80 LGERA 247 at 253 and as to the latter *Majury v Sunbeam Corporation Ltd* [1974] 1 NSWLR 659 at 774; *Cooper v ICI Operations Pty Ltd* (1987) 64 LGERA 58 at 65; *Tiger Nominees v State Pollution Control Commission* (1992) 25 NSWLR 715 at 719; *Australian Iron & Steel Pty Limited v Environment Protection Authority* (1992) 29 NSWLR 497 at 507; and *State Rail Authority (NSW) v Hunter Water Board* (1992) 28 NSWLR 721 at 722 (dealing with the previous s 16 of the *Clean Waters Act 1970* (NSW) which has become s 120(1) of the *Protection of the Environment Operations Act 1997* (NSW)).

¹²⁹ *Majury v Sunbeam Corporation Ltd* [1974] 1 NSWLR 659 at 664; *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 700; *Environment Protection Authority v Hochtief AG* [2006] NSWLEC 200 (28 April 2006); and *Gittany Constructions Pty Ltd v Sutherland Shire Council* [2006] NSWLEC 242 (10 May 2006) at [123].

¹³⁰ R J Lazarus, "Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law" (1995) 83 Geo LJ 2407 at 2443.

¹³¹ *R v Morabito* (1992) 62 A Crim R 82 at 86; *R v Bata Industries Ltd* (1992) 9 OR (3d) 329, 7 CELR (NS) 245 at [181]; *Dempsey v R* [2002] QCA 45 (22 February 2002).

¹³² *R v F Howe & Son* [1999] 2 All ER 249 at 254; *R v Yorkshire Water Services Ltd* [2002] 2 Cr App R (S) 13, [2002] Env LR 18 at [17]; *R v Bata Industries Ltd* (1992) 9 OR (3d) 329, 7 CELR (NS) 245 at [192].

¹³³ *Axer Pty Ltd v Environment Protection Authority* (1993) 113 LGERA 357 at 366; *Director-General National Parks and Wildlife v Wilkinson* [2002] NSWLEC 171 (27 September 2002) at [92]; *Bentley v*

The carrying out of an offence to make a profit, or to save incurring an expense or to avoid the cost of obtaining and implementing a statutory permission such as a development consent or environment protection licence increases the seriousness of the crime. Offenders should not profit from crime.¹³⁴

Foreseeability of risk of harm

The extent to which the offender could reasonably have foreseen the harm caused or likely to be caused to the environment by the commission of the offence is a relevant objective circumstance. This is required to be considered by a sentencing court for an offence against the *Protection of the Environment Operations Act 1997* (NSW).¹³⁵ However, more generally, it is a relevant objective circumstance for other offences.¹³⁶ The degree of risk and extent of the danger created by the offence will be relevant.¹³⁷

Practical measures to prevent risk of harm

The practical measures that could have been taken to prevent, control, abate or mitigate the environmental harm caused or likely to be caused in the environment by the commission of the offence is another relevant consideration. Again, this is required to be considered by a sentencing court for offences against the *Protection of the Environment Operations Act 1997* (NSW).¹³⁸ However, it is also relevant for other offences. An offence is objectively more serious if the commission of the offence and the risk of harm occasioned by the commission of the offence, are foreseeable and there are practical measures that could be taken to prevent, control, abate or mitigate the occurrence of the offence or the harm, but those practical measures are not taken.¹³⁹

Parliament imposed on persons a heavy burden to do everything possible to ensure they do not cause environmental harm.¹⁴⁰ Prudent persons ought to conduct ongoing risk assessments looking at not only the likelihood of events occurring that lead to environmental harm but also the extent of damage or possible damage if they

BGP Properties Pty Ltd [2006] NSWLEC 34 (6 February 2006) at [237]; and *Gittany Constructions Pty Ltd v Sutherland Shire Council* [2006] NSWLEC 242 (10 May 2006) at [140].

¹³⁴ *State Pollution Control Commission v T J Bryant Pty Ltd* [1991] NSWLEC 70 (11 June 1991); *Environment Protection Authority v Gardner* [1997] NSWLEC 169 (7 November 1997) at p 1; *R v F Howe & Son* [1999] 2 All ER 249 at 254; *R v Milford Haven Port Authority* [2000] JPL 943 at 950; *Environment Protection Authority v Australian Waste Recyclers 1 Pty Ltd* [2005] NSWLEC 739 (22 December 2005) at [97]-[99], [149] and [167]; *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34 (6 February 2006) at [238], [246] and [247]; *Cameron v Eurobodalla Shire Council* [2006] NSWLEC 47 (13 February 2006) at [70]; and *Gittany Constructions Pty Ltd v Sutherland Shire Council* [2006] NSWLEC 242 (10 May 2006) at [141]. See also C Hatton, P Castle and M Day, "The environment and the law: does our legal system deliver access to justice? A review" (2004) 6(4) *Environmental Law Review* 240 at 264 and M Watson "Environmental Offences: the Reality of Environmental Crime" (2005) 7(3) *Environmental Law Review* 190 at 199, 200.

¹³⁵ See s 241(1)(c) of the *Protection of the Environment Operations Act 1997*.

¹³⁶ *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 700.

¹³⁷ *R v F Howe & Son* [1999] 2 All ER 249 at 254.

¹³⁸ s 241(1)(b) of the *Protection of the Environment Operations Act 1997*.

¹³⁹ *Environment Protection Authority v Ramsay Food Processing Pty Ltd* (2003) 125 LGERA 369 at 378 [43]; *Environment Protection Authority v Warringah Shire Council (No. 2)* (2003) 129 LGERA 211 at 216 [14], [15]; *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34 (6 February 2006) at [228], [230], [231], [236]; and *Environment Protection Authority v Ballina Shire Council* [2006] NSWLEC 289 (5 May 2006) at [103].

¹⁴⁰ *Alphacell Ltd v Woodward* [1972] AC 824 at 849 per Lord Salmon; *R v Anglian Water Services Ltd* [2004] JPL 458 at 461 [15].

do occur.¹⁴¹ Prudent persons ought to respond to what the risk assessment reveals.¹⁴²

In assessing the gravity of the offence, it is often helpful to assess the degree to which the offender fell below the appropriate standard in failing to take practical measures.¹⁴³

Control over causes

Another relevant circumstance is the extent to which the offender had control over the causes that gave rise to the offence. Again, this is a mandatory sentencing consideration for offences against the *Protection of the Environment Operations Act 1997* (NSW).¹⁴⁴ However, it is relevant to other offences as well. An offender who did not have control over the causes that gave rise to the offence will obviously be less culpable than one who did have such control.

Complying with orders

Another relevant consideration is whether, in committing the offence, the offender was complying with orders from an employer or supervising employee.¹⁴⁵

Surrounding circumstances

The surrounding circumstances may also suggest that the offence committed by the offender was not an uncharacteristic aberration.¹⁴⁶ The offence may involve a series of criminal acts.¹⁴⁷ An offence that continues over a period may be more serious than an isolated incident.¹⁴⁸

Subjective circumstances of offender

Within the limits set by reference to the objective gravity of the offence, the court may take into account the favourable and unfavourable factors personal to the offender.¹⁴⁹ The subjective circumstances of an offender which may be considered include: the existence of or lack of prior criminality; the good character of the offender; the entry and timing of a plea of guilty; contrition and remorse expressed by the offender; the assistance or cooperation of the offender with authorities; any extra curial punishment suffered by the offender and the financial means of the offender.

Existence or lack of prior criminality

¹⁴¹ *R v Anglian Water Services Ltd* [2004] 1 Cr App R (s) 62, [2004] JPL 458 at [20].

¹⁴² *Express Ltd (trading as Express Dairies Distribution) v Environment Agency* [2005] 1 WLR 223 at 232 [24] and *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419 (10 July 2006) at [159], [163]-[172], [173], [176], [185], [224].

¹⁴³ *R v F Howe & Son* [1999] 2 All ER 249 at 254.

¹⁴⁴ s 241(1)(d) of the *Protection of the Environment Operations Act 1997*.

¹⁴⁵ s 241(1)(e) of the *Protection of the Environment Operations Act 1997*.

¹⁴⁶ *Veen v R (No 2)* (1988) 164 CLR 465 at 477 and *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 700.

¹⁴⁷ s 21A(2)(m) of the *Crimes (Sentencing Procedure) Act 1999*.

¹⁴⁸ *R v F Howe & Son* [1999] 2 All ER 249 at 254.

¹⁴⁹ *Veen v R (No 2)* (1988) 164 CLR 465 at 491.

Existence of or lack of prior criminality is a factor in sentencing.¹⁵⁰ The absence of prior convictions will usually attract more lenient punishment. Conversely, an offender with prior convictions will be treated more seriously and ordinarily will receive a heavier sentence.¹⁵¹

Prior criminality has been held not to be part of the objective circumstances of the offence. The boundaries of a proportionate sentence are set by the objective circumstances which do not encompass prior convictions.¹⁵² Prior convictions, therefore, cannot be used to impose a sentence which is greater than the upper boundary of a proportionate sentence set by the objective gravity of the offence.¹⁵³

This conclusion may not accord with the general community's view. If the general community were to be asked whether an offence committed by an offender who has previously been convicted for the same or similar offence is objectively worse and the offender more morally culpable than an offence committed by a first-time offender, the general community would probably answer "yes".¹⁵⁴

This is particularly so with environmental offences. For example, a pollution offence committed by a repeat polluter would be seen to be objectively more serious and the polluter more morally culpable than a pollution offence committed by a person who has never committed a pollution offence. However, currently, judicial authority is contrary to such a community view.

Nevertheless, prior criminality can still legitimately be taken into account in fixing where, within the boundary set by the objective circumstances, a sentence should lie. Prior criminality is relevant to show whether the offence is an uncharacteristic aberration or whether the offender has manifested a continuing attitude of disobedience to the law. If so, the purposes of retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted.¹⁵⁵

Where there is a prior criminal record, its context must be considered. A monopoly corporation (such as state run water, sewerage and waste corporations) or major industries can run large operations which necessarily and continuously interact with the environment. Accidents are likely to occur. With many environmental offences being strict liability, some prior convictions may be expected.¹⁵⁶ This is not to relieve such corporations of the obligation to take precautions to prevent accidents.¹⁵⁷ But it sets a context for consideration of the culpability of such corporations.

Prior good character of offender

¹⁵⁰ s 21A(2)(d) (existence of prior record is an aggravating factor) and s 21A(3)(e) (lack of prior criminal record is a mitigating factor) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW). See also *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 701.

¹⁵¹ *Weininger v R* (2003) 212 CLR 629 at 640 [32] and 649 [58].

¹⁵² *R v McNaughton* [2006] NSWCCA 242 (11 August 2006) at [24], [60], [73], [76], [81].

¹⁵³ *Veen v The Queen (No. 2)* (1988) 164 CLR 465 at 477; *Baumer v The Queen* (1988) 166 CLR 51 at 57-58.

¹⁵⁴ *R v McNaughton* [2006] NSWCCA 242 (11 August 2006) at [63].

¹⁵⁵ *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477; *R v McNaughton* [2006] NSWCCA 242 (11 August 2006) at [126].

¹⁵⁶ *Environment Protection Authority v BHP Steel (AIS) Pty Ltd* [1999] NSWLEC 197 (3 September 1999); *Environment Protection Authority v BHP Steel (AIS) Pty Ltd* [2000] NSWLEC 19 (8 February 2000); *R v Anglian Water Services Ltd* [2004] JPL 458 at 462 [18], 465 [30].

¹⁵⁷ *Axer Pty Ltd v Environment Protection Authority* (1993) 113 LGERA 357.

Prior good character is an established mitigating factor.¹⁵⁸ Good character can have both a negative and a positive aspect.¹⁵⁹ The negative aspect of good character can refer to the absence of prior convictions and otherwise not having previously engaged in other criminal conduct.¹⁶⁰ The positive aspect of good character can include a history of prior good works and contribution to the community.¹⁶¹ The reason is that a “morally good” person is less deserving of punishment for a particular offence than a “morally neutral or bad” person who has committed an identical offence.¹⁶²

Character refers to the inherent moral qualities of a person. Character is to be contrasted with reputation which refers to the public estimation or repute of a person, irrespective of the inherent moral qualities of that person.¹⁶³ A person’s character need not be seen in terms only of the polar opposites of good or bad character. People are not to be treated as one-dimensional personalities.¹⁶⁴

Good character is not a summation of acts alone, but rather relates to the quality of the offender as a person. The quality is to be judged by acts and motives, by behaviour and the moral and emotional situations accompanying that behaviour. However, character cannot always be estimated by one act or one class of act.¹⁶⁵

In considering an offender’s good character when sentencing, the court engages in a two stage process. First, the court determines whether the offender is of good character. In making that assessment, the court disregards the offences for which the offender is being sentenced. Secondly, if the offender is of otherwise good character the court must take that fact into account. The weight to be given to the fact will vary according to all of the circumstances of the case.¹⁶⁶ Less weight might be given to previous good character where the offence is not an isolated act, is part of a prolonged course of criminal activity or involves a series of crimes that are deliberately and carefully planned and executed.¹⁶⁷

Good character may operate to reduce the sentence which the objective facts of the crime would otherwise attract.¹⁶⁸ As with prior criminality, prior good character is not part of the objective circumstances of the offence.¹⁶⁹ Prior good character is relevant to where, within the boundary set by the objective circumstances, a sentence should lie.¹⁷⁰

¹⁵⁸ S 21A(3)(f) of the *Crimes (Sentencing Procedure) Act* 1999; *Ryan v The Queen* (2001) 206 CLR 267 at 278-279 [36]; *R v Ryan* (2003) 141 A Crim R 403 at 410 [42]-411[45]; *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419 (10 July 2006) at [198].

¹⁵⁹ *R v Levi*, unreported, NSWCCA 15 May 1997, p 5; *Ryan v The Queen* (2001) 206 CLR 267 at 276 [27].

¹⁶⁰ *Weininger v The Queen* (2003) 212 CLR 629 at 638 [25].

¹⁶¹ *R v Levi*, unreported, NSWCCA, 15 May 1997, p 5; *Ryan v The Queen* (2001) 206 CLR 267 at 276 [27].

¹⁶² *Ryan v The Queen* (2001) 206 CLR 267 at 276-277 [30], [31].

¹⁶³ *Melbourne v The Queen* (1999) 198 CLR 1 at 15 [33], 24 [64], [65], 26 [67]; *Ryan v The Queen* (2001) 206 CLR 287 at 278 [28].

¹⁶⁴ *Melbourne v The Queen* (1999) 198 CLR 1 at 15 [34], 16 [35], 24 [63], 25 [67], 55[152]; *Weininger v The Queen* (2003) 212 CLR 629 at 638 [25]; *Ryan v The Queen* (2001) 206 CLR 267 at 310 [144], [145].

¹⁶⁵ *Ex parte Tziniolis; Re Medical Practitioners Act* (1966) 67 SR (NSW) 448 at 475-476; *Melbourne v The Queen* (1999) 198 CLR 1 at 25 [66].

¹⁶⁶ *Ryan v The Queen* (2001) 206 CLR 267 at 278-279 [36] and *Lozanovski v R* [2006] NSWCCA 143 (5 May 2006) at [10], [11].

¹⁶⁷ *Ryan v The Queen* (2001) 206 CLR 267 at 317 [174]-318 [175].

¹⁶⁸ *Ryan v The Queen* (2001) 206 CLR 267 at 317 [174].

¹⁶⁹ *R v McNaughton* [2006] NSWCCA 242 (11 August 2006) at [17].

¹⁷⁰ *R v McNaughton* [2006] NSWCCA 242 (11 August 2006) at [26].

Typically persons who commit environmental offences are of good character. They very rarely have previously engaged in other criminal conduct and mostly do not have any prior convictions for environmental offences.

For corporations, the extent to which the corporation has endeavoured to be an environmentally responsible corporate citizen is relevant. This will include the extent to which a corporation has sought to comply with environmental laws, including the one breached, the adoption of appropriate in-house corporate environmental principles and the existence and implementation of an internal environmental compliance programme.¹⁷¹

Plea of guilty

The sentencing court is required to take into account the fact that an offender has pleaded guilty and the timing of the plea. As a consequence, the court may impose a lesser penalty than it would have otherwise imposed.¹⁷² In *R v Thomson; R v Houlton*,¹⁷³ the Court of Criminal Appeal of NSW gave a guideline judgment in respect of the discount to be given for a plea of guilty. A plea of guilty may have two elements: a utilitarian element and a remorse element.

The utilitarian element relates to the value that a plea of guilty yields to the administration of criminal justice. The utilitarian value to the criminal justice system for a plea of guilty was assessed to be in the range of 10-25% on sentence.¹⁷⁴

A primary consideration in determining where in the range a particular case should fall is the timing of the plea.¹⁷⁵ A late plea would merit a discount towards the lower end of the range.¹⁷⁶ However, the timing of the plea is not the only factor relevant to the assessment of the utilitarian value of a plea of guilty. A plea entered at the earliest available opportunity does not entitle an offender to a discount at the top of the range.¹⁷⁷

Other factors are also relevant to assessing the utilitarian value. One factor is the likely duration and/or complexity of the trial that has been avoided. Another factor is the potential cost of the trial, involving circumstances such as the need to transport witnesses long distances or assemble complex evidentiary material. If a trial would have not been long or complex and the cost would have been relatively moderate,

¹⁷¹ B Fisse, "Corporate Compliance Programmes: The Trade Practices Act and Beyond" [1989] 17 Aust Bus LR 357 at 369; Chester and Rowley, "Environmental Committees and Corporate Governance" [1992] International Business Lawyer 342; *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 at 502; *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419 (10 July 2006) at [199]. See also *Australian Competition & Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) ATPR 41-562.

¹⁷² ss 21A(3)(k) and s 22(1) of the *Crimes (Sentencing Procedure) Act* 1999.

¹⁷³ (2000) 49 NSWLR 383.

¹⁷⁴ *R v Thomson; R v Houlton* (2000) 49 NSWLR 383 at 419 [160]. The guideline judgment in *R v Thomson; R v Houlton* continues to have force and use in New South Wales despite the decisions of the High Court in *Wong v R* (2001) 207 CLR 584 and *R v Cameron* (2000) 209 CLR 339, due to s 22 of the *Crimes (Sentencing Procedure) Act* 1999: see *R v Sharma* (2002) 54 NSWLR 300 at 315 [67] – 316 [68].

¹⁷⁵ *R v Thomson; R v Houlton* (2000) 49 NSWLR 383 at 418 [154]-[149], [160]; *R v Carter* [2001] NSWCCA 245 at [14] and s 22(1)(b) of the *Crimes (Sentencing Procedure) Act* 1999.

¹⁷⁶ *R v Thomson; R v Houlton* (2000) 49 NSWLR 383 at 418 [155]; *R v Karacic* (2001) 121 A Crim R 7 at 11 [17]; *R v Stebbings* [2001] NSWCCA 262 (2 July 2001) at [24]; *R v Finnie* [2002] NSWCCA 533 (12 December 2002) at [63]; *R v MacDonnell* (2002) 128 A Crim R 44 at 51 [40]; *Environment Protection Authority v Australian Waste Recyclers 1 Pty Ltd* [2005] NSWLEC 739 (22 December 2005) at [163]; and *Byres v Leichhardt Municipal Council* [2006] NSWLEC 82 (13 February 2006) at [98].

¹⁷⁷ *R v Harmouche* (2005) 158 A Crim R 357 at 366 [39].

the utilitarian value of a guilty plea may be less than the maximum specified in the guideline.¹⁷⁸

The strength of the prosecution case is not relevant to determining the utilitarian value of a plea of guilty.¹⁷⁹

There may be a case where the criminality involved in the offence is so serious that, despite the utilitarian value of a plea of guilty, no discount or only partial discount should be allowed.¹⁸⁰

The remorse element relates to the individual offender. The plea of guilty may be a practical expression of the offender's genuine contrition and remorse. This remorse element needs to be taken into account independently of the utilitarian element. It has significant implications for other objectives of the sentencing process. Genuine remorse would indicate that the purpose of personal deterrence does not need to be given weight in the particular case. It also indicates that the prospects of rehabilitation are good.¹⁸¹

A plea of guilty is, of itself, equivocal with respect to remorse. A mere plea of guilty from a person caught red-handed is not evidence of remorse.¹⁸² A plea may be entered as an acceptance of the inevitable or in order to obtain such advantage as may be afforded in the circumstances. In such a case, a plea does not indicate genuine remorse or contrition.¹⁸³ The strength of the prosecution's case is relevant to the evaluation of remorse and the weight that should be given to that factor in determining the appropriate sentence.¹⁸⁴

A large majority of prosecutions for environmental offences do involve a plea of guilty, especially where the offences involve strict liability and evidentiary provisions facilitate proof of certain facts by the prosecutor.¹⁸⁵

Contrition and remorse

If an offender expresses contrition or remorse in respect of his or her conduct, the offender would be entitled to a further discount beyond that given for the utilitarian value of the guilty plea.¹⁸⁶

¹⁷⁸ *R v Heikkinen* [2006] NSWCCA 50 (8 March 2006) at [8], [9]. See also *R v Harmouche* (2005) 158 A Crim R 357 at 366 [39] - 367 [43] and *R v Stambolis* [2006] NSWCCA 56 (10 March 2006) at [11]-[13].

¹⁷⁹ *R v Sutton* [2004] NSWCCA 225 (6 July 2004) at [12]; *R v McNaughton* [2006] NSWCCA 242 (11 August 2006) at [46].

¹⁸⁰ *R v Kalache* (2000) 111 A Crim R 152 at 166 [38], 202 [200] - 203 [202].

¹⁸¹ *R v Thomson*; *R v Houlton* (2000) 49 NSWLR 383 at 412 [116].

¹⁸² *R v Power* [1999] NSWCCA 25 (5 March 1999) at [21]; *Cameron v Eurobodalla Shire Council* [2006] NSWLEC 47 (13 February 2006) at [94]; and *Byres v Leichhardt Municipal Council* [2006] NSWLEC 82 (13 February 2006) at [101].

¹⁸³ *R v Winchester* [1992] 58 A Crim R 345 at 350; *R v Thomson*, *R v Houlton* (2000) 49 NSWLR 383 at 412 [117], 416 [137]-417 [139]; *R v Kalache* (2000) 111 A Crim R 152 at 202 [199].

¹⁸⁴ *R v Sutton* [2004] NSWCCA 225 (6 July 2004) at [12]; *R v McNaughton* [2006] NSWCCA 242 (11 August 2006) at [46].

¹⁸⁵ Such as under the *Protection of the Environment Operations Act 1997* (NSW) where tier 2 pollution offences involve strict liability (s 114(2)), and the Act grants the prosecutor wide investigation powers (Ch 7) and facilitates proof by evidentiary provisions (Part 8.5).

¹⁸⁶ *Neal v R* (1982) 149 CLR 305 at 315; *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 700; *Environment Protection Authority v Ampol Ltd* (1995) 85 LGERA 443 at 447; *R v Kalache* (2000) 111 A Crim R 152 at 165 [30].

Contrition and remorse will be more readily shown by the offender taking actions rather than by offering smooth apologies through their legal representatives. Actions underlying genuine contrition and remorse may take at least four forms¹⁸⁷.

First, the speed and efficiency of action to rectify any harm caused or likely to continue to be caused by the commission of the offence is the clearest indication of contrition and remorse. Where it occurs it justifies a reduction in the sentence.¹⁸⁸

Secondly, voluntary reporting of the commission of the offence and any concomitant environmental harm to relevant authorities indicates a genuine desire to act responsibly. Environmental regulation depends upon the integrity of persons making full disclosure. Voluntarily reporting breaches should therefore be acknowledged as a mitigating circumstance by the courts in sentencing.¹⁸⁹

Thirdly, the taking of action to address the causes of the offence, such as designing and installing improved pollution prevention and control systems, also indicates a genuine desire to act responsibly.¹⁹⁰

Fourthly, the personal appearance of corporate executives in court and their personal evidence outlining the company's genuine regret and stating future plans to avoid repetition of such offences is an indication of genuine corporate contrition. Too often corporations appear solely through agents such as a lawyer, or through a lesser functionary of the company. This practice suggests that the company accords a lack of significance to the offence. If the court is to assess properly the degree of sanctions required to effect the full rehabilitation of the offending corporation, the governing or guiding minds of the company, such as senior executive officers, should be present and give evidence.¹⁹¹ If an offender appearing for sentence wishes to place evidence before the court designed to minimise the offender's criminality, it should be done directly and in a form which can be tested. Material which is not able to be tested will be treated with caution and will be entitled to less weight.¹⁹²

The failure of the offender to tell the truth mitigates against a conclusion of contrition and remorse.¹⁹³

¹⁸⁷ *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419 (10 July 2006) at [203]-[215].

¹⁸⁸ *Mickelberg* (1984) 13 A Crim R 365 at 370; s 21A3(i) of the *Crimes (Sentencing Procedure) Act* 1999; *R v United Keno Hill Mines Ltd* (1980) 1 YR 299; 10 CELR 43 at [24]; *R v Bata Industries Ltd* (1992) 9 OR (3d) 329, 7 CELR (NS) 245 at [193]; *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419 (10 July 2006) at [204].

¹⁸⁹ *R v United Keno Hill Mines Ltd* (1980) 1 YR 299; 10 CELR 43 at [24]; *R v Bata Industries Ltd* (1992) 9 OR (3d) 329, 7 CELR (NS) 245 at [193]; *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419 (10 July 2006) at [210].

¹⁹⁰ *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 700-701; *R v F Howe & Son* [1999] 2 All ER 249 at 254; *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419 (10 July 2006) at [212].

¹⁹¹ *R v United Keno Hill Mines Ltd* (1980) 1 YR 299; 10 CELR 43 at [26]; *R v Bata Industries Ltd* (1992) 9 OR (3d) 329, 7 CELR (NS) 245 at [193]-[195], [239]-[240]; *Environment Protection Authority v Coe Drilling Australia Pty Limited* [2005] NSWLEC 719 (5 December 2005) at [186]-[187]; and *Environment Protection Authority v Ballina Shire Council* [2006] NSWLEC 289 (5 May 2006) at [115]; *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419 (10 July 2006) at [214].

¹⁹² *R v Qutami* (2001) 127 A Crim R 369 at 377 [58], [59], and 380 [79]; *R v McGourty* [2002] NSWCCA 335 (13 August 2002) at [24], [25]; *R v Elfar* [2003] NSWCCA 358 (2 December 2003) at [24], [25], [29].

¹⁹³ *R v Power* [1999] NSWCCA 25 (5 March 1999) at [21]; *Cameron v Eurobodalla Shire Council* [2006] NSWLEC 47 (13 February 2006) at [94]; and *Environment Protection Authority v Ballina Shire Council* [2006] NSWLEC 289 (5 May 2006) at [116].

Assistance to authorities by the offender

The cooperativeness of the offender with relevant regulatory and law enforcement authorities is a matter to be taken into account when fixing penalties.¹⁹⁴ The court may impose a lesser penalty than it would otherwise impose on an offender, having regard to the degree to which the offender has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence concerned or any other offence.¹⁹⁵

The matters which the court must consider when deciding whether to impose the lesser penalty for an offence and the nature and extent of the penalty imposed include the significance and usefulness of the offender's assistance to the authorities concerned,¹⁹⁶ the truthfulness, completeness and reliability of any information provided by an offender,¹⁹⁷ the nature and extent of the offender's assistance or promised assistance,¹⁹⁸ the timeliness of the assistance or undertaking to assist¹⁹⁹ and whether the assistance or promised assistance concerns the offence for which the offender is being sentenced or an unrelated offence²⁰⁰.

However, a sentence cannot be reduced for this factor of assistance to authorities to such an extent that the sentence becomes unreasonably disproportionate to the nature and circumstances of the offence.²⁰¹

Typically, in environmental offences, assistance to authorities might involve the offender reporting the offence and its consequences, assisting with abatement, prevention and clean up of environmental harm caused by the offence, and assisting in the investigation of the offence committed by the offender and by any co-offenders, such as voluntarily participating in records of interviews and providing information and documents.

The offender's willingness to assist the authorities may form a complex of interrelated considerations with its plea of guilty and expressions of contrition and remorse.²⁰² For this reason, the factor of willingness to assist the authorities may be included as part of a single combined discount reflecting a guilty plea, contrition and remorse and cooperation with authorities.²⁰³

Extra curial punishment

In some circumstances, extra curial punishment that has been imposed on an offender as a result of committing an offence will be taken into consideration when determining appropriate sentence. Such extra curial punishment is usually inflicted by others and in the form of abuse, harassment, threats or injury, or actual injury to

¹⁹⁴ *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 700-701 and ss 21A(3)(m) and 23(1) of the *Crimes (Sentencing Procedure) Act* 1999.

¹⁹⁵ s 23(1) of the *Crimes (Sentencing Procedure) Act* 1999.

¹⁹⁶ s 23(2)(b) of the *Crimes (Sentencing Procedure) Act* 1999.

¹⁹⁷ s 23(2)(c) of the *Crimes (Sentencing Procedure) Act* 1999.

¹⁹⁸ s 23(2)(d) of the *Crimes (Sentencing Procedure) Act* 1999.

¹⁹⁹ s 23(2)(e) of the *Crimes (Sentencing Procedure) Act* 1999.

²⁰⁰ s 23(2)(i) of the *Crimes (Sentencing Procedure) Act* 1999.

²⁰¹ s 23(3) of the *Crimes (Sentencing Procedure) Act* 1999.

²⁰² *R v Gallagher* (1991) 23 NSWLR 220 at 228.

²⁰³ *R v Thomson*; *R v Houlton* (2000) 49 NSWLR 383 at 419 [160]; *R v El Hani* [2004] NSWCCA 162 (21 May 2004) at [65]-[69]; *R v A* [2004] NSWCCA 292 (16 December 2004) at [27]; *R v Waqa (No 2)* (2005) 156 A Crim R 454 at 457 [14], 458 [21] and [24]; and *Gittany Constructions Pty Ltd v Sutherland Shire Council* [2006] NSWLEC 242 (10 May 2006) at [165].

persons or property.²⁰⁴ The incurring and payment of interest on borrowings over a period longer than it would otherwise have been had the offender not committed the offence does not readily fall within the concept of extra curial punishment meted out by others so as to warrant a reduction in penalty.²⁰⁵

Financial means of the offender

In the exercise of a discretion to fix the amount of a fine, the court should consider the financial means of the offender to pay a fine from such information as is reasonably and practically available to the court.²⁰⁶

Once a determination has been made that a fine should be imposed the correct procedure in assessing the appropriate amount of the fine is to determine it by reference to the gravity of the offence for which it imposed. If the court is satisfied that the offender would be unable to pay the amount determined, the court may reduce the amount of the fine to take account of the offender's means and impecuniosity.²⁰⁷

The fine may be only part of the penalty imposed on the offender. Consideration can also be given to other monetary amounts the offender may be ordered to pay, including the prosecutor's legal costs of the proceedings.²⁰⁸

The means of the offender is applicable to individuals as well as to corporate offenders. However, the factor of hardship to an offender may be less relevant for a corporation than an individual.²⁰⁹

Difficulty is sometimes found in obtaining timely and accurate information about a corporate offender's means. The corporate offender who wishes to make a submission to the court about its ability to pay a fine ought provide its annual accounts and other financial information on which it intends to rely in good time before the hearing to the court and to the prosecutor. This will give the prosecutor the opportunity to assist the court should the court wish it. Usually accounts need to be considered with some care to avoid reaching a superficial and possibly erroneous conclusion. If accounts or other financial information are deliberately not supplied the court will be entitled to conclude that the company is in a position to pay any fine the court is minded to impose.²¹⁰

Largely indefinite financial circumstances should not be used to mitigate the fine to an appreciable extent.²¹¹

Reviewing the appropriate sentence

²⁰⁴ *R v Allpass* (1993) 72 A Crim R 561 at 566-567; *R v Daetz* (2003) 139 A Crim R 398 at 409 [57], 410 [62]-411 [64], [66] and [67]; and *R v Do* [2005] NSWCCA 258 (22 July 2005) at [26].

²⁰⁵ *Gittany Constructions Pty Ltd v Sutherland Shire Council* [2006] NSWLEC 242 (10 May 2006) at [175].

²⁰⁶ s 6 of the *Fines Act* 1996 (NSW).

²⁰⁷ *R v Rahme* (1989) 43 A Crim R 81 at 87.

²⁰⁸ *Environment Protection Authority v Barnes* [2006] NSWCCA 246 (17 August 2006) at [78], [88].

²⁰⁹ *Environment Protection Authority v Coe Drilling Australia Pty Ltd* [2005] NSWLEC 719 (5 December 2005) at [195]; *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34 (6 February 2006) at [274].

²¹⁰ *R v F Howe & Son* [1999] 2 All ER 249 at 254-255.

²¹¹ *Environment Protection Authority v Capdate Pty Ltd* (1993) 78 LGERA 349 at 353; *Environment Protection Authority v Coe Drilling Australia Pty Ltd* [2005] NSWLEC 719 (5 December 2005) at [191], [195]; *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34 (6 February 2006) at [275].

Consistency in sentencing

A relevant consideration in sentencing is the ascertainment of the existence of a general pattern of sentencing by criminal courts for offences such as the offence under consideration. The task of the sentencing court is to pursue the ideal of even-handedness in the matter of sentencing.²¹² Inconsistency in punishment leads to an erosion of public confidence and the integrity of the administration of justice.²¹³

However, care must be taken in the task of achieving consistency. There is always a difficulty in tempting to compare the penalty in one case with a penalty in another because of the wide divergence of facts and circumstances.²¹⁴ Each case is different and one case does not demonstrate the limits of a sentencing court's discretion.²¹⁵

The proper approach is for the court to look at whether the sentence is within the range appropriate to the gravity of the particular offence and to the subjective circumstances of the particular offender and not whether it is more severe or more lenient than some other sentence (other than that of a co-offender) which merely forms part of that range.²¹⁶

An extrinsic aid to assist the court with its tasks of ascertaining the range or pattern of sentences is sentencing statistics.²¹⁷ Sentencing statistics are maintained by the Judicial Commission of New South Wales under its Judicial Information Research System.²¹⁸ The system is being expanded to include sentences for environmental offences.

Totality principle

The totality principle is a principle of sentencing which must be applied when sentencing an offender who has committed more than one offence. The effect of the totality principle is to require the sentencing court which has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed, to review the aggregate sentence and consider whether the aggregate is "just and appropriate" and reflects the total criminality before the court.²¹⁹

To reflect the fact that a number of sentences are being imposed an appropriate aggregate may be reached by either making sentences wholly or partially concurrent or lowering the individual sentences below what would otherwise be appropriate.²²⁰

²¹² *R v Oliver* (1980) 7 A Crim R 174 at 177; *R v Visconti* [1982] 2 NSWLR 104 at 107.

²¹³ *Lowe v The Queen* (1984) 154 CLR 606 at 610-611; *R v Jurisic* (1998) 45 NSWLR 209 at 216; *R v Henry* (1999) 46 NSWLR 346 at 353 and *Wong v The Queen* (2001) 207 CLR 584 at 591 [6], [7].

²¹⁴ *Axer Pty Limited v Environment Protection Authority* (1993) 113 LGERA 357 at 365.

²¹⁵ *R v Stahl* [1999] NSWCCA 160 (26 May 1999) at [10]; *Cabonne Shire Council v Environment Protection Authority* (2001) 115 LGERA 304 at 312; *Environment Protection Authority v Barnes* [2006] NSWCCA (17 August 2006) at [79].

²¹⁶ *R v Morgan* (1993) 70 A Crim R 368 at 371 and *Capral Aluminium Ltd v WorkCover Authority of NSW* (2000) 49 NSWLR 610 at 641.

²¹⁷ *R v AEM Snr*; *R v KEM*; *R v MM* [2002] NSWCCA 58 at [10]; *R v Way* (2004) 60 NSWLR 168 at 192 [122].

²¹⁸ The Judicial Commission is constituted under the *Judicial Officers Act* 1986 (NSW). The Judicial Information Research System is established under s 8 of the Act. See *R v Bloomfield* (1998) 44 NSWLR 734 at 738-739.

²¹⁹ *Mill v The Queen* (1988) 166 CLR 59 at 62-63; *Pearce v The Queen* (1998) 194 CLR 610 at 624 [49]; *R v AEM Snr*; *R v KEM*; *R v MM* [2002] NSWCCA 58 (13 March 2002) at 70; and *R v Bahsa* (2003) 138 A Crim R 245 at [62], [63].

²²⁰ *Mill v The Queen* (1988) 166 CLR 59 at 63.

The court must first fix an appropriate sentence for each offence then consider questions of cumulation or concurrence as well as questions of totality.²²¹

Although the totality principle is applicable where the penalty is by way of fine,²²² it may not have the same force as it does in the case of the imposition of imprisonment where it has a special operation.²²³ In the case of fines, there is obviously no room for partial accumulation of sentences or concurrence. If the sentencing court believes the totality principle requires an adjustment to the fines that would otherwise be appropriate, the amount of each fine can be altered.²²⁴

In determining an appropriate sentence, the court must consider the need to uphold public confidence in the administration of justice. If sentences are reduced substantially, offenders may view that they can escape punishment for a deliberate series of discrete offences.²²⁵ In applying the totality principle, the court must avoid determining a sentence that is disproportionate to the seriousness of the offence.²²⁶

Parity principle

Where the court is sentencing co-offenders, the parity principle of sentencing is applied to ensure consistency or parity in the sentences given to the co-offenders.²²⁷

There is a danger in taking the principle that co-offenders should receive the same sentence too far. It applies if all other things are equal.²²⁸ There is no obligation to follow the principle of parity where the earlier sentence was manifestly inadequate or the differences between the two offenders justified the different result.²²⁹ The principle may also be difficult, if not impossible, to apply where co-offenders are charged with different offences, particularly where the nature of the offences is widely divergent.²³⁰

D SENTENCING OPTIONS

Effective attainment of the purposes of sentencing can be achieved by judicious selection from the sentencing options available for the offence in question.

Custodial sentence

A custodial sentence may be appropriate for the more serious environmental offences to achieve the purposes of retribution, denunciation, deterrence and incapacitation. A court must not sentence an offender to imprisonment unless it is

²²¹ *Pearce v The Queen* (1998) 194 CLR 610 at 624 [45]; *R v Wheeler* [2000] NSWCCA 34 (16 February 2000) at [31], [32] and *R v AEM Snr; R v KEM; R v MM* [2002] NSWCCA 58 (13 March 2002) at [64], [67]; *Johnson v R* (2004) 205 ALR 346 at 356 [26].

²²² *Sgroi v R* (1989) 40 A Crim R 197 at 203; *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 704.

²²³ *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 704.

²²⁴ *Environment Protection Authority v Barnes* [2006] NSWCCA 246 (17 August 2006) at [50].

²²⁵ *R v Wheeler* [2000] NSWCCA 34 (16 February 2000) at [36]-[37].

²²⁶ *Regina v A* [1999] NSWCCA 61 (30 March 1999) at [32].

²²⁷ *Postiglione v The Queen* (1997) 189 CLR 295 at 301-302, 309, 325, 338, 341.

²²⁸ *Doan (Chau Thi Bao)* (unreported, NSWCCA, 27 September 1996); *Steele (Robert Ernest)* (unreported, NSWCCA, 17 April 1997); and *O'Brien (Edward Paul)* (unreported, NSWCCA, 7 April 1997).

²²⁹ *R v Reid* [2000] NSWCCA 166 (5 May 2000) at [16]; *R v Glasby* (2000) 115 A Crim R 465 at 496 [160]; *R v SY* [2003] NSWCCA 291 (15 October 2003) at [81]; *R v Horne* [2004] NSWCCA 8 (19 March 2004) at [70].

²³⁰ *R v Formosa* [2005] NSWCCA 363 (27 October 2005), at [40].

satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.²³¹

Consideration of cases where a custodial sentence has been imposed for environmental offences illustrates circumstances where imprisonment has been considered the appropriate punishment to reflect the criminality involved.

In New South Wales, in *Environment Protection Authority v Gardner*,²³² the offender was convicted under s 5(1) of the *Environmental Offences and Penalties Act 1989*. The offender was found to have wilfully and deceptively pumped sewage into a river near oyster leases over a period of 118 weeks in order to save the expense of pumping it into a road tanker for proper disposal. The offender was sentenced to 12 months imprisonment (with a non-parole period of 9 months) and fined \$250,000 (the then maximum penalty).

In Queensland, in *R v Moore*,²³³ the offender was convicted of wilfully and unlawfully causing material environmental harm, contrary to s 437(1) of *Environment Protection Act 1994* (Qld). The offender was the executive officer of a company that caused heavy metals and toxic chemicals to enter waters with a potential adverse environmental harm. Section 493(2) provided that if a corporation commits an offence, the executive officer of the corporation also commits the offence. The offender was convicted on 8 counts. He was fined \$100,000 on one count and sentenced to between 9 and 18 months imprisonment on the other counts, to be served concurrently. The maximum penalties varied between the offences the subject of the counts. The most serious offence had a maximum penalty of a fine of \$312,375 or 5 years imprisonment and the others a lesser fine of \$150,000 or 2 years imprisonment. The head sentence of 18 months imprisonment was for the most serious offence. This reflected the totality of the offender's criminality. His conduct was reckless in the extreme, even contemptuous of the law. There was an extremely serious risk of harm to the sensitive creek environment. Not even the most basic safeguards were taken nor compliance with the Act attempted. Remediation orders were ignored twice. The offender had no remorse and continued to avoid obligations under the Act.²³⁴ The Court of Appeal held that "major" environmental offences particularly where there is a high degree of criminality involved because of the repetitive nature of the conduct, will call for the imposition of custodial sentences.²³⁵

In *Dempsey v R*,²³⁶ the offender cut down and removed 25 trees in an area of one hectare of world heritage listed, wet tropics rainforest. The trees were hundreds of years old and very large. The logs were sold at a public auction for \$45,000. The offender was convicted of destroying forest products contrary to s 56(1) of the *Wet Tropics World Heritage Protection and Management Act 1993* (Qld) and stealing with a circumstance of aggravation. The maximum penalty was a fine of \$225,000 and/or 2 years imprisonment. The offence was found to be premeditated, performed systematically and efficiently and elaborate efforts were made to avoid detection. Although the offender pleaded guilty eventually at the committal hearing, he initially denied any involvement in the commission of the offence and told false stories. The environmental harm was serious, not only to the trees cut down but also to the

²³¹ s 5(1) of the *Crimes (Sentencing Procedure) Act 1999*, *R v James* (1985) 14 A Crim R 364 and *R v O'Connor* (1986) 23 A Crim R 50 at 54-55.

²³² [1997] NSWLEC 169 (7 November 1997).

²³³ [2003] 1 Qd R 205.

²³⁴ *R v Moore* [2003] 1 Qd R 205 at 209 [13].

²³⁵ *R v Moore* [2003] 1 Qd R 205 at 211 [21], [23], [24].

²³⁶ [2002] QCA 45 (22 February 2002).

rainforest by the use of heavy machinery, causing soil disturbance, compaction and damage to immature plant species. The rainforest was of national and international significance and quite rare. The offender was sentenced to 12 months imprisonment.

The offence was held to be one in which the imposition of a custodial sentence may be an effective deterrent. Deterrence was an important factor. The offence was a serious, blatant and cynical act of environmental destruction for commercial gain.²³⁷ An actual period of prison custody was held to be likely to have a real deterrent effect on others minded to commit like offences over and beyond that in other cases. If offenders consider they might succeed in escaping with nothing more than a financial penalty, it may be that they would take the risk of doing so for the profit that appears to be recoverable from the offences committed.²³⁸

In New Zealand, in *R v Borrett*,²³⁹ the offenders carried out on their property illegal earthworks and bush clearance. The property was zoned to protect the natural landscape and areas of native vegetation. One of the offenders had a history of contravening local government requirements, having undertaken illegal earthworks and vegetation removal over a period of two and a half years. An interim enforcement order was obtained to halt these activities. The offenders knowingly contravened this order as well as other local government requirements. One of the offenders was sentenced to 20 weeks' imprisonment and ordered to pay costs of \$5,000. The maximum penalty for the offence was 2 years imprisonment or a fine of \$200,000. The sentencing judge concluded a sentence of imprisonment was appropriate because of the deliberate nature of the offences, the extent of the damage inflicted, the nature of the environment affected, the lengthy period of the offending and the offender's previous convictions. On appeal, the New Zealand Court of Appeal held the sentencing judge was entirely correct in determining that imprisonment was the appropriate response to the contempt shown by the offender. However, the Court held that what was required by the offending was a short prison sentence sufficient to make it clear to the offender that courts will not countenance behaviour such as his, but no more was required for this purpose. The original term of imprisonment of 20 weeks was therefore reduced to 12 weeks and the costs order was quashed.²⁴⁰

In *R v Conway*,²⁴¹ the offender conducted a business of wrecking and recycling motor vehicles. Over an extended period, the offender illegally discharged contaminants to land where they may have entered waters close to a wildlife refuge, deliberately failed to comply with abatement notices issued by the local government authority and deliberately contravened enforcement orders made by the Environment Court. The maximum penalty for the offences was a fine of \$200,000 or 2 years imprisonment. The sentencing judge sentenced the offender to 3 months imprisonment. The New Zealand Court of Appeal dismissed the offender's appeal against sentence. The sentencing goals of accountability for the harm done to the community, deterrence and denunciation were held to be applicable. These sentencing goals could not be met by a sentence other than imprisonment. A sentence of imprisonment would act as a deterrent to persistent offending by the offender and would deter others from regarding the economic penalty of a fine or

²³⁷ *Dempsey v R* [2002] QCA 45 (22 February 2002) per Davies JA.

²³⁸ *Dempsey v R* [2002] QCA 45 (22 February 2002) per McPherson JA.

²³⁹ [2004] NZRMA 248.

²⁴⁰ [2004] NZRMA 248 at 252 [20]-[22].

²⁴¹ [2005] NZRMA 274.

community work as being a risk worth taking to gain profit from illegal activities.²⁴² The term of 3 months imprisonment was upheld as appropriate.²⁴³

In England, in *R v Sissen*,²⁴⁴ an offender who imported illegally endangered parrots into the European Union and then into the United Kingdom was sentenced originally to imprisonment for 30 months, although this was reduced on appeal to 18 months taking into account the personal circumstances of the offender. The maximum penalty for the offence was 7 years imprisonment. The Court of Appeal held that the offence warranted a term of imprisonment. The Court noted that trade in endangered species was prohibited or restricted for good reason. Whether the offender's reason for the breach of the restriction was profit, obsession or private conservation, all contribute to the illegal market which underlies the capture of endangered species from the wild. The Court held the law was clear as to where the interests of conservation lie. The offences were serious. The Court noted an immediate custodial sentence was usually appropriate to mark their gravity and the need for deterrence. There was nothing wrong in principle with a sentence of 30 months for the offence. The offence involved a devious and elaborate scheme to smuggle birds into the country, including critically endangered species.²⁴⁵

In *R v Garrett*,²⁴⁶ the offender was sentenced to imprisonment for a term originally of 18 months (of a maximum of 2 years) but reduced to 12 months on appeal, for deliberate disposal of hazardous chemical waste which posed a high level of risk to the environment and the public.²⁴⁷

In the United States, custodial sentences for individuals and directors or managers of corporations are more frequently employed. The possibility that corporate officers are at risk of imprisonment for criminal liability has a deterrent effect and provides a greater incentive to ensure corporate compliance. Prison time, unlike fines, cannot be passed on as a cost of business to the customer.²⁴⁸

Non-custodial sentencing alternatives

Non-custodial sentencing alternatives include:

²⁴² [2005] NZRMA 274 at 286 [65], [66], 288 [71], [73].

²⁴³ [2005] NZRMA 274 at 276[6], 288 [74].

²⁴⁴ [2001] 1 WLR 902.

²⁴⁵ *R v Sissen* [2001] 1 WLR 902 at 917-918 [51].

²⁴⁶ [1997] 1 Cr App R (S) 109.

²⁴⁷ [1997] 1 Cr App R (S) 109 at 111, 112. Contrast *R v O'Brien and Enkel* [2000] Env LR 653 where the unlawful disposal of lorry tyres was seen to involve a low level of risk to the environment. This factor together with subjective factors favourable to the offender led the Court of Appeal to hold a sentence of imprisonment was not appropriate.

²⁴⁸ M W Schneider, "Criminal Enforcement of Federal Water Pollution Laws in an Era of Deregulation" (1982) 73 J Crim L & Criminology 642 at 668; E D Muchnicki, "Only Criminal Sanctions can Ensure Public Safety", *The Environment Forum* (May/June 1990), 31; J M Nolan and S K Stahl, "The Rules Have Changed, but the Game Remains the Same: Why the Government Has Turned to Criminal Prosecution as a Means of Enforcing Environmental Laws" (1990) 7 *Cooley L Rev* 407 at 410; S Hedman, "Expressive Functions of Criminal Sanctions in Environmental Law" (1991) 59 *Geo Wash L Rev* 889 at 894, 895; J M Strock, "Environmental Criminal Enforcement Priorities for the 1990's" (1991) 59 *Geo Wash L Rev* 916 at 916; J G Block, "Criminal Enforcement of Environmental Liability" (1992) 2 *Vill Envtl LJ* 33 at 35; G N Smith, "No Longer Just a Cost of Doing Business: Criminal Liability of Corporate Officials for Violations of the Clean Water Act and the Resource Conservation and Recovery Act" (1992) 53 *La L Rev* 119 at 126; J P Strom, "The United States Attorney's Policy towards Criminal Enforcement of Environmental Laws" (1993) 2 *SC Envtl LJ* 184 at 185-186; M K Minister, "Federal Facilities and the Deterrence Failure of Environmental Laws: The Case for Criminal Prosecution of Federal Employees" (1994) 18 *Harv Envtl L Rev* 137 at 146; K F Brickey, "Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory" (1996) 71 *Tul L Rev* 487.

- (a) community service orders;²⁴⁹
- (b) good behaviour bonds;²⁵⁰
- (c) dismissal of charges and conditional discharge of offender;²⁵¹
- (d) deferral of sentencing for rehabilitation, participation in an intervention program or other purposes;²⁵² and
- (e) suspended sentence of imprisonment.²⁵³

These alternatives may be appropriate where the primary sentencing purpose is rehabilitation. They will be less appropriate where the offence demands retribution, denunciation and deterrence²⁵⁴. These alternatives have been infrequently employed in sentencing for environmental offences.²⁵⁵

The most likely of the alternatives to be used is for a court that finds an offender guilty of an offence, without proceeding to conviction, to order that the relevant charge be dismissed²⁵⁶ or that the offender be conditionally discharged, such as on condition that the offender enter into a good behaviour bond²⁵⁷ or enter into an agreement to participate in an intervention program and to comply with any intervention plan arising out of the program.²⁵⁸

Such orders have been employed in cases where the offender, as a matter of practical reality, could not have done anything to ensure the offence did not occur.²⁵⁹ Otherwise, it is not commonly invoked.²⁶⁰

Fines

Fines are the most common sentencing option²⁶¹ and often the most appropriate penalty²⁶². The fine embodies the legislative view, based on community standards,

²⁴⁹ s 8 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

²⁵⁰ s 9 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and see G Zdenkowski, "Non-Financial Non-Custodial Sentencing Options in the *Crimes (Sentencing Procedure) Act 1999*", (2003) 6 TJR 189 at 191-198.

²⁵¹ s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) see G Zdenkowski, "Non-Financial Non-Custodial Sentencing Options in the *Crimes (Sentencing Procedure) Act 1999*", (2003) 6 TJR 189 at 199-204.

²⁵² s 11 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) see G Zdenkowski, "Non-Financial Non-Custodial Sentencing Options in the *Crimes (Sentencing Procedure) Act 1999*", (2003) 6 TJR 189 at 204-206 and N Cowdery, "Alternatives to Conventional Sentencing: Some Recent Developments" (2005) 7 TJR 365.

²⁵³ s 12 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) see G Zdenkowski, "Non-Financial Non-Custodial Sentencing Options in the *Crimes (Sentencing Procedure) Act 1999*", (2003) 6 TJR 189 at 207-214.

²⁵⁴ *R v Conway* [2005] NZRMA 274 at 285 [59], 286 [66], 288 [71], [72].

²⁵⁵ Examples of where an offender was sentenced to a period of community service are *Environment Protection Authority v White* (1996) 92 LGERA 264 at 273 and *Environment Protection Authority v Coggins* (2003) 126 LGERA 219 at 231 [58].

²⁵⁶ s 10(1)(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

²⁵⁷ s 10(1)(b) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

²⁵⁸ s 10(1)(c) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

²⁵⁹ Such as in cases involving pollution of waters from ships: *Thorneloe v Filipowski* (2001) 52 NSWLR 60; *Webb v Chung* [2002] NSWLEC 135 (22 August 2002); *Filipowski v Cadern Shipping Pty Ltd* [2005] NSWLEC 552 (7 October 2005). See also *Murray Irrigation Ltd v ICW Pty Ltd* [2006] NSWLEC 23 (20 January 2006).

²⁶⁰ See for example *Environment Protection Authority v Coe Drilling Australia Pty Ltd* [2005] NSWLEC 719 (5 December 2006) where a s 10 order was held to be inappropriate.

of the seriousness of criminal conduct. The maximum fine will be prescribed by the relevant statute. In some cases, the maximum penalty will be specified to be comprised of two components: the primary penalty for the commission of the offence, and an additional penalty. The additional penalty may be imposed for each day the offence continues in the case of a continuing offence, or for each particular item that makes up the commission of the offence (such as each plant or animal of a threatened species picked or harmed).²⁶³ Additional penalties are intended by parliament to make the total penalty proportionate to the duration or extent of the offence.²⁶⁴

Alternative sentencing options

A comparatively recent trend has been for the legislature to increase the range of sentencing options beyond the traditional penalties of imprisonment and fines. These options allow for tailor-made sentencing to fit the crime and the offender. The options vary between statutes, and are not all available to all courts. The options include the following types or orders.

Orders for restoration and prevention

The court may order the offender to take such steps to prevent, control, abate or mitigate any harm to the environment, make good any resulting environmental damage, or prevent the continuance or reoccurrence of the offence.²⁶⁵

Illustrations of orders for restoration and prevention include:

- (a) An order that the offender block all drains conveying polluted stormwater and ground water from the offender's premises to prevent the pollution of a river into which the drains flowed.²⁶⁶
- (b) An order that the offender cause to be prepared by an appropriately qualified expert independent of the offender and submit to the Environment Protection Authority, a report verifying that the recommendations of the Authority's expert to address the causes of the emission of odour that constituted the offence, have been implemented.²⁶⁷
- (c) An order that the offender remove waste (tyres and baled plastic) from the premises, dispose of the waste at a waste facility legally able to accept that type of waste, obtain receipts for the disposal of the waste from the waste facility which receives it, send the receipts to the Environment Protection Authority and not unlawfully dispose of any further waste on the premises.²⁶⁸

²⁶¹ C Abbot, "The Regulatory Enforcement of Pollution Control Laws: The Australian Experience", (2005) 17 J Envtl Law 161 at 170.

²⁶² *Selwyn Mews Ltd v Auckland City Council* (High Court of New Zealand, Auckland, CRI-2003-404-159-161, 30 April 2004, Randerson J) at [40].

²⁶³ Illustrations of additional penalties include s 126 of the *Environmental Planning and Assessment Act* 1979, s 123 of the *Protection of the Environment Operations Act* 1997 and s 118A of the *National Parks and Wildlife Act* 1974.

²⁶⁴ *Walker v Eves* (1976) 13 SASR 249 at 250; *Hemming v Neave and Neave* (1989) 51 SASR 427 at 428-429.

²⁶⁵ s 245 of the *Protection of the Environment Operations Act* 1997 (NSW).

²⁶⁶ *Environment Protection Authority v Iron Gates Pty Ltd* [1998] NSWLEC 123 (12 June 1998)

²⁶⁷ *Environment Protection Authority v Camilleri's Stock Feeds Pty Ltd* [1998] NSWLEC 221 (15 September 1998).

²⁶⁸ *Environment Protection Authority v Keogh* [1998] NSWLEC 225 (21 September 1998).

- (d) Orders that the offender undertake detailed remediation works to stabilise a large landfill, revegetate it, install a sediment and nutrient catch basin at the toe of the landfill and vegetate it with indigenous macrophyte plants, and then continue to inspect and maintain the remediation works for a period of 20 years.²⁶⁹
- (e) An order that the offender submit to the Environment Protection Authority a document specifying the system that had been installed for inspection of the effluent treatment system and the means by which the system is maintained and the procedures for recording incidents likely to cause water pollution.²⁷⁰
- (f) An order that the offender carry out works to construct a wash bay, a pumped connection to the sewer and a dedicated roofed and bunded chemical filling and emergency storage facility to prevent the reoccurrence of the offence of escape of poisonous substances.²⁷¹
- (g) An order that the corporate offender prepare and distribute to all its employees an environmental compliance notice to prevent reoccurrence of environmental offences.²⁷²
- (h) Where the offender was found guilty of an offence involving the destruction of or damage to a tree or vegetation, an order that the offender plant new trees and vegetation and maintain them to a mature growth.²⁷³

Orders for payment of costs, expenses and compensation

A public authority might incur costs and expenses in connection with the prevention, control, abatement or mitigation of any harm to the environment caused by the commission of the offence or making good any resulting damage. Equally, a person (including a public authority) might, by reason of the commission of the offence, suffer loss of or damage to property or might incur costs and expenses in preventing or mitigating, or in an attempt to prevent or mitigate, any such loss or damage. In these circumstances, the court may order the offender to pay to the public authority or person concerned, the costs and expenses so incurred, or compensation for the loss or damage so suffered.²⁷⁴

Illustrations of such orders include:

- (a) An order that the offender pay the clean up costs incurred by local government authorities in relation to an offence of water pollution prosecuted by the Environment Protection Authority.²⁷⁵

²⁶⁹ *Environment Protection Authority v Waight (No.3)* [2001] NSWLEC 126 (22 June 2001).

²⁷⁰ *Environment Protection Authority v Ramsey Food Processing Pty Ltd* (2003) 125 LGERA 369.

²⁷¹ *Environment Protection Authority v Warringah Golf Club (No 2)* (2003) 129 LGERA 211 at 217, 221.

²⁷² *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 at 510-511.

²⁷³ s 126(3) of the *Environmental Planning and Assessment Act 1979* (NSW) and *Ku-ring-gai Municipal Council v Gumland Property Holdings Pty Limited* [2001] NSWLEC 39 (13 December 2000); *City of Canada Bay v Frank Edward Bird (No. 2)* [2003] NSWLEC 152 (24 June 2003); *Sutherland Shire Council v Nustas* [2004] NSWLEC 608 (3 November 2004) and *Council of Camden v Runko* [2006] NSWLEC 486 (9 August 2006).

²⁷⁴ s 246 and s 247 of the *Protection of the Environment Operations Act 1997* (NSW).

²⁷⁵ *Environment Protection Authority v Warringah Golf Club (No 2)* (2003) 129 LGERA 211 at 217, 221.

- (b) An order that the offender, who was the tenant of land used unlawfully as a dumpsite for tyres, reimburse the landlord for its costs in removing the tyres.²⁷⁶
- (c) An order that the offender pay the tipping fees and disbursement for disposal of dead fish killed by the pollution incident.²⁷⁷

The amount of these costs orders will be relevant in determining the level of any term of imprisonment or the level of any fine.²⁷⁸ However, it would be a rare case in which only a civil-type order for costs, expenses or compensation was appropriate. If a prosecution is appropriate, having regard to the purposes of sentencing including retribution, denunciation and deterrence, a criminal sanction such as imprisonment or fine ordinarily should also be imposed.²⁷⁹

Orders to pay investigation costs

The court may order the offender to pay to a regulatory authority an amount for the costs and expenses it reasonably incurred during the investigation of the offence.²⁸⁰

The order may relate to costs and expenses incurred by the prosecuting authority²⁸¹ and also by other regulatory authorities.²⁸²

Monetary benefits penalty orders

The court may relieve the offender of any monetary benefits enjoyed as a result of the commission of the offence. The court may do this by ordering the offender to pay, as part of the penalty for committing the offence, an additional penalty of an amount that represents the amount of any monetary benefits acquired by the offender or accrued or accruing to the offender, as a result of the commission of the offence.²⁸³ Such an order accords with the principle that an offender should not profit from committing the offence.

Publication orders

The court may make various publication orders. The court may order an offender to:

- (a) take specified action to publicise the offence (including the circumstances of the offence) and its environmental and other consequences and any other

²⁷⁶ *Environment Protection Authority v Obaid* [2005] NSWLEC 171 (15 April 2005).

²⁷⁷ *Environment Protection Authority v Coggins* (2003) 126 LGERA 219 at 230, 232.

²⁷⁸ *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 at 505.

²⁷⁹ *Auckland City Council v North Power Ltd* [2004] NZRMA 354 at 360 [22], [23], 371 [78].

²⁸⁰ s 248(1) of the *Protection of the Environment Operations Act 1997* (NSW).

²⁸¹ Examples are *Environment Protection Authority v Integral Energy Australia Pty Ltd* [2006] NSWLEC 141 (28 March 2006) at [84]; *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419 (10 July 2006) at [246].

²⁸² An example is *Environment Protection Authority v Warringah Golf Club (No 2)* (2003) 129 LGERA 211 at 217, 221 where the investigation costs of local councils were reimbursed.

²⁸³ s 249 of the *Protection of the Environment Operations Act 1997* (NSW).

orders made against the offender.²⁸⁴ Typically, the specified action is to publish a notice in the newspaper stating these matters.²⁸⁵

- (b) 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. The specified action may include publication in any annual report or any other notice to shareholders of a company or the notification of persons aggrieved or affected by the offender's conduct.²⁸⁶

If an offender fails to comply with a publicity order, the prosecutor may take action to carry out the order as far as practicable²⁸⁷. Failure to comply with a publicity order is itself a contempt.²⁸⁸

Publicity orders are useful adjuncts to substantive criminal sanctions, increasing awareness and deterrence as well as holding the offender accountable for the offence.²⁸⁹

Environmental service orders

The court may order an offender to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit.²⁹⁰

²⁸⁴ s 250(1)(a) of the *Protection of the Environment Operations Act 1997* (NSW).

²⁸⁵ Cases in which the court has made orders under s 250(1)(a) of the *Protection of the Environment Operations Act 1997* include *Environment Protection Authority v HTT Huntley Heritage* [2003] NSWLEC 142 (20 June 2003); *Environment Protection Authority v Warringah Golf Club (No 2)* (2003) 129 LGERA 211; *Environment Protection Authority v Incitec Ltd* (2003) 131 LGERA 176; *Environment Protection Authority v Yolarno Pty Ltd* [2004] NSWLEC 765 (16 August 2004); *Environment Protection Authority v Metalcorp Recyclers Pty Ltd* (2004) 136 LGERA 125; *Environment Protection Authority v Biosolids Management Pty Ltd* (2004) 141 A Crim R 573; *Environment Protection Authority v Pannowitz; EPA v Steepleton Pty Limited* [2005] NSWLEC 175 (22 April 2005); *Environment Protection Authority v Orica Australia Pty Ltd* [2005] NSWLEC 621 (4 November 2005); *Environment Protection Authority v Integral Energy Australia Pty Ltd* [2006] NSWLEC 141 (28 March 2006); *Environment Protection Authority v Hochtief AG* [2006] NSWLEC 200 (28 April 2006); *Environment Protection Authority v Pannowitz* [2006] NSWLEC 219 (9 May 2006); *Environment Protection Authority v Arengo Pty Ltd* [2006] NSWLEC 244 (9 May 2006); *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419 (10 July 2006); *Environment Protection Authority v Shoalhaven Starches Pty Ltd* [2006] NSWLEC 685 (2 November 2006). In Victoria, see s 67AC(2)(a) of the *Environment Protection Act 1970*.

²⁸⁶ s 250(1)(b) of the *Protection of the Environment Operations Act 1997* (NSW). In *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419 (10 July 2006) the court ordered publication of a notice in the annual report. In *Environment Protection Authority v Shoalhaven Starches Pty Ltd* [2006] NSWLEC 685 (2 November 2006) at [55 (5)] the offender was ordered to place a readily accessible notice of the offence, convictions and sentence on its website for a period of not less than 3 months. In *R v Bata Industries Ltd* (1992) 9 OR (3d) 329, 7 CELR (NS) 245 at [217], [251] the court ordered publication of a notice on the front page of the corporate newsletter for international distribution the facts leading to a conviction and details of the penalties. In Victoria, see s 67AC(2)(b) of the *Environment Protection Act 1970*.

²⁸⁷ s 250(3) of the *Protection of the Environment Operations Act 1997* (NSW).

²⁸⁸ In *Environment Protection Authority v Pannowitz* [2006] NSWLEC 219 (9 May 2006), the offender was ordered to publish a specified notice in a specified newspaper. The offender published a notice but it differed from the notice ordered in a number of respects, including it was published on a different page, it was a quarter of the size, and it included words not required. Collectively these acts amounted to an interference with the course of justice as they undermined, frustrated and interfered with the Court's publication order. Through these acts the offender committed a contempt of court: at [77].

²⁸⁹ See R Martin, "Alternative sentencing in environment protection: Making the punishment fit the crime" (2003) 77 (7) *Law Institute Journal* 33 at 35 and C Abbot, "The Regulatory Enforcement of Pollution Control Laws: The Australian Experience" (2005) 17 *J Env'tl L* 161 at 174, 175. See further the text above corresponding with footnotes 32-44.

Illustrations of environmental service orders made by the court include:

- (a) An order that the offender, within 12 months and in consultation with a university and a land care organisation, carry out specified projects to a value of \$20,000 for the restoration or enhancement of the environment, including undertaking works to stabilise levee banks and river banks in a specified degraded riverine environment, remove noxious weeds and alien species and plant native species in the riverine environment.²⁹¹
- (b) An order that the offender, within 12 months, undertake an assessment of ways of reducing greenhouse gas emissions from the offender's coal-fuelled plant to a level at or below 108% of the estimated level emitted from the premises 10 years before, through its redesign and its replacement with a gas fuel plant.²⁹²
- (c) An order that the offender within a specified time period carry out an environmental restoration project to the amount of \$30,000 along the bed and banks of a specified creek.²⁹³
- (d) An order that the offender within a specified time period ensure the carrying out of the planting of at least 4,500 trees along a road reserve to the amount of \$32,000 (the tree planting was proposed to be carried out by a local government authority in whom was vested the road as the paid contractor of the offender).²⁹⁴
- (e) An order that the offender erect a fence and gate along the common boundary of the offender's premises and a nature reserve (to protect the wetlands of the nature reserve from stock) to the amount of \$20,000.²⁹⁵

If an environmental service order is to be made, a publication order generally should also be made. It is important to publicise to the community at the time the environmental service order is made that the works being carried out are being undertaken as a result of the offender committing an offence and not for other reasons, such as the offender being an altruistic citizen.

Relevant factors to determining the appropriateness of a project for a proposed environmental service order include whether the project has easily measured outcomes and is able to be readily administered and supervised.²⁹⁶

Environmental audit orders

The court may order an offender to carry out a specified environmental audit of activities carried on by that person.²⁹⁷ The orders can relate not only to the premises

²⁹⁰ s 250(1)(c) of the *Protection of the Environment Operations Act 1997* (NSW) and s 67AC(2)(c) of the *Environment Protection Act 1970* (Vic). See C Abbot, "The Regulatory Enforcement of Pollution Control Laws: The Australian Experience" (2005) 17 *J Env'tl L* 161 at 176,177.

²⁹¹ *Environment Protection Authority v Simplot Australia Pty Ltd* [2001] NSWLEC 264 (25 October 2001) at [24].

²⁹² *Environment Protection Authority v Simplot Australia Pty Ltd* [2001] NSWLEC 264 (25 October 2001) at [25].

²⁹³ *Environment Protection Authority v Yolarno Pty Ltd* [2004] NSWLEC 765 (17 August 2004) at [12].

²⁹⁴ *Environment Protection Authority v Cargill Australia Ltd (No 2)* [2004] NSWLEC 421 (20 July 2004) at [6].

²⁹⁵ *Environment Protection Authority v Slade* [2004] NSWLEC 773 (16 August 2004) at [21], [35].

²⁹⁶ EPA Guidelines for Seeking Environmental Court Orders, 22 June 2004.

and the activities involved in the offence but also other premises and activities of the offender. The purpose of these orders is to audit the offender's operations to determine whether the offender's operations lack essential environment protection systems or have serious ongoing weaknesses and if so, to identify measures that ought be taken to modify the operations so as to prevent a reoccurrence of the offence²⁹⁸.

Payment into environmental trust

The court may order an offender to pay a specified amount to an environmental trust²⁹⁹, or a specified environmental organisation, for the purposes of a specified project for the restoration or enhancement of the environment or for general environmental purposes.³⁰⁰

Illustrations of such orders include:

- (a) An order that the offender pay a government authority (Mineral Resources NSW) the amount of \$26,000 to be used for the erosion and sediment control project at an abandoned silver mine.³⁰¹
- (b) An order that the offender pay a local government authority the amount of \$77,000 to be used for the restoration of a wetland in the local government area.³⁰²

Order to attend training

The court may order an offender to attend, or to cause an employee or employees or a contractor of the offender to attend, a training or other course specified by the court.³⁰³

Order to establish training course

The court may order an offender to establish, for employees or contractors of the offender, a training course of a kind specified by the court³⁰⁴.

Order to provide financial assurance

If the Environment Protection Authority is a party to the proceedings, the court may order an offender to provide a financial assurance, of a form and amount specified by the court, to the Environment Protection Authority, if the court orders that offender to carry out a specified work program for the restoration or enhancement of the environment.³⁰⁵

²⁹⁷ s 250(1)(d) of the *Protection of the Environment Operations Act 1997* (NSW) and in Victoria see s 67AC (2)(d) of the *Environment Protection Act 1970* (Vic). See C Abbot, "The Regulatory Enforcement of Pollution Control Laws: The Australian Experience" (2005) 17 J Evtl L 161 at 177, 178.

²⁹⁸ An illustration of an environmental audit order is in *Environment Protection Authority v Shoalhaven Starches Pty Ltd* [2006] NSELEC 685 (2 November 2006) at [53], [55 (6)] and Annexure B.

²⁹⁹ Such as the Environmental Trust established under the *Environmental Trust Act 1998* (NSW).

³⁰⁰ s 250(1)(e) of the *Protection of the Environment Operations Act 1997* (NSW).

³⁰¹ *Environment Protection Authority v Arenco Pty Ltd* [2006] NSWLEC 244 (9 May 2006) at [54], [55], [57].

³⁰² *Environment Protection Authority v Caltex Refineries (NSW) Pty Ltd* [2006] NSWLEC 335 (30 June 2006) at [87] and subsequent order under s 250(1)(e) made on 28 July 2006.

³⁰³ s 250(1)(f) of the *Protection of the Environment Operations Act 1997* (NSW).

³⁰⁴ s 250(1)(g) of the *Protection of the Environment Operations Act 1997* (NSW).

³⁰⁵ s 250(1)(h) of the *Protection of the Environment Operations Act 1997* (NSW).

Conclusion

Sentencing for environmental offences, as for any offence, requires careful consideration of the purposes of sentencing. I have explained the primary purposes of sentencing and their relevance to environmental offences.

Retribution has, at its core, morality. This is relevant to environmental offences. Environmental offences are crimes; they are not mere administrative breaches.³⁰⁶

Crimes against the environment are rightly viewed by the community as morally repugnant. Persons who commit environmental crime ought to be punished, and punished in proportion to the gravity of the crime. Persons who profit from environmental crime have been unjustly enriched. That too offends the community's sense of fairness.

The sentence of the court is also an important denunciation of the criminal conduct.

Other purposes have a utilitarian aim. Deterrence, protection of the community and rehabilitation seek to prevent the commission of crime, both by the offender and by others who might be tempted. Prevention is especially important for environmental offences. The axiom "prevention is better than cure" is apt for the protection of environment. Principles of ecologically sustainable development, especially the precautionary principle, are based on this axiom.

These purposes achieve prevention in different ways. Deterrence will always be relevant. The experience with white-collar crime (in which category it is reasonable to include most environmental offences) is that deterrence sentences are effective. Publicity of the sentence will assist deterrence. Protection of the community through incapacitation of the offender, such as revocation of the offender's licence or ability to re-offend, may be appropriate for persistent offenders. Rehabilitation may be appropriate for offenders ill-educated in relation to the need for and means of environmental protection. Orders for compulsory environmental education and training may achieve this goal.

Restoration and reparation have, evidently, a restorative aim. Although it is better to prevent environmental degradation than to endeavour to repair it, there is still a need, if environmental degradation occurs, to restore and repair the environment affected. Orders for restoration and reparation of the environment harmed by an offence achieve this goal.

Reference to the purposes of sentencing assist the court in explicating the rationale for sentencing and making principled sentencing decisions.

The considerations a court should take into account in sentencing reflect the different purposes of sentencing.

Circumstances establishing the objective gravity of the offence are relevant to the purposes of retribution for and denunciation of the conduct constituting the offence and of general deterrence of others who might be tempted to commit the kind of offence committed by the offender. Circumstances personal to the offender are relevant to the purposes of specific deterrence of the offender, protection of the community from the offender and rehabilitation of the offender. Circumstances

³⁰⁶ *R v United Keno Hill Mines Ltd* (1980) 1 YR 299, 10 CELR 43 at [9].

establishing the harm caused by the offence are relevant to the purposes of restoration and reparation.

The weight that ought to be assigned to these sentencing considerations will be in the discretion of the sentencing court, although such discretion is to be exercised judicially and within certain parameters. The parameters include those set by the legislature in sentencing procedure statutes³⁰⁷ as well as by appellate criminal courts. An example of the latter is the principle of proportionality that requires a sentence of the court to reflect the objective circumstances of the offence, as well as the subjective circumstances of the offender.³⁰⁸

These considerations structure the exercise of the sentencing discretion of the court. They focus attention on matters relevant to sentencing and reduce the risk of arbitrariness and inconsistency caused by ignoring relevant matters. When the considerations are referred to in the court's decision on sentence, they improve transparency and accountability of the sentencing process.

Effective attainment of the purposes of sentencing can also be achieved by judicious selection from the sentencing options available for the offence in question. Apart from the traditional penalties of imprisonment and fines, other sentencing options are increasingly available. These options allow punishment to be tailored to fit the offence and the offender.

Taken together, reference by a sentencing court to the purposes of sentencing and to the various sentencing considerations will assist the court in explicating the rationale for sentencing and contribute to a principled approach to sentencing for environmental offences. It should also promote sentencing outcomes that are just and fit the crime.

³⁰⁷ Eg *Crimes (Sentencing Procedure) Act 1999 (NSW)* and *Protection of the Environment Operations Act 1997 (NSW)*, s 241.

³⁰⁸ *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472.