

Sentencing For Environmental Offences: An Australian exploration

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Abstract

Environmental law is now “middle aged” (reviews commonly date modern environmental law from the brown laws of the 1960s rather than medieval forest protections) but environmental crime appears to be in somewhat of an arrested development. Calling something a crime sends a message that certain behaviour is not countenanced and that it is deserving of particular and significant punishment: but how much punishment and for what purpose is punishment to serve? These questions are fundamental to sentencing but face several complications in the environmental arena. Declaring standards of moral conduct and meting out punishment for moral blameworthiness are important functions of the criminal law but environmental laws have been accused of lacking the prerequisite moral repugnance, for attracting mainly fines, and for also attracting sentences too light to deter. The “Benthamite” factors of deterrence may have particular weight in the environmental arena as many crimes against the environment may be characterised as economic in motivation. Sentences perceived to be inadequate may fail to deter whilst also indicating that transgression is not reprehensible, and the latter impression may be reinforced, where, as is often the case, few prosecutions are brought. While certain sectors of society may perceive environmental crimes as “not really crime”, the argument that they are as deserving of punishment as crimes against the person and property is achieving more prominence. Such divergence of opinion is perhaps not unexpected in a transitional phase of regard: as there have been similar shifts as the moral circle of concern has expanded to include women, slaves, and animals, and as shame has attached to acts such as corporate crime, driving without a seatbelt, or driving home under the influence. However such developments challenge pre-existing social norms as well as notions of universal and immutable moral codes. This transitional phase presents challenges for environmental law: not only in sentencing but in setting statutory maximums, in implementation, in generating voluntary compliance, as well as to the more fundamental questions of what crime is (and should be) and what appropriate sentencing is (and should be). Sentencing for environmental offences in particular must engage the difficult issues of specific and general deterrence, environmental harm, parity, cumulative damage, as well as restoration and rehabilitation. These latter two may indeed be primary public policy aims but may sit disquietly with punishment more traditionally considered. Current broader explorations into restorative justice may add to their increasing support. This paper will provide a brief overview of the recent history and challenges of environmental crime more broadly before examining sentencing for environmental offences in several contexts.

INTRODUCTION

Popular mention of sentencing frequently concentrates on sentences which are perceived to be “too light.” Retribution, particularly for crimes against the person, appears to be strongly supported by the public as a function of sentencing, culminating ultimately in approval for capital punishment. However the views of the community in this case have not persuaded their representatives in Parliament. There is a similar mal-alignment between parliamentary enactments for environmental

purposes, such as those against land clearance, and community support for the same activity. However in this case sentences appear to be in concert with community expectation. This may be considered an odd situation considering the long history of environmental law and present concern about the threats to the Earth's, and humanity's, environmental security.

The earliest known conservation laws were enacted in the Middle Ages; since the 11th Century forests were preserved for game via prohibitions against tree-felling and burning for charcoal. However these early forest protection laws were mainly aimed at protecting certain human interests from the interference of others, such as recreational hunting by the elite from the interference of poaching by the poor. Disregarding for the moment arguments for an innate human reverence for the natural world, the earliest modern environmental laws grew out of a more scientific sensibility that the activities of humans were becoming unhealthy for humans. Pollution laws such as Industrial Britain's Public Health Act of 1875 may be cast as anthropocentric, since they were primarily concerned with human health and safety. Environmental legislation enacted in the last few decades of the twentieth century may similarly be described as serving human interests, but only because notions of the public good have come to include the interests of non-human nature. Aided by scientific recognition of the connections between humans and all other beings there has been a shift from the protection of humans from environmental degradation to the protection of the environment from humans, for both parties' sakes. Provisions restricting clearance of native vegetation is an example of these, as declining native vegetation cover has been linked to increasing land degradation, declining biodiversity and the enhanced greenhouse effect. Although these laws benefit all, like the early forest protection laws, they benefit some more than others, with some bearing great costs and others none.

This paper will look at sentencing for land clearance offences in rural New South Wales and examine the confusing status of laws whose moral culpability may not be universally accepted and whose practical consequences in operation call the adequacy of the law into question. While penalties for land clearance are very low and may therefore be lauded for being one area of criminal sentencing which is in step with community expectation, the failure to meet other public policy aims means that more fundamental issues may need to be addressed.

DISCUSSION

Sentencing for criminal offences often comes under criticism for neglecting popular opinion and being too "soft" or lenient on criminals. Public outrage directed towards sentences given to particular offenders perceived to have got off lightly often results in "law and order" panics. These may result both in increases to maximum statutory penalties for certain crimes and frequently also dismay by those in the legal fraternity who would wish the public to be better educated about exactly what goes on in criminal courtrooms and the reasons sentences have been in most cases properly arrived at. Such results suggests a widening rather than a closing of the original "disconnect" between popular (and public policy) and professional opinion, although governments have refused to follow popular opinion all the way down the path to capital punishment.

One area of the criminal law where no disconnect may be present is environmental crime. The focus of this paper is land clearance crimes and this study forms part of a larger investigation into community attitudes towards such crimes. In preliminary background research for this larger work it has been found that judicial attitudes may mirror community expectations towards certain environmental transgressions. It has previously been observed that illegal land clearance is not classed in the same moral category as "core" crimes or capital "C" crimes such as those against the property and the person, and that this is a serious error on the part of policy makers as it is putting the cart of criminal sanction before the horse of moral culpability. This has resulted in low

compliance by those being regulated, dysfunctional implementation by regulatory agencies and legislative aims going unmet.¹ This discussion will outline how sentencing for some land clearance crimes provides evidence in support of this argument and whether reform is required and what form this might take.

FUNCTIONS OF SENTENCING

The functions of sentencing for criminal acts are varied: sentences may aim to achieve retribution and just deserts and protect society through incarceration of the malignant individual. Sentences may be aimed at general and specific prevention through raising compliance via deterrence and also rehabilitation of offenders. Sentences may aim at restitution. The multiple aims of sentencing are not necessarily agreeable and in some cases are antagonistic. Deterrence has a basic utilitarian focus and is forward looking while retribution is far more personal and backward looking. Rehabilitating offenders and repairing damage caused is again forward looking. Protection of society from danger is also forward looking, although usually environmental offences attract only monetary penalties, so few people have been given custodial sentences for environmental offences. Justice Preston's (2006) paper to the 4th International Union for the Conservation of Nature Colloquium in New York reviews just three from Australia: two pollution cases (one for 12 months plus \$250,000 in New South Wales in *Gardner*² for pumping sewage into a river and another in Queensland in *Moore*³ for 9-18 months and \$100,000 for dumping toxic waste and causing material environmental harm) and one (*Dempsey*⁴) for 12 months for cutting down 25 trees in a World Heritage Area. Custodial sentences are not available for unlawful clearance of native vegetation on private land. Maximum statutory penalties however have increased since the first enactment (Table 1).

Table 1: Maximum statutory penalties

STATE	LEGISLATION	Maximum penalty for unpermitted clearance
New South Wales	Native Vegetation Act 2003 (took effect 2005) and Regulations 2005	\$1.1 million
	Native Vegetation Conservation Act 1997	\$110,000
	State Environment Planning Policy (SEPP) 46 1995 (Protection and Management of Native Vegetation Policy)	

All purposes do have one aspect in common and that is that there be some sort of background community agreement that the illegal activities attracting penalty are morally blameworthy. The consequence of condemnation varies according to which of the functions is determined to be the primary priority, but the basis of all is that the illegal activity is agreed to be bad.

In New South Wales sentencing purposes are set out in the *Crimes (Sentencing Procedure) Act 1999*, s 3A:

- “(a) to ensure that the offender is adequately punished for the offence,
- (b) to prevent crime by deterring the offender and other persons from committing similar offences,
- (c) to protect the community from the offender,
- (d) to promote the rehabilitation of the offender,
- (e) to make the offender accountable for his or her actions,
- (f) to denounce the conduct of the offender,

¹ Bartel, R.L., Compliance and complicity: An assessment of the success of land clearance legislation in New South Wales (2003) 20(3) Environmental and Planning Law Journal 116-141; Farrier, D. and Mooney, C. The moral dimension: facilitating cultural shifts in perception of environmental crime, Paper presented to the First Annual AELERT Conference, 4-5 November, 2004.

² *Environment Protection Authority v Gardner* [1997] NSWLEC 169

³ *R v Moore* [2003] 1 Qd R 205

⁴ *R v Dempsey* (2002) 127A Crim R 113; [2002] QCA 4

(g) to recognise the harm done to the victim of the crime and the community.”

Courts recognise that these purposes may overlap, and that they also may conflict, as Preston recognises “the concept of proportionality can operate as a constraint on utilitarian purposes of sentencing such as deterrence”.⁵ Judicial support has been expressed in numerous decisions for deterrence, but not over proportionality. Justice Bignold in *Robson* (Table 2 below) has expressed a view common to the Land and Environment Court, that deterrence should be moderated by proportionality: “I am mindful of what I said in the Bungle Gully case and what Mr Justice Lloyd has recently said in the Jones case for a similar offence, of the *need for general deterrence* and of the need to apply sentencing policy not unfairly (or out of *proportion to the gravity* of the offence in penalizing the Defendant) but in furtherance of the public educative role of the criminal law” (para 20, italics added).

Both deterrence and proportionality involve value judgements. In the environmental crime context penalties may be calculable using rational actor models for deterrence purposes as the motivation for commission of offences is commonly economic. These are hardly “crimes of passion”. However such calculations may be limited and unreasonable in the environmental arena as environmental harms and benefits include incommensurables. In the context of environmental crime value judgements are especially powerful when it comes to assessing what a proportionate penalty would be as assessing proportionality entails judgement of the relative seriousness of offences and the gravity of the crime involved.⁶ How serious has been the environmental harm caused by the offence (noting that harm is inchoate in the offence itself) and how serious is environmental harm anyway? Is clearing vegetation really *bad* at all?

Judicial assessments of environmental harm have generally not been generous and it is rare that any individual act of clearance is found to be, nor could be able to be shown to be, particularly heinous in terms of local and immediate consequences, although the cumulative damage caused by many contraventions may be very great, indeed catastrophic. In further considering proportionality the subjective circumstances of the offender becomes important in reducing penalties in the land clearance context as few offenders are recidivists and many are considered pillars of their communities. In *Orlando* (Table 2), mitigating factors included a past history of agricultural success: “He has had a long and successful involvement with agriculture in the country” (per Lloyd J at 106). In *Leverton* the defendant had “substantial standing throughout the Commonwealth”. In *Warroo*, admittedly a poorly selected case for the prosecution (who conceded during the trial that the clearance undertaken was “substantial but not serious” and that “an application for consent was more than likely to have been approved subject to conditions”), Justice Talbot concluded that “(It is a tragedy for this family that they are suffering the shame and humiliation of being treated as criminals” (para 46).

SENTENCES FOR ILLEGAL LAND CLEARANCE

The primary consideration in sentencing is the objective gravity or seriousness of the offence, and “(T)he primary indicator of the objective gravity or seriousness of the offence is the maximum penalty prescribed by the legislature” *Taylor* per Lloyd J para 23 (see Table 3). Table 1 above describes the maximum statutory penalty available. In *Taylor* it was \$1.1 million and for the cases in Table 2, \$110,000. Averaging the penalties from the cases prosecuted and resulting in a monetary penalty in Table 2 below provides a price of \$37/ha for illegal land clearance.

Table 2: Cases prosecuted in which a monetary penalty was imposed

CASE	CLEARANCE	MITIGATION	PENALTY (costs)	PRICE (\$/ha)
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⁵ Preston, B. J., Principled sentencing for environmental offences – Part 1: Purposes of sentencing, (2007) 31 Crim LJ 91 at 93.

⁶ Proportionality includes objective circumstances of the offence as well as subjective circumstances of the offender.

DETAILS		(\$AUD)		
<i>Bungle Gully</i> ⁷ 8 Jul 97 Bignold J	275 ha between 24 April and 13 June 96 of coolabah on riverfront for farming by bulldozer	50% reduction due to mitigating factors including: pleaded guilty, had a partial exemption that clearing was for boundary fence and paddock access, family history of farming, environmentally conscious farming practices, remedial works, costs, good character, that was first offence, financial position and difficult economy	\$20,000 (\$40,000) and consent order (direction for remediation) that substantial part of the land that had been cleared to be used for the creation of wildlife corridor, riverine wildlife corridor, unfarmed flood runner corridor	72.73
<i>Nunki</i> ⁸ 6 Feb 98 Bignold J	180 of 2,900 ha property between 11 and 21 June 1996 of open woodland (coolabah, blackbox, rosewood and belah) for grazing	Good character, co-operation, remedial works	\$10,000 (\$8,525) and consent order setting aside vegetated area of 400 ha	55
<i>Greentree</i> ⁹ 4 Mar 98 Talbot J	650 ha between 13 and 30 Oct 1996 of coolabah/black box interspersed with River Cooba by bulldozer	Co-operation, pleaded guilty, remedial works	\$7,000 to each of 2 companies (Prime Grain and Limthomo) (\$52,000) and property agreement ordered that on part of land cleared a wildlife corridor/refuge be established under Pt 5 of the Native Vegetation Conservation Act 1997 and registered in accordance with s 44 of the Native Vegetation Conservation Act or with the Land Titles Office to be signed within 6 months	21.5 (av) (11/ha for each co)
<i>Jones</i> ¹⁰ 1 Apr 98 Lloyd J	35 ha of 3323 ha property between 27 Dec and 5 Jan 1997 of <i>Eucalyptus coolabah</i> (7-31 trees per ha) and <i>Eucalyptus largiflorens</i> for cropping	Co-operation, pleaded guilty, not likely to reoffend	\$3,000 (\$7,000)	86

Table 2 continued: Cases prosecuted in which a monetary penalty was imposed

<i>Rial</i> ¹¹ 29 Apr 98 Talbot J (quashed on appeal, not incl in total)	240 ha between 1 Jan 96 - 16 Feb 1996 of chenopod shrubland for agriculture (rice), by Harris	Good character, remedial works (by owner)	\$5,000 (Rial), \$2,000 (Harris), \$10,000 (Crawford) \$10,000 (Windouran Pastoral) (\$100,000 costs) and consent order to fence off 765 ha of remaining and use 35 ha for experimental regeneration	112.5 (av)*
<i>Orlando</i> ¹² 19 May 98 Lloyd J	1,200 ha in 4 lots of mainly open Coolibah woodland pushed by bulldozer between 22	Pleaded guilty, good character, remedial works (agreed to retire area as well as to revegetate	\$35,000 in total (sum for 4 areas: \$18,000; \$9,500; \$5,000 and \$2,500 no reasons given in judgement for apportionment) and	29.17

⁷ *Director General Department Of Land & Water Conservation v Bungle Gully Pty Limited* [1997] NSWLEC 112

⁸ *Director General Of The Department Of Land & Water Conservation v Nunki Pastoral Pty Limited* [1998] NSWLEC 6

⁹ *Director-General Of The Department Of Land And Water Conservation v Ronald Lewis Greentree* [1998] NSWLEC 30

¹⁰ *Director General Of The Department Of Land & Water Conservation v Stanley Arthur Jones* [1998] NSWLEC 51

¹¹ *Director General Land & Water Conservation v Tony Rial (Director General Land & Water Conservation v Windouran Pastoral Company Pty Ltd & Oths)* [1998] NSWLEC 72

¹² *Director General Of The Department Of Land & Water Conservation v Orlando Farms Pty Ltd* (1998) 99 LGERA 101

	October and 29 December 1996 for dryland wheatcropping	cleared) and significant financial burden (and penalty reduced also by principle of totality for 4 related offences following <i>R v Holder</i> [1983])	s 126(3) order to remediate area cleared as per property agreement already consented to (plus costs)	
<i>Cameron</i> ¹³ 28 Jul 98 Pearlman J	same as <i>Jones</i> above	Co-operation, contrition, good character, pleaded guilty, remedial works	\$10,000, (\$15,000) (also agreed to pay \$10,000 as a contribution towards the fine and costs incurred by the contractor who did the actual clearing work (above))	286
<i>Warroo</i> ¹⁴ 25 Feb 99 Talbot J (max penalty \$110,000)	329 ha (900 trees) between 4 and 25 May 1997 for agriculture by bulldozer	Guilty plea (although late), consent likely due to exemptions, remorse, humiliation, embarrassment, good character, long history of association with the property	\$2,500 plus costs (no remedial order)	7.6
<i>Leverton</i> ¹⁵ 18 Sep 02 Talbot J (max penalty \$110,000)	325 ha on 3 lots of Brimbel Box and Belah layered open woodland community and native grassland near Boggabilla between 1 August 1999 and 22 September 1999 for agriculture by bulldozer and loader	Guilty plea, lack of priors & good character: "substantial standing throughout the Commonwealth", embarrassment and stress, contrition, remedial works, some grass clearing was legal, economic loss and costs, "defendant's antecedents" (long history of association with the property incl conditions to clear)	\$5,000 plus costs (\$31,000)	15.40

* \$42 for Crawford and company, \$21 for Rial and \$8 for Harris. The convictions however were quashed on appeal.

SENTENCES FOR OTHER ENVIRONMENTAL CRIMES

Removing trees in metropolitan areas of New South Wales (which are not covered by the *Native Vegetation Act* but local provisions) has attracted sentences of \$10,000 per tree.¹⁶ Clearing vegetation protected under the provisions of the *National Parks and Wildlife Act* has attracted a sentence of over \$100,000/ha.¹⁷ Obviously not all vegetation is the same, and not all hectares and trees are the same. Such a comparison serves as only a very rough indication of the severity with which offences are viewed. Generally however it may appear here that the courts are reflecting popular opinion, as in built up areas the value of trees may be greater as there are fewer of them, and threatened and endangered species have long captured public concern, notwithstanding the obvious advantage in preventing a species or community from attaining such dire, and therefore exalted, status in the first place. So, while maximum statutory penalties may be indicating the public good of vegetation retention, courts may be reflecting more dominant and popular opinions in sentencing for vegetation clearance: some vegetation is obviously much more important than others.

Such sentences may be compared to sentences for other environmental crimes such as pollution. Harm does not need to be caused to attract a high sentence under the pollution provisions; in *Shoalhaven Starches*¹⁸ the (admittedly repeat) offender was fined \$125,000 (half of the statutory

¹³ *Director General Of The Department Of Land And Water Conservation v Duncan Maxwell Cameron* [1998] NSWLEC 236

¹⁴ *Director-General Of The Department Of Land And Water Conservation v Warroo (Lands) Pty Ltd* [2002] NSWLEC 1

¹⁵ *Director-General of the Department of Land and Water Conservation v Leverton Pastoral Company Pty Limited* [2002] NSWLEC 212

¹⁶ see *Active Tree Services Pty Ltd v Ku-ring-gai Municipal Council* [2005] NSWLEC 431; *Cameron v Eurobodalla Shire Council* [2006] NSWLEC 47; *Advanced Arbor Service Pty Ltd v Strathfield Municipal Council* [2006] NSWLEC 485.

¹⁷ *Garrett v Williams* [2007] NSWLEC 56

¹⁸ *Environment Protection Authority v Shoalhaven Starches Pty Ltd* [2006] NSWLEC 685

maximum for the offence) for a non-toxic, albeit offensive, odour. It may be that while environmental law overall is accepted, some laws are more accepted than others. Pollution laws, being amongst the oldest environmental laws, may form the core and illegal land clearance the penumbra. Perhaps the circle of legislative concern has expanded to a degree beyond the moral circle.

MORAL DISAGREEMENT

Some environmental crimes may not be considered to be “real” crimes for several reasons including their strict liability and the nature of regulation as compared to prohibition. In the land clearance context the property rights movement is also experiencing resurgence, although there have been few dilemmas in constraining private property holders overall: planning law is one area with a long history of compensation-free incursions into property rights. Nonetheless rebellious movements such as Agmates’ “Chop A Tree A Day” campaign highlight the difficulty of relying on voluntary compliance.

Land clearance laws constrain economic production and business expectations and this is related to historic norms about land management which provide that land clearance is not only *not a bad* thing to do but a *good* thing to do. Land clearance was a condition of early land lease grants in the colonies. Modern society is and has been entirely dependant upon clearing land: replacing native vegetation with agriculture, residences, industry and infrastructure. So, while land clearance may be generating notable public bads (such as land degradation) there will be continued disagreement about the balance to be desired between production and preservation. Sentencing options now include restoration, which may be for re-establishing, rehabilitating and preserving vegetation in the place of the cleared vegetation or elsewhere (off-sets), and this may assist in achieving this balance (see for e.g. the consent orders in Table 2). Such orders may be viewed as more enlightened than more backward-looking and offender-(rather than outcomes-) focused sentencing options however such sentences may not be ideal because the requirements may be difficult to enforce and administer. They may also reinforce the existing division between rural landholders and urban dwellers. While sentences for urban tree clearance may be higher the impact of tree clearance legislation is greatest in rural areas because it is in rural areas that the great majority of native vegetation survives, and where the highest land clearance rates occur. An inequitable burden is being placed upon those in rural areas who by historical accident have had land left to clear. Landholders who own cleared land which was cleared while land clearance was promoted, or relatively unregulated, are not required to do anything to address the decline in native vegetation cover.

One of the reasons that the “bads” of land clearance may be under-appreciated is because the harms caused by clearance (and benefits obtained by retention) are too widely dispersed. The fact that environmental harm is actually being caused to so many may actually be a problem, and another problem is that the costs for addressing it are to be borne by so few. There may be deeper questions that need to be asked about the status quo of the legal system itself and whether merely introducing regulation in such a form is sufficient to generate outcomes which are effective and fair, and also stable politically. The legislation against land clearance has been resisted even though it has been far from draconian in operation; most permits are issued, few prosecutions are brought, and when they are, penalties are low; these results are symptomatic of the absence of moral agreement and are resulting in a failure to achieve the legitimate public policy aims of the legislation, as land clearance rates remain high.¹⁹

¹⁹ Bartel, R.L., Compliance and complicity: An assessment of the success of land clearance legislation in New South Wales (2003) 20(3) Environmental and Planning Law Journal 116-141

FUTURE SENTENCES FOR LAND CLEARANCE

Past sentences for illegal land clearance in rural New South Wales are too low to deter because clearance for agriculture has a high economic return. In the interests of the principle of parity small penalties are usually also reinforced by further small penalties. Low penalties support, rather than challenge, the belief that the activity is trivial and may also call into question the credibility of the law and the legal system. Higher sentences however would have been out of step with community regard and expectations and would have generated resistance.

After an extended period of little or no enforcement action under the *Native Vegetation Act* (a strong indication of the politically unpalatable moral mire of the provisions) *Taylor* was decided late last year under the new statutory maximum penalty of \$1.1 million (see Table 3). In the course of his judgement Justice Lloyd said “(P)ersons will not be deterred from committing environmental offences by nominal fines. There is a need to uphold the integrity of the system of protecting and preserving endangered ecological communities. There is a need to send a strong warning to others who may be minded to breach the law that such actions will be visited with significant consequences” (at 32). Expressed as a price per hectare the sentence was the highest yet however it is still considerably lower than is common for metropolitan tree clearance or illegal clearance under the *National Parks and Wildlife Act*. The decision in *Taylor* nonetheless may be a sign that a more moral-based regard for illegal land clearance is developing, and that sentencing is moving through a transition phase of norm development from status quo to new horizon. In *Taylor* the landholder described the vegetation as “rubbish”, “small spindly regrowth” and “paperbark scrub” (para 20 per Lloyd J). Others would disagree and may now find support in the court’s decision. The educative function of law is vitally important in supporting the change in norms of behaviour about land clearance, precisely because the law is attempting to lead social change, rather than merely reflect the status quo of perceptions and expectations. Such change has occurred before: in corporate crime and in the introduction of driver safety measures such as seatbelts and limits on alcohol consumption. Land clearance norms however may be particularly resistant because the change in values requires a 180 degree shift: from good to bad, rather than from merely mildly distasteful to bad.

Table 3: The most recent case prosecuted in which a monetary penalty was imposed

CASE	CLEARANCE DETAILS	MITIGATION	PENALTY	PRICE
<i>Taylor</i> ²⁰ 9 Nov 07 Lloyd J (max penalty \$1,100,000)	30.5 ha of Malaleuca species, Eucalyptus species and Casuarina glauca near Frederikton (Kempsey) between about 28 October 2003 and 22 February 2004 for agriculture by bulldozer and loader	Guilty plea, remediation agreement, but had made erroneous assertions re reasons for clearance and misled investigator- \$30,000 reduced to \$20,000 via mitigation of 33%	\$20,000 plus costs	655.74

There may be greater change still afoot however. It may be that it is not only what is deemed to be good behaviour that is being questioned but also what has been previously assumed to be the best mechanism to generate it. The criminal law as a whole is undergoing an evaluation of what was once simply accepted as effective. Lessons from the field of restorative justice in particular appear to be charting a fresh path. Environmental crime may succeed in attracting higher penalties and changing norms but then find that yet better outcomes may be possible by alternative means.

²⁰ *Director-General of the Department of Environment and Climate Change v Taylor* [2007] NSWLEC 530

CONCLUSION

The function of criminal law is to declare standards of moral conduct and mete out punishment for violations, but in Australia land clearance laws have been accused of lacking the prerequisite moral culpability. Sentences imposed in New South Wales appear to be inadequate, which indicates that violation of land clearance laws is acceptable. While maximum statutory penalties may be high, actual fines meted may be low and of little deterrent value, sentences reflecting perhaps also a lack of appreciation of the seriousness of contraventions within the judiciary, a position which may be shared by the wider community. This is an area of law with considerable resistance expressed towards it by those being regulated, including active rebellion and transgression. This poses a significant problem for achieving legislative aims of reducing environmental harm. Such a situation perhaps demands action in (re)educating the community and the judiciary to align attitudes and behaviours with those norms that the laws support in order to achieve their environmental aims. Looked at another way however it may be that sentences that accurately reflect community opinion should be applauded, as a check also on unreasonable laws. To achieve the legislative aims and public goods desired we may need to look beyond the traditional solutions, and beyond existing institutions and mechanisms to achieve environmental (and social) aims.

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