

Who really pays for environmental crime?

Sentencing in Environmental
Prosecutions

Introduction

Environmental offences have been created by legislation by the Commonwealth and all States and Territories.

- *Environment Protection and Biodiversity Conservation Act 1999* (C'wlth)
- *Waste Management and Pollution Control Act 1998* (NT)
- *Environment Protection Act 1997* (ACT)
- *Environment Protection Act 1970* (Vic)
- *Environment Protection Act 1993* (SA)
- *Protection of the Environment Operations Act 1997* (NSW)
- *Environmental Management and Pollution Control Act 1994* (Tas)
- *Environment Protection Act 1994* (Qld)
- *Environment Protection Act 1986* (WA)

These are the general Acts. All jurisdictions have additional Acts which create environmental offences, eg, Fisheries Act, National Parks and Wildlife Act, Native Vegetation Act, Customs Act etc

This presentation will discuss:

- the purpose of sentencing
- the factors to take into account when sentencing
- innovative sentencing options
- the parallel civil penalty system
- practical difficulties in sentencing,

leading to a finding as to who pays for environmental crime.

What is Environmental Crime

- Pollution or other contamination of air, land or water
- Illegal discharge and dumping of, or trade in, hazardous and other regulated waste
- Illegal trade in ozone depleting substances
- Illegal fishing
- Illegal trade in protected flora and fauna and other harm to biodiversity
- Illegal logging and timber trade
- Illegal native vegetation clearance
- Water theft

*Samantha Bricknell, Environmental Crime in Australia: A/C Report 109
(Australian Government, Australian Institute of Criminology, 2010)*

- Offences under planning and heritage legislation
- Contempt of court in relation to any of the above subject matter

The Purpose of Sentencing

General

- Deterrence
 - both of the offender and of others who may in the future consider offending of this kind
- Protection of the Community
- Retribution
 - holding the offender accountable for the breaching of community standards
- Denunciation
 - impressing upon the offender and the community the blameworthiness of the offence
- Rehabilitation
- Restoration and reparation
 - recognising and addressing the harm done to victims and the community

Factors taken into account when sentencing

General

- objective gravity of the offence
- nature of the offence
- maximum penalty
- prevalence of the offence
- objective harmfulness of the offence (where not an element of the offence)
- state of mind of the offender (where not an element of the offence)
- reasons for committing the offence
- foreseeability of the risk of harm
- practical measures to prevent the risk of harm
- control over causes
- whether the offender was complying with orders from a supervisor or employer
- surrounding circumstances (eg, was this an uncharacteristic aberration or part of a criminal course of conduct)

Factors taken into account when sentencing

continued

- subjective circumstances of the offender
- existence or lack of prior criminality
- prior character of offender
- plea of guilty
- contrition and remorse
- assistance rendered to the authorities by the offender
- extra curial punishment ie, punishment such as abuse or threats inflicted on the offender as a result of the offending or penalties or costs paid in an administrative process
- financial means of the offender

Final Steps

- consistency in sentencing
- the totality principle (where an offender is being sentence for more than one offence, to ensure that the aggregate sentence is just and appropriate)
- the parity principle (where co-offenders are being sentenced - if there is a significant difference between the sentences, the reasons for that should be cogent and clearly explained)
- in some jurisdictions, a reduction in sentence on account of the timing of a plea of guilty

See Brian Preston "Principled Sentencing for Environmental Offences"
(paper presented at the 4th International IVCN Academy of Environmental Law
Colloquium White Plains New York 16-20 October 2006)

Specific to environmental offences

- concepts of “harm” are different from general criminal law because the impact primarily being measured is the impact upon the air, soil, water, flora or fauna which has been harmed. The impact of that harm on the people who interact with that environment is also relevant
- the offender may have been called upon to render assistance to the authorities which may have been extensive and expensive, eg, the rehabilitation of contaminated land
- the reasons for committing the offence have a distinctive character in some environmental offences, eg, where the reason is for financial gain or commercial benefit

Factors which are not directly relevant to sentencing

In a sense, everything about the defendant is relevant to sentencing, however, the following factors should not assume any prominence in the sentencing balancing exercise:

- how traumatised the defendant is about experiencing the process of being prosecuted
- the allegedly uneven exercise of prosecutorial discretion

Sentences

- The most serious environmental crimes in all jurisdictions provide for imprisonment as a sentencing option
- Imprisonment is also available as a sentencing option in actions for contempt of court. Contempt actions are not infrequently brought when an offender repeatedly breaches civil enforcement orders requiring him or her to remediate some breach of an environmental statute
- A fine is the most common basic penalty

Innovative sentencing options

Almost all Australian jurisdictions provides for a range of environmental-crime-specific sentencing options. These include orders:

- that the offender publicise the offence in a specified form, possibly including the environmental consequences resulting from the offence, any penalties imposed or other orders
- that the offender notify a specified class of people (eg, shareholders) of the offence, its environmental consequences etc
- that the offender pay compensation
- that the offender carry out a specified project for the restoration or enhancement of the environment in a public benefit (even if the project is unrelated to the offence)
- that an environmental audit of the offender's activities be conducted
- licences or approvals may be cancelled

Not all of these options are provided for in all jurisdictions

Civil penalty system

The Commonwealth provides for a civil penalty regime in the *Environment Protection and Biodiversity Conservation Act 1999 (C'wlth)*.

The States and the Territories have followed suit. The regimes vary. Some or all provide for:

- a requirement (by notice) that an activity which is causing environmental harm or nuisance cease
- a requirement that the conditions of a licence or approval be adhered to and that a breach of those conditions ceases
- a requirement that compensation be paid
- audits and other programs may be imposed
- a civil penalty (an administratively imposed fine)

Most of these administrative orders are subject to a right of appeal.

A civil process is independent of a prosecution and may proceed before, during or after a prosecution. If civil penalties are imposed prior to sentencing in a related prosecution, the civil penalty should be taken into account. There may be a need to co-ordinate the two processes in time in the interests of justice.

Practical difficulties in sentencing

- deficiencies in the information provided about the offence and the offender
- mental illness of the offender
- companies which go into liquidation - see s.471B *Corporations Act 2001*
- cultural issues

Conclusion

The answer to the question "*Who really pays for environmental crime?*" is:-

- sometimes the offender
- sometimes the ratepayer
- sometimes the taxpayer
- often all three