Articles

ENCOURAGING RESTORATIVE JUSTICE IN ENVIRONMENTAL CRIME

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I. INTRODUCTION

Modern environmental legislation has evolved to better protect the environment than traditional common law principles based largely on the protection of individual property rights. Greater community concern about the importance of the natural and built environment in its own right and as a benefit to civil society drove government legislative action in many countries. Most early environmental laws in Australia were enacted in the 1970s and since then many kinds of statutory environmental crimes now result from harming or destroying the natural and built environments.

[1] Current environmental issues including the impact of climate change, the ongoing drought in southeast Australia and the acute water crisis in the Murray-Darling Basin heighten the importance of the enforcement of environmental laws.

Environmental crime includes water pollution, air pollution and land contamination. It encompasses illegal land clearing resulting in the destruction of habitat and important ecological communities and destruction of fish habitat in rivers and streams to name some other examples. The destruction of cultural heritage both indigenous and non-indigenous is also an environmental crime. Given this diverse range of offences this paper explores whether a restorative justice approach should be a greater part of the sentencing response to environmental crimes.

The concept of restorative justice and its application is discussed and the benefits of applying such an approach to environmental crime are outlined. The philosophical and practical question of who represents the environment is considered. The current utilisation of restorative justice processes and outcomes as a response to environmental crime in the Australian states of New South Wales (NSW) and Victoria and in New Zealand is considered. Issues in applying restorative justice in practice are identified and potential approaches canvassed. Overall, it is

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[1] Samantha Bricknell, 'Environmental Crime in Australia' (Research and Policy Series No 109, Australian Institute of Criminology Reports, 2010) iii <https://aic.gov.au/publications/rpp/rpp109>.

concluded that restorative justice processes and outcomes have the potential to enable more just outcomes for environmental offences.[2]

The three jurisdictions selected demonstrate the application of restorative justice approaches, to varying degrees, by courts and regulatory agencies. Recent developments in the Land and Environment Court of NSW (LEC NSW) where the author sits as a judge prompted consideration of NSW and Victoria, where the regulator has adopted restorative justice outcomes for a number of years.[3] New Zealand has adopted restorative justice approaches in many criminal law areas for decades. It has the most comprehensive approach in its sentencing laws and practice, including in environmental crime, compared to Australian jurisdictions and is therefore useful to consider as a best practice benchmark.

II. WHAT IS RESTORATIVE JUSTICE?

There is no single authoritative definition of restorative justice.[4] The United Nations Office on Drugs and Crime ('UNODC') notes in its comprehensive 2006 publication, *Handbook on Restorative Justice Programmes*, restorative justice 'is an evolving concept that has given rise to different interpretation in different countries, one around which there is not always a perfect consensus.'[5]

One of the most widely accepted definitions is that advanced by Tony Marshall. Restorative justice is understood as 'a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future'.[6] The UNODC defines restorative justice as 'a process for resolving crime by focussing on redressing the harm done to the victims, holding offenders accountable for their actions and, often also, engaging the community in the resolution of that conflict.'[7]

The key characteristics of restorative justice are well recognised. First, the restorative justice process is a tripartite response to crime, engaging the offender, the victim and the community, in the resolution or aftermath of the crime. Second, restorative justice is a process involving the offender, the victim and the community which culminates in a tangible outcome. Types of processes recognised as promoting restorative justice include victim-offender mediation, community and family group conferencing, circle sentencing, peacemaking circles, and reparative probation and community boards and panels.[8] Third, the parties collectively resolve the issues arising from the offence. Each party must be identified and willingly participate in

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[2] See generally the comprehensive paper by Justice Brian Preston, Chief Judge of the NSWLEC, 'The Use of Restorative Justice for Environmental Crime' (2011) 35 *Criminal Law Journal* 136.
[3] The Australian Capital Territory government passed the Crimes (Restorative Justice) Act 2004 (ACT). That Act is not considered in this article.
[4] United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (New York, 2006) 6; Michael S King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review* 1096, 1102.
[5] UNODC (n 3).
[6] Tony F Marshall, 'The Evolution of Restorative Justice in Britain' (1996) 4(4) *European Journal of Criminal Policy and Research* 21, 37; Jacqueline Joudo Larsen, 'Restorative Justice in the Australian Criminal Justice System' (Research and Public Policy Series No 127, Australian Institute of Criminology, 2014) vi < https://aic.gov.au/publications/rpp/rpp127>; King (n 3).
[7] UNODC (n 4).
[8] UNODC (n 4) 14-15.

achieving a resolution. In part, this means that an offender must take responsibility for their actions and accept their guilt. Fourth, the focus of restorative justice processes and outcomes is on redressing the harm caused by the offence, promoting healing over retribution.

Engaging in a restorative justice process gives voice to those victims who are impacted by the commission of a crime but who have traditionally been excluded from its resolution. Any outcomes which may emerge from such a process may enable a wider response to all the impacts of a crime than the traditional sentencing process.

A number of authors have discussed the various stages in which it may be appropriate to engage in a restorative justice process.[9] In summary, the restorative justice process can take place as part of a diversion scheme either before the offender is charged, or after the offender has been charged and the criminal justice system has been engaged. Once the offender has been charged, the restorative justice process can take place either on a voluntary basis before sentencing, or as a part of the sentence imposed by a court.

Restorative justice first emerged in dealing with offences committed by young adults. The reason for its widespread application to this cohort appears two-fold. When restorative justice processes were introduced to Western legal systems,[10] its initial trials in 1989 in New Zealand[11] and later Australia[12] were targeted at young adults. Its success[13] indicated that it was an appropriate alternative to the often stigmatising criminal justice system which entrenched a cycle of criminality in many cases. Restorative justice focusses on constructive outcomes for victims, offenders and their communities. Its success has led to dedicated restorative justice programs to deal with offences committed by young adults.[14] Increasingly the concept is being applied across a broader spectrum of criminal offences, such as assault, domestic violence and sexual assault offences[15] (more controversially), and even war crimes.[16]

III. HOW IS HUMAN ACTIVITY IN THE ENVIRONMENT REGULATED?

[9] See, e.g., Preston (n 2) 138-39; *Garrett v Williams* (2007) 151 LGERA 92, [46]. The four stages where restorative justice processes may be engaged are the pre-charge phase, the post-charge pre-conviction phase, the post-conviction pre-sentence phase, and the post-sentence phase.

[10] See John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002) 5, 24.The author discusses the historical origins of restorative justice, and notes that in many non-Western cultures restorative justice practices feature prominently.

[11] See *Children, Young Persons and Their Families Act 1989* (NZ) pt. 2 which introduced provisions for Family Group Conferencing.

[12] See DB Moore and TA O'Connell, 'Family Conferencing in Wagga Wagga: A Communitarian Model of Justice' in Christine Alder and Joy Wundersitz (eds), *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (Australian Institute of Criminology, 1994) 45.

[13] See, e.g., Heather Strang, 'Restorative Justice Programs in Australia: A Report to the Criminology Research Council' (Research School of Social Sciences, Australian National University, March 2001) 9 < http://www.criminologyresearchcouncil.gov.au/reports/strang/report.pdf>; Lily Trimboli, 'An Evaluation of the NSW Youth Justice Conferencing Scheme' (NSW Bureau of Crime Statistics and Research, 2000); Braithwaite (n 8) 46-51.

[14] See, e.g., *Young Offenders Act 1997* (NSW).

[15] David O'Mahony and Jonathan Doak, *Reimagining Restorative Justice: Agency and Accountability in the Criminal Process* (Hart Publishing, 2017) 4, 13.

[16] Ray Nickson, 'Participation as Restoration: The Current Limits of Restorative Justice for Victim Participants in International Criminal Trials' in Kerry Clamp (eds), *Restorative Justice in Transitional Settings* (Routledge, 2016) 95.

The environment is a finite and valuable resource.[17] The emergence of laws to protect the environment and manage town planning were adopted as early as 1945 in NSW. Environmental law was formally recognised as a discipline in the 1970s.[18] The establishment of the LEC NSW[19] in 1980 was the earliest specialist environmental court in the world with civil and criminal jurisdiction. That year also saw the passage of the principal planning act in NSW, the *Environmental Planning and Assessment Act 1979* (NSW) ('*EPA Act*'). Substantial pollution control legislation was enacted with the *Protection of the Environment Operations Act 1997* (NSW) ('*POEO Act*') which repealed and replaced a number of existing laws. The environment is broadly defined in these statutes. The *EPA Act* defines the environment as including '…all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings.'[20] The *POEO Act* defines environment as meaning:

> components of the earth, including:
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> (a) land, air and water, and
>
> (b) any layer of the atmosphere, and
>
> (c) any organic or inorganic matter and any living organism, and
>
> (d) human-made or modified structures and areas,
>
> and includes interacting natural ecosystems that include components referred to in paragraphs (a)–(c).[21]

In Victoria the *Environment Protection Act 1970* (Vic) ('*EP Act*') defines environment as 'the physical factors of the surroundings of human beings including the land, waters, atmosphere, climate, sound, odours, tastes, the biological factors of animals and plants and the social factor of aesthetics.'[22] The Victorian Civil and Administrative Tribunal ('VCAT') was established in 1998.[23] The VCAT has jurisdiction to hear and resolve a broad range of planning and environmental matters[24] including the review of planning permit applications, granting enforcement orders and applications in relation to environmental licences. Offences under

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[17] See *Development and International Economic Co-operation: Environment*, UN GAOR, 42nd session, Supp. No 25, UN Doc A/42/427 (4 August 1987) annex ('*Report of the World Commission on Environment and Development: "Our Common Future"*').
[18] See, e.g., Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 8th ed, 2013) 3; Rosemary Lyster et al, *Environmental & Planning Law in New South Wales* (Federation Press, 3rd ed, 2012) 1; Murray Wilcox, *The Law of Land Development in New South Wales* (The Law Book Company, 1st ed, 1967).
[19] *Land and Environment Court Act 1979* (NSW) s 5.
[20] *Environmental Planning and Assessment Act 1979* (NSW) s 1.4 (definition of 'Environment').
[21] *Protection of the Environment Operations Act 1997* (NSW) ('*POEO Act*') Dictionary (definition of 'Environment').
[22] *Environment Protection Act 1970* (Vic) ('*EP Act*') s 4 (definition of 'Environment').
[23] *Victorian Civil and Administrative Tribunal Act 1998* (Vic).
[24] *Ibid,* s 52.

environmental legislation are heard in the Magistrates' Court. Decisions of that court can be reviewed by the Supreme Court of Victoria.[25]

New Zealand also has a long history of environmental and town planning management and dispute resolution, with the first town planning legislation being introduced in 1926.[26] In the 1980s there was a consolidation of planning and environmental controls resulting in the enactment of the *Resource Management Act 1991* (NZ) ('*RM Act*'). In 1996 the Planning Tribunal was replaced by the Environment Court of New Zealand. The environment is defined in both the *RM Act*[27] and the *Environment Act 1986* (NZ)[28] as including:

> (a) ecosystems and their constituent parts including people and communities; and
>
> (b) all natural and physical resources; and
>
> (c) those physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes; and
>
> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters.

III. WHAT IS ENVIRONMENTAL CRIME?

All three jurisdictions have laws which prohibit harming or destroying the natural and built environments thereby creating criminal offences. Many forms of pollution such as water pollution, air pollution and land contamination are strict liability offences, meaning that only the physical acts giving rise to the offence need be proved beyond reasonable doubt for an offence to be proved. No mental element of intention need be proved. More serious environmental crime includes a mental element and, where significant environmental harm has been caused, could result in a gaol term being imposed.

The destruction of cultural heritage both indigenous and non-indigenous without statutory authority is also an offence in all three jurisdictions. In NSW under the *National Parks and Wildlife Act 1974* (NSW) ('*National Parks and Wildlife Act*') there are *mens rea* and strict liability offences for harming or desecrating Aboriginal objects and places without a permit.[29] The *Heritage Act 1977* (NSW) contains both general[30] and specific[31] strict liability offences for harming or desecrating items of cultural or heritage significance. In Victoria, the *Aboriginal Heritage Act 2006* (Vic) makes it an offence to harm Aboriginal cultural heritage without a

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[25] Pursuant to Supreme Court (General Civil Procedure) Rules 2015 (Vic) O 56.
[26] Environment Court of New Zealand, 'History of the Court', *About the Environment Court* (Web Page, 7 September 2016) <https://www.environmentcourt.govt.nz/about/history/>.
[27] *Resource Management Act 1991* (NZ) ('*RM Act*') s 2(1) (definition of 'Environment').
[28] *Environment Act 1986* (NZ) s 2 (definition of 'Environment').
[29] *National Parks and Wildlife Act 1974* (NSW) ss 86(1)-(2), (4)-(5).
[30] *Heritage Act 1977* (NSW) s 156.
[31] See, e.g., ibid s 51(1) which provides for an offence of moving, damaging or destroying an historic shipwreck.

permit.[32] There are different offences with varying penalties according to the *mens rea* of the offender.[33] The *Heritage Act 2017* (Vic) contains numerous offences relating to places and items of cultural heritage value.[34] In New Zealand the *Heritage New Zealand Pouhere Taonga Act 2014* (NZ) provides a number of *mens area* and strict liability offences for the desecration of indigenous and non-indigenous heritage.[35]

IV. THE BENEFITS OF APPLYING RESTORATIVE JUSTICE PROCESSES AND OUTCOMES IN ENVIRONMENTAL CRIME

For environmental crime which damages the natural or built environment it is useful to ask whether restorative justice processes and outcomes have the potential to ensure the achievement of justice between all of the victims of these kinds of crime.

The legislative regimes in NSW, Victoria and New Zealand which regulate the environment include very broad definitions of the environment as outlined above. The scope for considering that broad definition arises when sentencing for environmental crime and for determining who is a victim. While a significant fine may be the punitive penalty imposed by a court to denounce and exact retribution for the conduct giving rise to the offence, and while orders may be made for the restoration of the environment, the potential remains for damage to the economic, social or cultural fabric of a community to go unrecognised. Restorative justice processes can lead to recognition of all aspects of the harm occasioned by the commission of such an offence. That may result in outcomes beyond the sentencing options available in a court.

In terms of restorative justice processes, a commonly employed mechanism is one or more community conferences, the negotiations for which and conduct of can lead to a fruitful outcome. A community conference offers the opportunity for an offender to directly apologise to victims, understand how his or her actions or a company's actions have affected the lives, livelihoods and overall wellbeing of the victim(s), and commit to targeted actions to redress this harm. Whether a restorative justice conference occurs as part of, separate to or in place of a criminal prosecution, it presents the opportunity for a meaningful dialogue between the offender, victim and community, and would hopefully reach a collective resolution.

In environmental offences there is potential for the interests of communities which rely on, or interact with, the environment being unrecognised and subsumed in the broader responsibilities of the State as the prosecutor. The words 'interact with' are used to encompass those members of the community (arguably all of us) who gain intellectual, emotional and spiritual enjoyment in the natural world as well as those deriving an economic benefit from it.

A conference potentially facilitates the education of the offender (and where the offender is a company, company employees) about the impact that environmental crime has on the environment and on associated communities. Ideally, it reinforces the importance of compliance with environmental laws and reduces the likelihood of recidivism.

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[32] *Aboriginal Heritage Act 2006* (Vic) s 27.
[33] Ibid s 27(1)-(6).
[34] See, e.g., *Heritage Act 2017* (Vic) s 123 (*mens rea* offences in relation to archaeological sites) or s 192 (the strict liability offence of failing to comply with an Approved World Heritage Management Plan).
[35] *Heritage New Zealand Pouhere Taonga Act 2014* (NZ) Part 5.

As an integral part of the restorative justice process, there is considerable value in the act of an offender offering an apology. In addition to an acceptance of wrongdoing, an apology is a way for an offender to show respect and empathy for victims. Where the offender is a company operating within a community, it provides the company with an opportunity to restore its social licence to operate within that community.[36]

One interesting matter to consider is whether strict liability environmental crime is well suited to restorative justice processes. In NSW, where environmental crime largely comprises strict liability offences, a high number of guilty pleas are achieved.[37] Because accepting culpability is an important factor for the legitimacy of any restorative justice outcome, an offender who is guilty of a strict liability offence may not be predisposed to such processes as he or she may not genuinely accept their culpability. This issue will be referred to below when particular court cases in New Zealand and NSW are discussed.

V. WHO REPRESENTS THE ENVIRONMENT?

Importing restorative justice into the environmental crime context requires some adjustments to the processes employed in non-environmental crime. The participants in a restorative justice process are generally the offender, the victim(s), and possibly representatives of a wider community. While clearly defined in many non-environmental criminal contexts the participants in environmental crime require a broader approach.

Identifying the victim(s) is integral to the restorative justice process.[38] Where a crime is 'victimless', the restorative justice process is potentially undermined because no agreement with the victim can be reached, no apology can be meaningfully offered to, or accepted by, the victim, and no relationship can be readily repaired. Restorative justice needs to adapt to be fully responsive to all those affected directly and indirectly by environmental crimes.

In environmental crime where the natural environment is damaged or harmed the 'victim' of such crime is the environment which is damaged or harmed. Impacts include the loss of habitat, ecosystems, biodiversity, fauna and flora. Victims also include people who are impacted by the environmental harm, those groups or individuals who interact with the damaged environment and who as a consequence of the offence are unable to interact with the environment.[39] As an example, toxic chemical plumes which spread widely can impact well beyond the immediate locality of an industrial site from which they are emitted. The victims can be 'countless and may be miles and years removed from the offenders who victimise them.'[40]

Conceptualisation of the environment and its benefits to the community include its benefits for future generations. The interest of future generations incorporates to a large degree preservation of the health of the current environment. Future generations are also notional victims of

[36] Preston (n 2) 150.
[37] See LEC NSW, 'Class 5: Criminal Proceedings' (Web Page, 6 April 2018) <http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_5/class_5.aspx> which indicates 70 percent of criminal matters in the LEC NSW in 2017 involved a guilty plea.
[38] UNODC (n 4) 8; Preston (n 2) 140-41.
[39] For a different conceptualisation of potential victims of environmental crime, see Preston (n 2) 141-43.
[40] Neal Shover and Aaron S Routhe, 'Environmental Crime' (2005) 32 *Crime and Justice* 321, 323-24.

environmental crime. It may be appropriate for the environment and future generations to be represented by the same person or group.

The interest of the broader community or general population, the members of which may not have any direct interaction with the harmed environment, also warrants consideration. Although members of the broader community may not be aware of the commission of an offence, their interest in the protection of the environment has been impinged upon.

The issue of who speaks for each of these types of victims arises. Where a large group of people is affected by a crime, or where a victim does not wish to, or cannot, be present, it is common in the restorative justice process for a representative to be appointed.[41] Separate representation for the environment may be necessary given that its protection will not necessarily align with those of individual human victims. Who speaks for the environment? There are a number of possible representatives, including the prosecuting authority, other government agencies, dedicated environmental groups or representatives of the wider public. In a restorative justice setting where the role of a representative would be to speak for the environment as a victim of crime, the participation of dedicated environmental groups and concerned members of the wider public as representatives of the environment is to be preferred. A mechanism may therefore be required to determine who is the appropriate person or group to do so. An effective process and skilled mediator to identify and balance the various interests is also important.

Other crimes which occur in the natural and built environment such as the destruction of cultural heritage, both indigenous and non-indigenous, may also benefit from a restorative justice approach. Where indigenous cultural heritage is destroyed participants must include representatives of such communities affected by that crime.

Too many participants in the restorative justice process may render it unwieldy and reduce the prospect of a successful outcome. A restorative justice facilitator who can adequately identify and balance the need of all participants to be heard and provide a sense of organisation and process is crucial. McDonald identifies that 'preparation is crucial' to the success of restorative justice processes. He went on to note that '…a full understanding of the politics of the communities in which the events took place [is] paramount.'[42]

Another aspect to consider in relation to environmental offences is that one of the benefits of a restorative justice approach is the repair or maintenance of relationships. An important benefit is parties gaining an understanding of each other's position because of their participation in a community conference seeking to apply restorative justice principles. In an environmental offence context the importance of what has been harmed can be emphasised and innovative measures to deal with that harm considered as parties' understanding increases. In a smaller community a company which commits an environmental offence may preserve its social licence to operate by participating in a restorative justice process such as a community conference and committing to long-term measures both financial and otherwise over and above any obligations that would be imposed in a sentencing process.

[41] UNODC (n 4) 61.
[42] John M McDonald, 'Restorative Justice Process in Case Law' (2008) 33(1) *Alternative Law Journal* 41, 43.

VI. CURRENT APPROACHES TO RESTORATIVE JUSTICE IN ENVIRONMENTAL CRIME IN THREE JURISDICTIONS

Varying provision for restorative justice processes and outcomes in the Australian states of NSW and Victoria and in New Zealand will now be considered, focussing on the role of courts when sentencing for environmental crime and the role of the principal environmental regulator in each jurisdiction.

A. New South Wales, Australia

Environmental offences in NSW focussing on pollution are primarily contained in the *POEO Act*. The LEC NSW has jurisdiction in relation to numerous environmental offences. Prosecutions for environmental crime are generally commenced by agencies on behalf of the State and by local elected councils (local councils). Recognition of the importance to the community of the environment has seen an increase in maximum penalties able to be imposed in NSW for committing environmental crimes.[43]

In light of the objective seriousness of an offence and subjective factors relevant to a particular defendant, judges of the LEC NSW applying the instinctive synthesis approach endorsed by the High Court of Australia in *Muldrock v The Queen*[44] exercise their discretion when sentencing to determine an appropriate penalty. A gaol term is considered for more serious crime involving wilful or reckless behaviour and significant harm to the environment. In addition to a fine, the usual penalty for strict liability offences, judges have various sentencing options open to them. The orders able to be imposed by the LEC NSW in addition to any penalty are broad:[45] including orders for the restoration and prevention of environmental harm,[46] orders for the recovery of any monetary proceeds arising from the commission of the offence;[47] orders to notify people or classes of people of the commission of the offence;[48] orders to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit;[49] or orders to put money into trust for the purposes of a specified project for the restoration or enhancement of the environment.[50] In other words, orders for restoration of the environment can be made as part of sentencing and the LEC NSW has made such orders on many occasions since 1997 when the *POEO Act* was enacted.

In 2015 the *POEO Act*, along with other legislation,[51] was amended to state that restorative justice activity orders can be made by judges sentencing in the LEC NSW, in addition to any

[43] In NSW, under the *POEO Act* (n 20) the maximum penalty for a Tier 1 offence is $5,000,000 for corporations, and $1,000,000 and 7 years imprisonment for individuals: s 119; and under the *Marine Pollution Act 1987* (NSW) the maximum penalty is $10,000,000 for a corporation and $500,000 for an individual: ss 8 and 8A.
[44] (2011) 244 CLR 120, [26] unanimously following *Markarian v The Queen* (2005) 228 CLR 357, [51] (McHugh J).
[45] See the wide powers the LEC NSW has under pt 8.3 of the *POEO Act* (n 20).
[46] *POEO Act* (n 20) s 245.
[47] Ibid s 249.
[48] Ibid s 250(1)(a) and (b).
[49] Ibid s 250(1)(c).
[50] Ibid s 250(1)(e).
[51] *Contaminated Land Management Act 1997* (NSW) ('*Contaminated Land Management Act*') and the *Radiation Control Act 1990* (NSW).

penalty imposed for an offence.[52] Section 250 of the *POEO Act* states the court may make a number of orders including that an offender carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit. Under s 250(1A) the court may order the offender to carry out any social or community activity for the benefit of the community or persons that are adversely affected by the offence (a *restorative justice activity*) that the offender has agreed to carry out. Section 250(1A) does not prescribe what sort of 'social or community activity' is envisaged by the legislature. 'Activity' is defined in the Dictionary of the *POEO Act* as 'an industrial, agricultural or commercial activity or an activity of any other nature whatever (including the keeping of a substance or an animal).' This wording is sufficiently broad to include a restorative justice conference as a 'restorative justice activity.' The limiting factor in s 250(1A) is the requirement that the offender must have agreed to the activity. The offender's willing participation is, in any event, a critical element of restorative justice.

The LEC NSW issues practice notes to inform parties and their legal representatives what case preparation is required by the Court. The practice note for criminal matters in the LEC NSW has been recently amended with effect from 3 April 2018 to require that:

> 26. If the defendant enters a plea of guilty, the prosecutor and defendant are to advise the Court of any proposal for, and timing of, any restorative justice process in which the defendant and victims (people and the environment) of the offence committed by the defendant are willing to participate and any proposed order for a restorative justice activity that the defendant has agreed to carry out.

1. Restorative justice in indigenous cultural heritage destruction offences in LEC NSW

In two criminal cases in the LEC NSW there has been explicit application of a restorative justice process and recognition of outcomes as part of sentencing for charges arising from the destruction of Aboriginal cultural heritage.

In the 2007 decision of *Garrett v Williams*[53] the Chief Judge of the LEC NSW Preston CJ intervened in a sentencing hearing to divert the parties to a restorative justice conference. The case commenced by the Environment Protection Authority (Garrett on the record) concerned the destruction of Aboriginal artefacts in breach of the *National Parks and Wildlife Act* in the Broken Hill area of western NSW during construction and exploration activities undertaken by a mining company, Pinnacle Mines Pty Ltd (Williams being its sole director). The defendant pleaded guilty to three offences of knowingly destroying Aboriginal heritage. A restorative justice conference was facilitated by the prosecutor and funded by the defendant. It was held in Broken Hill. The Court appointed an independent facilitator who undertook three days of preparation before the conference, interviewing representatives of the Broken Hill Local Aboriginal Land Council, archaeologists, representatives of Pinnacle Mines and

[52] Protection of the Environment Legislation Amendment Bill 2014 (NSW).
[53] See (2007) 151 LGERA 92.

representatives of the prosecutor.[54] The conference provided the opportunity for the chairperson of the Broken Hill Aboriginal Land Council and the defendant to meet, and for the defendant to apologise directly for the harm caused. McDonald insightfully commented that:

> Restorative Justice Conferencing is designed to turn conflict into cooperation. The Process achieves this transformation by allowing communities caught up in a complex system of relationships and histories to clarify what has happened, understand why events unfolded as they have, appreciate the consequences of the actions and together develop a plan to learn from the events and ensure they are not repeated.[55]

The parties produced a document outlining the agreement reached at the conference. The defendant agreed to make financial contributions to the Aboriginal victims, to provide future training and employment opportunities for the local community and provided a guarantee that the traditional owners would be involved in any salvage operations of Aboriginal artefacts.[56] This was a private agreement between the parties and not enforceable by the LEC NSW. In determining the appropriate sentence to be imposed on the defendant, Preston CJ stated that:

> The fact of and the results of the restorative justice intervention can be taken into account in this sentencing process, but the restorative justice intervention is not itself a substitute for the Court determining the appropriate sentence for the offences committed by the defendant.[57]

In sentencing the defendant, his Honour took into account the defendant's participation in the restorative justice conference, together with the costs incurred in holding that conference and the agreement which included the defendant's offers of money and equipment to Aboriginal people that was reached between the parties.[58] The defendant was fined a total of $1,400 for the three offences whereby the total aggregate fine reflected the total criminality for several similar offences.

More recently in 2018, in *Chief Executive, Office of Environment and Heritage v Clarence Valley Council* ('*Clarence Valley Council'*),[59] Preston CJ sentenced a local council for breaching the *National Parks and Wildlife Act* by lopping the crown of a scar tree (a tree which had bark removed by local Aboriginal people for various purposes) in Grafton NSW. Section 86(1) makes it is an offence to harm or desecrate an object that the person knows is an Aboriginal object. The council pleaded guilty thereby accepting the element of the offence that included knowledge and agreed to participate in a restorative justice conference with representatives of the Aboriginal communities whose cultural heritage had been harmed by the removal of the scar tree. A restorative justice conference was held, facilitated by an experienced restorative justice facilitator. The conference began with a Welcome to Country, an explanation of the significance of Welcome to Country and an explanation of a history of scar trees and

[54] Ibid, [56].
[55] McDonald (n 41) 42.
[56] *Garrett v Williams* (2007) 151 LGERA 92, [63].
[57] Ibid, [64].
[58] Ibid, [117].
[59] (2018) NSWLEC 205.

their significance in the Clarence Valley.[60] All participants had the opportunity to introduce themselves individually by talking about their families, their relationship to the Clarence Valley, and connections they shared with each other, either growing up or working in the area, or working in related fields over the past years. At the conference the council agreed, firstly, that any financial sanction imposed on the council would be paid to the Grafton Ngerrie Local Aboriginal Land Council to be utilised for work related to increasing awareness of local Aboriginal history.[61] Secondly, the council would implement cultural skills development training designed and delivered in consultation with the local Aboriginal community. Thirdly, the council would undertake a tree restoration and interpretation project to address the site destruction and the use of the remaining timber from the scar tree.

Preston CJ noted that the agreement reached at the conference provided for harm reparation, social restoration, community harmony and problem solving, thereby facilitating restorative justice.[62] His Honour ordered the council to pay the Grafton Ngerrie Local Aboriginal Land Council $300,000 to be applied towards amongst other things a feasibility study to establish a 'Keeping Place' in the Grafton area for Aboriginal cultural heritage items, and funding research into local Aboriginal cultural heritage. His Honour relied on the agreement formed at the restorative justice conference in making these orders.[63] The council's involvement in the restorative justice process, the fact that it paid for this process and that its staff personally apologised to the Aboriginal people present at the conference contributed to the finding that the council was genuinely remorseful (a mitigating factor on sentence).[64]

2. Enforceable undertakings negotiated by environment protection regulator

Turning to the regulator, the NSW Environment Protection Authority ('NSW EPA') is responsible for issuing environmental protection licences, monitoring, investigating and prosecuting environmental offences and ensuring compliance with pollution reduction programs.[65] The NSW EPA prosecutes regularly in the LEC NSW and the Local Court in NSW. The NSW EPA has discretion whether to prosecute an offence under the *POEO Act* or pursue an administrative solution such as an enforceable undertaking.[66] Enforceable undertakings are voluntary and legally binding written agreements between the NSW EPA and the party alleged to have contravened a provision of the *POEO Act*.[67] Section 253A of the *POEO Act* outlines the powers of the NSW EPA to enforce undertakings. Pursuant to s 253A(3), the NSW EPA may apply to the LEC NSW for an order if it considers that the person who gave the undertaking

[60] Ibid, [16].
[61] Ibid, [21].
[62] Ibid, [106].
[63] For example, ibid, [120]-[121], [128].
[64] Ibid, [85]-[86].
[65] NSW Environment Protection Authority ('NSW EPA'), 'About the NSW EPA' (Web Page, 4 October 2017) <https://www.epa.nsw.gov.au/about-us/our-organisation/about-nsw-epa>; Environment Protection Authority Victoria (EPA Victoria), 'Our Work' (Web Page, 12 December 2017) <https://www.epa.vic.gov.au/our-work>.
[66] NSW EPA, 'Guidelines on Enforceable Undertakings' (February 2017) <https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/publicregister/enforceable-undertaking-guide-160640.pdf?la=en&hash=5F32B461F7B0C3224CB03B3E9892EA720C5FB4C1>.
[67] See also *Contaminated Land Management Act* (n 51).

has breached any of its terms. The orders that the Court can then make if satisfied that the person has breached a term of the undertaking are outlined in s 253A(4) and are broad.

An amendment was made to s 253A in 2015. Section 253A(1A) came into effect on 1 January 2015 and provides that an undertaking to carry out a restorative justice activity can be an undertaking accepted by the NSW EPA. The effect of the amendment is that the NSW EPA may accept a written undertaking by an offender in which the offender can agree to carry out activities, or do certain things, as agreed between the relevant parties at a restorative justice conference.

In 2017 the NSW EPA updated its Guidelines on Enforceable Undertakings ('the Guidelines'). The Guidelines indicate when enforceable undertakings are likely to be accepted, the issues an acceptable undertaking must address and how undertakings are to be monitored.[68] The Guidelines also state that for an undertaking to be acceptable it must address certain objectives, where such circumstances feature in a particular case.[69] Thirty-one enforceable undertakings have been made under s 253A of the *POEO Act* since that provision came into operation on 1 May 2006.[70]

The NSW EPA has accepted undertakings that included measures that could be described as having a restorative justice outcome. For example, in 2013 AGL Upstream Investments Pty Ltd gave an undertaking to the NSW EPA in relation to failures to maintain its plant and equipment and failures to monitor emissions from its Camden Gas Project in the Sydney Basin, together with other breaches.[71] The undertaking offered to the NSW EPA included measures to correct the issues that had led to the breaches and payment of $150,000 to a local environmental education and management project run by the University of Western Sydney.

Since the 2015 amendment, 14 enforceable undertakings have been made.[72] In May 2015 Transpacific Industries Pty Ltd gave an undertaking after an incident where wastewater was discharged into stormwater instead of the sewer. The undertaking included a $100,000 payment to the Sustainable Communities Garden project operated by Newcastle Police Citizens Youth Club.[73]

B. Victoria, Australia

The Environment Protection Authority Victoria ('EPA Victoria') administers the *EP Act*.[74] It has similar functions to the NSW EPA. The EPA Victoria prosecutes environmental offences

[68] NSW EPA (n 66) 1.
[69] Ibid 4-8.
[70] NSW EPA, 'POEO Act Public Register' (Web Page, 13 April 2018) <http://www.epa.nsw.gov.au/prpoeo/index.htm>.
[71] NSW EPA, 'Undertaking to the Environment Protection Authority Given for the Purposes of Section 253A by AGL Upstream Investments Pty Limited' (Web Page, 8 August 2013) <http://www.epa.nsw.gov.au/prpoeoapp/ViewNotice.aspx?ID=1516526>.
[72] NSW EPA (n 70).
[73] NSW EPA, 'Undertaking by Transpacific Industries Pty Ltd to the Environment Protection Authority Given for the Purposes of Section 253A of the POEO Act' (Web Page, 7 May 2015) <http://www.epa.nsw.gov.au/prpoeoapp/ViewNotice.aspx?ID=1530547>.
[74] *EP Act* (n 21) s 13.

primarily in the Victorian Magistrate's Court with matters appealed to the Supreme Court of Victoria.

The central restorative justice provision is contained in s 67AC(2)(c) of the *EP Act* which was inserted in 2000.[75] Section 67AC(2)(c) provides that "in addition to, or instead of, any other penalty … the court may order the person … carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit (even if the project is unrelated to the offence)". The legislation focuses on outcomes rather than processes.

A number of s 67AC restorative projects have been implemented in Victoria pursuant to orders made by a magistrate. In 2012-13 six s 67AC projects were completed worth $802,000. In 2013-2014 there were three s 67AC projects completed worth approximately $225,000 and one enforceable undertaking.[76] In 2014-15 there were 10 s 67AC projects implemented worth approximately $679,800 and two enforceable undertakings entered into.[77]

Similarly to NSW, the EPA Victoria is able to enter into enforceable undertakings under s 67D of the *EP Act,* which precludes the EPA Victoria from bringing proceedings in relation to a matter over which an undertaking has been given.[78] Several enforceable undertakings have been entered into by the EPA Victoria under s 67D. In 2012-13 the EPA Victoria entered into one enforceable undertaking. In 2013-14 one enforceable undertaking was entered into.[79] In 2014-15 two enforceable undertakings were entered into.[80]

The EPA Victoria has two sets of guidelines which inform the preparation and enforcement of enforceable undertakings. The EPA Victoria first introduced its Compliance and Enforcement Policy in 2011 and most recently updated the policy in December 2017.[81] The Compliance and Enforcement Policy outlines the spectrum of remedial actions and sanctions available to the EPA Victoria in enforcing the *EP Act*,[82] including the implementation of enforceable undertakings where an offender has taken active responsibility for their actions and such a remedy is likely to be more effective for long-term environmental outcomes than prosecution.[83]

In 2012 the EPA Victoria introduced its Enforceable Undertakings Guidelines.[84] These were intended to supplement the Compliance and Enforcement Policy by providing greater detail on what enforceable undertakings were required to achieve and how they were to be enforced. Enforceable undertakings are required to meet three key objectives being to improve environmental performance, deliver benefits to the local environment and community and improve environmental performance industry wide. In addition to addressing the key objectives

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[75] Pursuant to the *Environment Protection (Enforcement and Penalties) Act 2000* (Vic).
[76] EPA Victoria, 'Year Three: Tackling Pollution at its Source: Annual Report 2013-2014' (2014) 19 <http://www.epa.vic.gov.au/~/media/Publications/1573.pdf> ('Annual Report 2013-2014').
[77] EPA Victoria, 'Connecting with the Community: Annual Report 2014-2015: Year Four' (2015) 14 http://www.epa.vic.gov.au/~/media/Publications/1610.pdf ('Annual Report 2014-2015').
[78] *EP Act* (n 21) s 67D.
[79] EPA Victoria, 'Annual Report 2013-2014' (n 76).
[80] EPA Victoria, 'Annual Report 2014-2015' (n 77).
[81] EPA Victoria, 'Compliance and Enforcement Policy' (31 December 2017) <https://www.epa.vic.gov.au/~/media/Publications/1388%203.pdf> ('Compliance and Enforcement Policy').
[82] Ibid 21.
[83] Ibid 27.
[84] Victoria, *Victoria Government* Gazette, No S 142, 1 May 2012.

enforceable undertakings are required to address factors such as reporting, costs and enforceability.[85]

The EPA Victoria also engages in restorative justice community conferences as part of its practice in resolving disputes. Restorative justice is stated to form a central aspect of the EPA Environmental Citizenship Strategy[86] which focusses on 'the interdependent relationship between Government and the Victorian Community (community, business and organisations), and their joint responsibility to protect and improve the environment.'[87]

The Hallam Road Landfill case study in 2013 is an example of the EPA Victoria and other parties engaging in a restorative justice conference. Following the conference the EPA Victoria entered into an enforceable undertaking. SITA Australia Pty Ltd ('SITA') the owner of a landfill site had committed several breaches of its licence conditions in relation to permissible odour limits. The purpose of the conference was to 'get input into the draft Enforceable Undertaking and incorporate stakeholder views into the process'.[88] SITA voluntarily committed to participate.[89] The conference resulted in the EPA Victoria entering an enforceable undertaking with SITA requiring it to collate an academic literature review into scientific findings on the health impacts of landfill odour, conduct infra-red aerial surveys to identify odour hotspots, plant trees along the southern boundary of the site, and contribute $100,000 towards a community environment project.[90] Additionally, SITA published a statement of regret.[91] The rationale for entering into an enforceable undertaking was that it provided 'a more flexible sanction than court action as it can benefit the affected community much more than a prosecution could'.[92]

In 2016 the EPA Victoria also obtained an enforceable undertaking from Hepburn Shire Council.[93] Hepburn Shire Council was alleged to have deposited industrial waste without a works approval for a period of approximately nine years, deposited industrial waste at a site not licensed to accept that type of waste for approximately four years and discarded industrial waste by burning it at a site not licensed to do so for approximately four years. Hepburn Shire Council undertook at a cost of approximately $62,000 to improve its procedures for handling green waste, complete a community education about waste disposal, review its internal policies, present its revised policies at various forums, install solar panels at a community facility near the area and install a cenotaph commemorating Australia's contribution to World War One.

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[85] Ibid 3-4.
[86] EPA Victoria, 'EPA Environmental Citizenship Strategy' (February 2013) <http://www.epa.vic.gov.au/~/media/Publications/1519.pdf>.
[87] Ibid 3.
[88] Environment Protection Authority Victoria, 'Hallam Road Landfill: Publication 1503' (September 2012) 1 <http://www.epa.vic.gov.au/~/media/Publications/1503.pdf>.
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Environment Protection Authority Victoria, 'Hepburn Shire Council', *Compliance and Enforcement* (19 October 2016) <https://www.epa.vic.gov.au/our-work/compliance-and-enforcement/epa-sanctions/prosecutions/search-prosecutions/prosecution-folder/hepburn-shire-council>.

C. New Zealand

Restorative justice processes and outcomes in sentencing for all crime have been explicitly endorsed in New Zealand since 2002 with the passing of the *Sentencing Act 2002* (NZ) ('*Sentencing Act*').

Section 7 of the *Sentencing Act* outlines the nine purposes of sentencing, the first four of which are restorative in nature, namely, to hold the offender accountable for harm done to the victim and the community by the offending, to promote in the offender a sense of responsibility for, and an acknowledgement of, that harm, to provide for the interests of the victim of the offence and to provide reparation for harm done by the reoffending.

As the *Sentencing Act* specifies principles for sentencing by all New Zealand courts it applies to prosecutions under the *RM Act*. In sentencing an offender a court is required, pursuant to s 8 of the *Sentencing Act*, to take into account any restorative justice outcomes that have occurred, or that the court is satisfied are likely to occur, in relation to a particular case. A court must also take into account any offer of amends made by the offender to the victim, any agreement between the offender and victim going to a remedy for the loss or damage caused, any measures taken or proposed to be taken by the offender to give compensation, apologise or make good the harm to the victim or their family, and any remedial action taken or proposed to be taken by the offender.[94] The conditions required before restorative justice can apply include that an offender has pleaded guilty to an offence and appears before the District Court before sentencing.[95]

The *Victims' Rights Act 2002* (NZ) ('*Victims' Rights Act*') also contains restorative justice provisions. Under s 9, if a victim requests to meet the offender to resolve issues relating to the offence, a member of court staff, police or a probation officer, must, if satisfied that the necessary resources are available, refer the request to a suitable person who is to arrange and facilitate a restorative justice meeting. As soon as is practicable after a victim comes into contact with a government agency, a victim must be given information about programmes, remedies or services available, including participation in restorative justice processes.[96]

Environmental offences in New Zealand are largely contained in the *RM Act*, with prosecutions generally run by regional councils.[97] Prosecutions under the *RM Act* are heard in the District Court by a District Court judge holding an Environment Court warrant.[98] Under the *RM Act*, the District Court has the power to issue an enforcement order under s 319 which can require the offender to take action to remedy the harm to the environment and pay money to reimburse any person for costs incurred in remedying the harm to the environment.[99]

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[94] *Sentencing Act 2002* (NZ) s 10(1).
[95] Ibid s 24A.
[96] *Victims' Rights Act 2002* (NZ) s 11.
[97] See *RM Act* (n 26) s 338; Ministry for the Environment, 'An Everyday Guide: Enforcement' (Web Page) <http://www.mfe.govt.nz/publications/fresh-water/everyday-guide-enforcement/everyday-guide-enforcement-html>.
[98] *RM Act* (n 26) s 309(3); Ministry for the Environment (n 97).
[99] *RM Act* (n 26) ss 314, 339(5)(a).

According to the 2013 report of the Ministry for the Environment on the use of prosecutions in relation to the *RM Act*, between 1 July 2001 and 30 September 2012, a restorative justice process was used in 33 of the 860 prosecutions under the *RM Act*.[100] In the period 1 July 2008 to 30 September 2012, 429 prosecutions took place with restorative justice processes applied in 14 cases. The restorative justice processes in these cases generally took place after the charge but prior to the offender being sentenced where a guilty plea had been entered by the offender. It is useful to outline five cases as these provide insight into how judges of the District Court have approached restorative justice processes in the context of strict liability offences.

In *Auckland Council v Akarana Golf Club & Treescape Ltd*[101] the defendant pleaded guilty to unlawful clearing of protected trees in breach of the *RM Act*. A successful restorative justice conference was held. Auckland Council subsequently sought and was granted leave from the Auckland District Court to withdraw the charge.

In *Northland Regional Council v Fulton Hogan Ltd, Cates Bros Ltd & North End Contractors Ltd, Whangerei District Council & T Perkinson*[102] the defendants caused waste and other materials to be discharged into a tributary from a landfill for which no development consent had been obtained in breach of the *RM Act*.[103] Four of the defendants were granted conditional discharges without conviction as a result of their participation in a restorative justice process. The discharges were conditional because a number of the outcomes from the restorative justice process were yet to be completed and the court wanted to ensure that they were. As part of the restorative justice process, the defendants consulted with local indigenous groups and signed a memorandum of understanding to establish a local eco-nursery. The fifth defendant, who was more culpable than the others, also participated willingly in the restorative justice process and received a reduced fine.

In *Auckland Council v Andrews Housemovers Ltd*[104] the defendant business pleaded guilty to a charge of contravening a general tree protection rule by permitting the removal of three pohutukawa trees without consent in breach of the *RM Act*. Upon attending a restorative justice conference the defendant agreed to replace the trees, pay Auckland Council's costs of $3,000 and make a $3,000 donation to an organisation involved with planting pohutukawa trees. The District Court judge held that the fine to be imposed would have been similar to the amount already agreed to be paid by the defendant at the conference and therefore did not impose a

[100] Ministry for the Environment, 'A Study into the Use of Prosecutions under the Resource Management Act: 1 July 2008 - 30 September 2012' (October 2013) 12, 23 < https://www.mfe.govt.nz/sites/default/files/study-into-the-use-of-prosecutions-under-the-RMA.pdf>. A report on compliance, monitoring and enforcement under the *RM Act* was published by the Minister of Environment in November 2016. The report relied on the statistics from the 2013 report.

[101] DC Auckland, CRI-2007-004-012712 & 713 (14 July 2008); ibid 62; Guilty plea to removal of protected trees in breach of s 9 of the *RM Act* as part of work on the golf club. Consent was obtained to remove six of the ten trees at the golf club provided that four were protected, however the defendants removed all ten.

[102] DC Whangarei, CRN 09088500008, 023, 028 – 034 & 039 (13 October 2009 and 6 May 2010); Ministry for the Environment (n 100) 63.

[103] Guilty plea by five defendants to one representative charge for discharge of soil, vegetation and demolition material and other waste in breach of s 15(1)(b) of the *RM Act* in relation to operation of unlawful landfill.

[104] [2016] NZDC 780, CRI-2015-004-002543 (21 January 2016).

fine. Her Honour noted at [16] that Auckland Council did not seek an enforcement order, demonstrating a genuine level of trust between the defendant business and the Council.

In *Tasman District Council v Mytton*[105] the defendant pleaded guilty to a charge of discharging contaminants into the air under the *RM Act*. The contaminants were caused by a fire on the defendant's property. The defendant participated in a restorative justice conference at which he agreed to: place a public notice in a local newspaper identifying himself as guilty of lighting the fire; apologise to the Rural Fire Authority manager; contribute to a newspaper article educating the community about rural fires and their consequences with a photograph of him identifying himself as the offender; donate $1,000 to the Richmond Volunteer Fire Service; and donate $5,000 to the Richmond Public Library to repay the community for the harm caused. The District Court judge noted at [29] that it was 'unusual…to see remorse demonstrated as tangibly.' The defendant was entitled to a 25 percent discount on sentence owing to his tangible remorse and co-operation, a further 25 percent discount for entering an early guilty plea and a reduction of the fine to be paid by $6,000 for the amounts paid to the fire service and public library.

In *Bay of Plenty Regional Prosecutor v Withington*[106] the defendant pleaded guilty to a charge under the *RM Act* of disturbing the foreshore by clearing a drainage channel to prevent flooding at his property. The defendant attended a restorative justice conference at which he apologised to the Bay of Plenty Council for his actions, agreed to pay $2,000 for planting native species in the affected area and agreed to pay half of the Council's costs. The District Court judge noted at [39] that '[w]ho attends [a restorative justice conference] may be relevant to the weight that can be given to the recommendations that arise from such a conference.' The judge stated that it was not clear from the conference record what steps were taken to consult mana whenua who may have had kaitiaki status (a kaitiaki is a person or group recognised as a guardian of environmental or cultural heritage by the Indigenous people of a particular locality). The Court held that although the Bay of Plenty Council represented the environment and community at the conference, there may have been other interests which should have been represented at the conference. The defendant was entitled to a discount on sentence for previous good character, entering an early guilty plea and agreeing to pay the Council's costs. The offence was ultimately discharged without a fine being imposed.

The Environmental Protection Authority in New Zealand is responsible for ensuring compliance and enforcement of various Acts[107] and has a prosecutorial role. The *RM Act* is primarily enforced by regional councils.[108] The extent to which mechanisms such as enforceable undertakings are utilised is unknown.

Considering the above jurisdictions, restorative justice processes enable a wider range of outcomes which respond to environmental crime than can usually be achieved under a statute.

[105] [2017] NZDC 9820, CRI-2016-042-001755 (11 May 2017).
[106] [2018] NZDC 1800, CRN 17070501148 (30 January 2018).
[107] See, e.g., *Climate Change Response Act 2002* (NZ); *Hazardous Substances and New Organisms Act 1996* (NZ); *Ozone Layer Protection Act 1996* (NZ); *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012* (NZ).
[108] Ministry for the Environment, 'An Everyday Guide: Enforcement' (n 97).

In all three jurisdictions the sentencing judge and magistrate can impose orders requiring the restoration of the environment. Restorative justice processes and outcomes can provide opportunity for measures addressing other impacts of an offence beyond what could be achieved by applying the statute only.

The description of the three jurisdictions above identifies varying levels of explicit recognition of restorative justice outcomes and processes. New Zealand courts are the most active in implementing restorative justice processes and thereby involve a greater number of participants in the sentencing process than a traditional sentencing approach. This approach is encouraged by the *Sentencing Act* and the *Victims Rights Act*. The five New Zealand District Court cases summarised considered various strict liability offences of tree clearing, land pollution, air pollution and foreshore disturbance in which the Court considered a restorative justice process when sentencing. The importance of having all relevant interests participate in a conference is identified in *Withington* where the District Court judge expressed concern that a representative of the Maori community was not present given that the offence concerned the destruction of a foreshore area.

The two cases in the LEC NSW which have expressly incorporated restorative justice processes to date have been concerned with the destruction of aboriginal heritage, suggesting that this area of environmental crime particularly benefits from such an approach. In both cases the restorative justice conferencing resulted in a far greater range of interests being considered and accommodated in useful ways than could be achieved in the usual sentencing process.

Whether strict liability offences lend themselves to restorative justice processes and outcomes given the absence of mental culpability as an element of the offence is identified above. The New Zealand experience in particular suggests that defendants charged with strict liability offences where *mens rea* is not an element of an offence nevertheless will engage in restorative justice processes in relation to a wide range of environmental offences. The two examples from the LEC NSW concerned *mens rea* offences in relation to the destruction of Aboriginal heritage.

The number of cases where the application of restorative justice processes and approaches will be appropriate is relatively small, as the figures for New Zealand show in the 2013 departmental report referred to above. This is appropriate if a court otherwise has wide powers to make appropriate orders to address a particular offence as courts hearing environmental offences generally do in Australia.

The approach of the regulator to environmental crime and the imposition of enforceable undertakings can also reflect restorative justice goals and outcomes. This is best encapsulated by the EPA Victoria which is explicit in adopting such an approach in the appropriate case through community conferencing as part of negotiations on the terms of an enforceable undertaking, as seen in the case of the Hallam Road Landfill.

VII. SOME ISSUES TO CONSIDER

A. Reconciling restorative justice with established sentencing purposes

The primary challenge in implementing restorative justice for environmental crime is responding to the tension between traditional sentencing objectives and restorative justice outcomes. The latter approach seeks to resolve harm collectively rather than focus on punishment and retribution. There are seven purposes of sentencing in NSW identified in the *Crimes (Sentencing Procedure) Act 1999* (NSW), namely, punishment, deterrence, community protection, rehabilitation of the offender, making the offender accountable, denunciation and recognising the harm inflicted on the victim and the wider community.[109] While not precluding a restorative justice approach these purposes do not all reflect such an approach. As noted above in relation to s 7 of the *Sentencing Act* in New Zealand, the first four purposes include aspects of a restorative justice approach. The sentencing purpose in s 1(i) of the *Sentencing Act 1991* (Vic), 'to ensure that victims of crime receive adequate compensation and restitution' could encompass a restorative justice approach.

Restorative justice may alter the usual weighting of these principles in a sentencing process. A well-managed and appropriate restorative justice process is likely to enhance the sentencing process. While the punishment of the offender is specifically not a goal of restorative justice because it does not contribute to the resolution of the harm caused by the offence, restorative justice is not a barrier to the sentencing judge imposing a penalty in addition to any other orders.

Depending on the seriousness of the offence and the terms of any agreement reached, restorative justice outcomes may be demanding of time and money and are no less likely to deter an offender than a fine. In some cases, the outcome may be more time-consuming for the offender, such as in confronting the victims and undertaking long term projects. The rehabilitation of the offender, meeting the victims and the community and learning about the full scope of harm caused by the commission of an offence is more likely to achieve this purpose than if a fine alone were imposed.

Although the focus of restorative justice is on repairing the harm done to the environment and other victims, it is important that the offender is held accountable and their conduct denounced. The process must not be exploited by an offender in order to receive a lesser penalty than he or she would otherwise have received if more orthodox sanctions were imposed. In the case of a restorative justice outcome agreed between the parties in lieu of a conviction, the agreement may not be subjected to judicial scrutiny. Although the victims and/or the community may be satisfied with the outcome, it may not reflect the broader public interest in recording a conviction against an offender and ensuring that he or she is held publicly accountable.

One of the objectives of restorative justice in other criminal law areas is to sing a voice to those otherwise voiceless in the criminal justice system and also to facilitate the development of relationships or repair broken relationships by overcoming a power imbalance.

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[109] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

B. Consistency in sentencing

Consistency in sentencing is an important sentencing principle in a just legal system. Like crimes receive like penalties noting that this principle does not override the responsibility of a sentencing judge to consider individual circumstances. Nor is a judge bound by a sentencing 'range' of penalties imposed in other cases. A judge will consider previous penalties imposed and compare facts of other similar matters with reference to the maximum and minimum sentences available for the relevant offence.[110] In environmental crime, where the penalty imposed is generally a fine, this comparative task is simpler than comparing different restorative justice orders. As a restorative justice order is by its nature directly responsive to the harm caused by the commission of an offence, it may be difficult to achieve consistency between like offences. As the summaries of the sentencing decisions in NSW and New Zealand identify the sentencing judge weighs up a number of factors in determining an appropriate penalty, including participation in restorative justice processes and their outcome. That restorative justice processes take place does not preclude a large fine being imposed, as occurred recently in *Clarence Valley Council* in the LEC NSW. This issue is not identified as an insurmountable difficulty, but rather to highlight the complexity of the sentencing task for judges.

C. Resources necessary to ensure that restorative justice undertakings and orders are complied with

Many restorative justice undertakings or orders will necessarily be implemented over an extended period of time. An order to revegetate an area of land that was unlawfully cleared must, for example, if it is to be of value, also include the obligation to maintain the vegetation until it is self-sustaining. Compared to a fine, a long term restorative justice order or undertaking will require a much greater degree of oversight by either the relevant court or the environmental authority to ensure compliance. In his 2011 article, Preston CJ of the LEC NSW envisaged that either the Court or the regulatory agency would play the role of monitoring the offender's compliance with restorative justice outcomes reached post-charge.[111] This oversight could involve ordering the offender to self-report to the Court, or the regulatory agency monitoring the offender's compliance and reporting to the court.[112] For restorative justice outcomes reached before trial, entering into a legally enforceable undertaking has consequences for breaches of the undertaking.[113]

These processes will require significant investments of time and resources from both the relevant court and/or the regulatory authorities. For the agency initiating the prosecution, the knowledge that a restorative justice outcome may require years of supervision could make the prosecutor less willing to seek a restorative justice order.

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[110] See, for e.g., *R v Visconti* [1982] 2 NSWLR 104; *Hoare v The Queen* (1989) 167 CLR 348; *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520.
[111] Preston (n 2) 153.
[112] Ibid.
[113] Ibid.

In the case of a restorative justice order or undertaking with a lengthy period of operation, there is a risk that some offenders may declare bankruptcy before the completion of the order or undertaking. Therefore, it may be advisable for the relevant environmental authority in accepting an undertaking or the court in imposing a restorative justice order to require the offender to provide a financial assurance where appropriate.

Separate to the cost of enforcing a restorative justice outcome is the cost of initiating it. Funding will need to be obtained from either the offender or the regulator, with the offender being the preferable source. In New Zealand restorative justice services are funded by the Ministry of Justice.[114] Restorative justice facilitators are trained and accredited through the Resolution Institute in partnership with PACT Training Consultants under a contract with the Ministry of Justice.[115]

D. Should charges be withdrawn?

In the case of a restorative justice outcome reached after the charge but before sentencing, and where the regulator is satisfied that an appropriate final outcome has been reached in relation to an offence, the question arises of whether a charge should continue. One possible solution is the action taken by Auckland Council in *Auckland Council v Akarana Golf Club & Treescape Ltd* referred to above, where the prosecutor successfully sought leave from the court to withdraw the charges. In another New Zealand case *Northland Regional Council v Fulton Hogan Ltd, Cates Bros Ltd & North End Contractors Ltd, Whangerei District Council & T Perkinson*, also referred to above, the sentencing judge ordered that the defendant be discharged on the condition that his restorative justice obligations were completed in full.[116]

VIII. INCREASING THE USE OF RESTORATIVE JUSTICE IN ENVIRONMENTAL CRIME

Modern environmental legislation considers the environment broadly as reflected in the definitions contained in the principal legislation in the three jurisdictions considered. Orders which enable a court to respond to the environmental harm caused by a particular offence such as requiring the restoration of the environment can be made by the LEC NSW, the Magistrate's Court in Victoria and the District Court in New Zealand.

In the three jurisdictions outlined above legislative measures exist to varying degrees to support restorative justice processes as part of sentencing in the criminal justice system. The New Zealand sentencing framework is most comprehensive in adopting restorative justice provisions and the District Court there has adopted restorative justice processes in environmental crime and considered outcomes of such processes to a markedly greater extent than courts in NSW and, even more so, Victoria. The New Zealand experience shows that in a

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[114] Ministry of Justice (New Zealand), 'How Restorative Justice Works' (Web Page, July 2016) <http://www.justice.govt.nz/policy/criminal-justice/restorative-justice/more-information-about-restorative-justice>.
[115] Resolution Institute, 'Restorative Justice (NZ)' (2016) <https://www.resolution.institute/accreditation/rj>.
[116] See above n 102.

small percentage of environmental criminal matters restorative justice processes can be usefully applied.

The LEC NSW has extensive powers to order restoration of the environment and other measures to ameliorate harm and to publicise offences and has made such orders on numerous occasions over many years. The implementation of restorative justice processes by the LEC NSW in environmental crime has been limited to date. Judges now have the explicit power to make restorative justice activity orders. If they are not familiar with this option, or the LEC NSW is not requested by the prosecutor and a defendant to make such an order, a restorative justice order is not likely to be made. Recent changes to the practice note in Class 5 criminal proceedings is one means of alerting a prosecutor and defendant to the possibility of such an approach. The legal profession and regulators need to be educated about restorative justice processes and the benefits they can bring for the environment, the community and the offender. *Garrett v Williams* was an important starting point for the development of restorative justice processes during sentencing in the LEC NSW. It is hoped that with the 2015 amendments to the *POEO Act* and the recent amendment of the practice note providing guidance on the conduct of criminal cases restorative justice processes will be used more often as part of sentencing procedures accepting that the number of cases where it is appropriate will be small. The recent decision in *Clarence Valley Council* identifies once again the benefits of such an approach.

The Victorian Magistrate's Court has the power to make orders for restoring the environment. Environmental or other legislation does not provide for specific restorative justice orders. As there is very limited reporting of decisions of magistrates in Victoria it is difficult to identify through documentary research alone whether such practices have been applied in any magistrate's court. Broad sentencing discretion would enable restorative justice approaches to be utilised but the time and resources required in a busy magistrate's court to encourage such approaches is likely to be lacking in environmental criminal matters.

The role of a regulator in pursuing undertakings is also significant. In Victoria the EPA Victoria has been proactive in adopting restorative justice processes in responding to environmental offences outside the charging and sentencing context.

While a sentencing judge has broad discretion which would enable a restorative justice process with the support of parties, as occurred in *Garrett v Williams*, adoption of both processes and outcomes is enhanced by legislation which explicitly refers to restorative justice as a desirable outcome, whether in overarching sentencing legislation or within a particular statutory regime. Rules of court can also assist in encouraging such approaches and outcomes. A cultural shift needs to happen for parties and judicial officers to embrace restorative justice principles. And last but not least, resources to enable participation are needed. As already observed the number of cases which justify the expense of a restorative justice approach is likely to remain relatively small as the New Zealand experience shows. A greater number of cases adopting such an approach in all Australian jurisdictions would be desirable.

IX. CONCLUSION

Bricknell suggested in 2010 that there is scope for examining how restorative justice is applied in cases of environmental crime overseas and its applicability to Australian environmental laws and sentencing practices[117] but to date no such research has been conducted. From the brief overview of three jurisdictions it is possible to make some useful observations as set out above. Implementing restorative justice processes will inevitably present challenges to courts and to regulators considering environmental crime. Nonetheless restorative justice processes offer advantages to courts, regulators, offenders and victims. For courts, restorative justice processes enable outcomes to be reached which sentencing considerations alone cannot achieve. The broad nature of the environment harmed can be reflected in sentencing outcomes. For regulators, restorative justice processes can facilitate tangible and positive responses and where an enforceable undertaking is entered into, may negate the need for prosecutions and protracted court proceedings. For offenders and victims, restorative justice processes provide an opportunity to be heard on an equal footing with a perpetrator of environmental crimes with the potential for greater recognition of harm caused. A restorative process may well have substantial benefits, tangible and intangible, beyond the prosecution process. Tangible benefits for victims include outcomes agreed in such processes that go well beyond what a sentencing process can deliver. Intangible benefits include greater awareness of different interests and repaired relationships in a community in relation to environmental matters in particular. Greater recognition of the benefits of applying restorative justice processes and outcomes will see the greater adoption of these in courts in Australia considering environmental crime.

[117] Bricknell (n 1) 116.