

The Prosecution of Environmental Offences in New Zealand

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ABSTRACT

This paper will examine the background law regarding environmental offences under the *Resource Management Act 1991* (NZ), prosecution trends, sentencing for RMA offences (including principles of sentencing, sentencing discretion, legislative guidance, appellate guidance, guideline judgments, and tariffs), the use of costs in conjunction with sentencing, recent appeal judgments, and finally draw conclusions regarding consistency and sentencing in relation to environmental offences. Where relevant comparisons will be made with the Australian jurisdictions.

BACKGROUND

The *Resource Management Act 1991* (“RMA”) is a sophisticated statute which restated and reformed the law relating to the use of land, air, and water. It governs the use and development of terrestrial natural and physical resources (including the subdivision of land), and the coastal marine area within the 12 nautical mile limits of the territorial sea.

Like similar environmental statutes in other common law jurisdictions the RMA provides for the preparation of policy statements and plans at national, regional, and district level to guide decision making under the statute; for applications to be made regarding the use and development of natural and physical resources, and for the determination of applications by the relevant Local Authority or by the Environment Court on appeal; and for enforcement regarding unlawful activities.

Environmental management under the RMA is delegated to Local Authorities (Regional Councils and Territorial Authorities). Territorial Authorities (City and District Councils) are generally responsible for regulating land use activities and subdivision, whilst Regional Councils are responsible for regulating activities within the Coastal Marine Area, the use of lake and river beds, the take and use of water, and the discharge of contaminants into the environment.

The RMA takes a permissive attitude to the use and development of land, which is generally allowed under s 9 unless the activity contravenes a rule contained in a Regional or District Plan. In contrast, a restrictive approach is adopted by the RMA regarding all other activities (including subdivision) which require prior approval by

the grant of resource consent, unless the activity is expressly permitted by a rule contained in a Regional or District Plan.ⁱ

The exercise of functions, powers, and duties under the RMA is guided by a single, overarching, statutory purpose – the promotion of sustainable management, which requires decision makers to take a holistic view of the environment and that any adverse effects of carrying out activities should be avoided, remedied, or mitigated. Section 5 provides:

5. Purpose

- (1) □ □ The purpose of this Act is to promote the sustainable management of natural and physical resources.
- (2) □ □ In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—
 - (a) □ □ Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
 - (b) □ □ Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
 - (c) □ □ Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

In the context of sentencing for environmental offences the Courts have held that when determining the appropriate sentence that should be imposed regarding offences against the RMA the sentencing Judge is entitled to have regard to the purpose and principles on which the legislation is founded. For example, in *R v Conway* the Court of Appeal stated:

[69] The extended definition of sustainable management in s 5(2) emphasises (amongst other things) the statutory purpose of avoiding, remedying or mitigating adverse effects on the environment ...

[70] In cases such as this, these provisions assist the sentencing Judge to identify the matters which Parliament considers to be significant where breaches under the Act are alleged and to assess accordingly the impacts of the offender's conduct as well as the extent of culpability.

This confirms the relevance of s 5 to all decision making under the RMA irrespective of whether the jurisdiction being exercised is civil or criminal.

ENFORCEMENT UNDER THE RMA

A variety of tools are provided for enforcement of the RMA including:

- The making of declarations by the Environment Court;ⁱⁱ
- The making of enforcement orders by the Environment Court;ⁱⁱⁱ
- The service of abatement notices by enforcement officers^{iv} warranted by Local Authorities;^v
- The prosecution of offences in the District Court;^{vi} and
- The service of infringement notices by enforcement officers warranted by Local Authorities.

Criminal jurisdiction under the RMA is exercised by the District Court. Judges of the Environment Court also hold warrants as District Court Judges, and commonly (but not exclusively) preside when offences against the RMA are brought before the Court.

The *discretion* to take enforcement action, including prosecution, is exercised by the relevant Local Authority and arises where:

- Land use is carried on in a manner that contravenes a rule in a District Plan, or the terms and conditions of a resource consent;^{vii}
- Subdivision is carried on without express authorisation by a rule in a District Plan or by a resource consent;^{viii}
- Use of the coastal marine area is carried on without express authorisation by a rule in a Regional Coastal Plan or by a resource consent;^{ix}
- Use of the beds of lakes and rivers is carried on without express authorisation by a rule in a Regional Plan or by a resource consent;^x
- Water is taken, used, dammed, or diverted without express authorisation by a rule in a Regional Plan or by a resource consent;^{xi}
- Contaminants are discharged into the environment without express authorisation by a rule in a Regional Plan or by a resource consent;^{xii}
- Carrying on an activity in breach of the terms of an enforcement order or an abatement notice.^{xiii}

Offences against the RMA are prescribed by s 338, and s 339 sets out the penalties or sentencing options available to the District Court on conviction. Section 338 of the RMA prescribes three levels of criminal offences:

- First, the group of offences prescribed by s 338(1) which deal with situations where the offender has carried on activities without having obtained the relevant resource consent, or where activities are carried out in breach of the terms and conditions of the relevant resource consent, or where activities are carried out in breach of the terms and conditions of any enforcement order made by the Environment Court or any abatement notice served by an enforcement officer. These offences are punishable by a sentence of up to two years imprisonment or a fine of up to \$200,000 and a fine of up to \$10,000 per day for continuing offences.

- Second, the group of offences prescribed by s 338(2) deal with situations where the offender has failed to comply with procedural requirements under the RMA such as failure by the offender to provide details of his or her name and address to an enforcement officer, or where activities are carried out in breach of the terms and conditions of an excessive noise direction or an abatement notice for unreasonable noise, or where activities are carried out in breach of the terms and conditions of any order made by the Environment Court (except breach of an enforcement order). These offences are punishable by a fine of up to \$10,000 and a fine of up to \$1,000 per day for continuing offences.
- Third, the group of offences prescribed by s 338(3) which deal with situations where the offender has obstructed a person executing their powers under the RMA, or where the offender has failed to attend the Environment Court when required to do so or has failed to co-operate with the Court, or where the offender has failed to comply with a witness summons under s 283 of the RMA, or where activities are carried out in breach of the terms and conditions of an esplanade strip or easement for access. These offences are punishable by a fine of up to \$1,500.

The sentencing options provided under s 339(1)-(3) of the RMA indicate the relative seriousness with which the different levels of offences are viewed by Parliament.

However, it is for note that although the RMA has been subject to regular statutory review and whilst 15 Amendment Acts have been passed during the period 1993-2007, there has been *no* revision of maximum fine levels since the RMA came into force in October 1991. When measured against inflation the Reserve Bank of New Zealand CPI Inflation Calculator shows that a “basket” of goods and services that cost \$200,000 in October 1991, would have cost \$280,946 in October 2007. This represents a total percentage change of 40.5%, or a compound average annual rate of inflation of 2.1%.

Defences are provided under ss 340(2), 340(3), and 341 of the RMA. Section 340(2) of the RMA provides for the liability of principals for the acts of agents (including employees and contractors). An alleged offender will have a good defence under s 340(2) of the RMA if he or she can prove that:

- They did not know and could not reasonably be expected to have known that an offence was being committed or was to be committed, or in the case of a company that the directors and persons concerned in management of the company did not know and could not reasonably be expected to have known that an offence was being committed or was to be committed;
- That all reasonable steps were taken to prevent commission of the offence; and
- That all reasonable steps were taken to remedy any adverse effects of the offence.

In *Auckland Regional Council v Bitumix*^{xiv} the District Court held that s 340(2) of the RMA applies in circumstances where:

... two distinct entities are involved in the commission of the alleged acts. One, the defendant charged and two, some other person acting as an agent or employee of that defendant. In those circumstances s 340 has the effect of rendering both the principal and the agent liable for the acts complained of.

It is also clear from the decision in *Auckland Regional Council v AFFCO Allied Products Ltd*^{xv} that a high standard of conduct will be required on the part of the defendant in order to prove a defence under s 340(2) of the RMA. For example, AFFCO was charged with offences regarding the discharge of contaminants from its hide processing plant and fellmongery into a stream via the stormwater system. The offences occurred when a contractor cleaning out cesspits blocked a valve and contaminants were diverted from the trade waste system into the stormwater system. The District Court held that AFFCO could not establish the defence because:

AFFCO was in control of the site and in a position to control the activities of its contractor. To the extent that it could and should have controlled the activity at the point where the pollution occurred it is responsible for the pollution. The defendant company actively undertook the operations conducted at its Wiri Plant including the responsibility for the collection and disposal of waste material on site. It cannot abdicate its responsibilities simply by employing an agent to undertake that work on its behalf. It was in a position to exercise continued control of that activity and to prevent the pollution from occurring but failed to do so.

Section 340(3) of the RMA provides that where a company is convicted of an offence against the RMA, the directors and persons concerned in the management of the company shall be deemed to be guilty of the same offence in cases where the Local Authority can prove:

- That the act which constituted the offence took place with the director's or manager's authority, permission, or consent; and
- That the director or manager knew or could reasonably be expected to have known that the offence was being committed or was to be committed, and that he or she failed to take all reasonable steps to prevent or stop it.

However, the decision in *R v Lorenzen* illustrates that company director's may incur personal liability for offences against the RMA by virtue of their personal involvement in the act which constituted the offence, independent of the deemed liability imposed by s 340(3). Lorenzen was the sole director of a company that had engaged a contractor who "altered native and exotic vegetation" contrary to the rules in the relevant District Plan. The company was not charged with the offences notwithstanding the fact that it owned the subject site, and the contractor could not be found. For example, the District Court held:

In summary the Crown here does not need to rely upon ownership of the land. It does not need to charge the company to be able to proceed against this defendant. His liability could arise either directly through s 338(1) as the

person contravening the relevant provision, or permitting its contravention, or alternatively his liability could arise as a party under s 66 of the Crimes Act. There is sufficient evidence referred to in the depositions to show his personal involvement in the control of what was happening on this land and in my view a reasonable jury, properly instructed on the law, could well come to the conclusion that he is guilty of the offences charged.^{xvi}

Section 341 of the RMA provides for strict liability. For example, regarding contravention of the duties and restrictions in ss 9 and 11-15 of the RMA (failure to carry out activities in accordance with the terms and conditions of a valid resource consent or in accordance with any relevant permitted activity rule contained in a Regional or District Plan) s 341(1) provides that it is not necessary to prove that the defendant intended to commit the offence. Defences are provided by s 341(2) regarding due diligence and *force majeure* where the defendant proves:

- That the action or event to which the prosecution relates was necessary for the purposes of saving or protecting life or health, or preventing serious damage to property or avoiding an actual or likely adverse effect on the environment; and
- That his or her conduct was reasonable in the circumstances; and
- That the adverse effects of the offence were adequately mitigated or remedied after it occurred; or
- That the action or event to which the prosecution relates was due to an event beyond his or her control including natural disaster, mechanical failure, or sabotage; and
- That the action or event could not reasonably have been foreseen or provided against by the defendant; and
- That the adverse effects of the offence were adequately mitigated or remedied after it occurred.

In order to take advantage of the defences provided by s 341(2)(a) or (b) of the RMA, the defendant is required to give written notice of the facts supporting the defence within 7 days of service of the summons, or within such further time as the Court may allow. Leave of the Court is required where notice is given out of time.

The defence of “necessity” in s 341(2)(a) of the RMA was considered in *Fugle v Cowie*^{xvii} regarding works carried out in the bed of a trout stream during spawning. The High Court held that the test is objective and requires that the action or event should be “reasonably necessary” as opposed to being “merely desirable”, that the defence will not be available when sufficient time was available to apply for resource consent before carrying out the works, that the action or event cannot be categorised as “necessary” when unacceptable damage is caused, and that the defendant’s conduct cannot be described as “reasonable” when the adverse effects of the action or event can be remedied but where certain adverse effects have not been mitigated or remedied.

Section 342 provides that where a person is convicted of an offence against the RMA, the Court shall order that 90% of any fine imposed on the defendant be paid to the Local Authority which laid the information and that 10% of any fine be paid into the Crown Bank Account.

PROSECUTION TRENDS

Enforcement and prosecution are *discretionary* activities. In New Zealand there are no statutory guidelines available to guide Local Authorities or Enforcement Officers when deciding whether enforcement action should be taken in any given case, and the devolved nature of environmental management under the RMA results in individual Local Authorities giving different priorities (both political and financial) to enforcement and prosecution within their respective administrative areas.

Monitoring of Local Authority performance under the RMA has been carried out by the Ministry for the Environment on a bi-annual basis since 1996/1997. The most recent reports covering the period 2001-2006 (summarised in Table 1 below) reveal a gradual decline in Court action, and increased reliance being given to the use of functions and powers under direct Local Authority control. There is no reliable data available regarding enforcement for the period 1996-2000.

Table 1

Period	Enforcement Orders	Abatement Notices	Infringement Notices	Prosecutions
2001/2002	27	838	394	74
2003/2004	25	889	887	31
2005/2006	21	1004	860	60

Source: Ministry for the Environment *RMA Survey of Local Authorities 2001/2002, 2003/2004, and 2005/2006.*

The increased use of abatement notices and infringement notices indicates that there has been a general increase in the detection of minor breaches of the RMA. Similarly, the decrease in civil and criminal Court action indicates either that there may have been a general decrease in the occurrence of more serious breaches of the RMA, or that there has been a gradual switch by Local Authorities away from using Court action as the appropriate response to breaches of the RMA. Studies of RMA prosecutions, however, do not reveal any reduction in the frequency of serious offending.

The Ministry for the Environment has also commissioned two studies of prosecutions under the RMA from Karenza de Silva, an experienced environmental lawyer and prosecutor. The first study covered the period 1 October 1991 to 30 June 2001. The second study covered the period 1 July 2001 to 30 April 2005.

During the period covered by the first study 375 prosecutions were analysed. The largest percentage of prosecutions (47%) were commenced regarding discharges of contaminants into water. The commercial sector represented the largest group (41%) of defendants. Most prosecutions (269) were commenced by Regional Councils, with the Auckland Regional Council being responsible for commencing 33% of prosecutions. The outcome of the prosecutions during the period 1991-2001 was:^{xviii}

- In 80% of cases the defendant pleaded guilty;
- A conviction was obtained in 87% of cases;
- The defendant was discharged without conviction in (14) 3.7% of cases;

- In most cases fines were imposed on the defendants;
- In 36 cases an enforcement order was made by the Court;
- In four cases the defendants were sentenced to community service;
- None of the defendants were sentenced to periodic detention;
- In two cases suspended sentences were imposed;
- None of the defendants was sentenced to a term of imprisonment;
- The average fine was \$4,400;
- The highest fine was \$50,000 in *Taranaki Regional Council v Petrocorp Exploration Ltd*^{xix} regarding the discharge of drilling mud, crude oil, and hydrocarbons from an oil rig into a stream.

During the period covered by the second study 171 prosecutions were analysed. The largest percentage of prosecutions (43%) were commenced regarding discharges of contaminants into water. The agricultural sector represented the largest group (37%) of defendants. Most prosecutions were commenced by Regional Councils, with the Waikato Regional Council and Southland Regional Council each being responsible for commencing 14% of prosecutions. The outcome of the prosecutions during the period 2001-2005 was:^{xx}

- In 82% of cases the defendant pleaded guilty;
- A conviction was obtained in 90% of cases;
- In four cases the defendants were discharged without conviction;
- In most cases fines were imposed on the defendants;
- In 21 cases an enforcement order was made by the Court;
- In eight cases the defendants were sentenced to community service;
- In three cases the defendants were sentenced to periodic detention;
- In two cases suspended sentences were imposed;
- In two cases the defendants were sentenced to a term of imprisonment;
- The average fine was \$5,631;
- The highest fine was \$55,000 in *Auckland Regional Council v Nuplex Industries Ltd* regarding the discharge into air of ethyl acrylate in breach of consent conditions. The unauthorised activity occurred for only one day.

The general trend during both periods shows an increase in the number of convictions, and an increase in the average fine level. Overall, the studies show a general improvement in compliance by the commercial sector, and an increase in non-compliance by the agricultural sector. However, in both periods the highest fines were imposed regarding unauthorised activities in the industrial sector.

More extensive use was made of the sentencing options available to the Court during the second period with suspended sentences being imposed in two cases, and terms of imprisonment being imposed in two cases. However, compared with the maximum fine of up to \$200,000 provided for under s 339 of the RMA, the highest fines imposed during both periods have remained static within the range of \$50,000 to \$55,000 and have not exceeded 30% of the statutory maximum.

The studies also show a general decrease in the number of Local Authorities who brought prosecutions under the RMA. For example, during the first period 42 out of

86 Local Authorities brought prosecutions under the RMA, compared with 17 out of 86 Local Authorities during the second period.

From an Australian perspective Rosemary Martin has carried out a review of *Trends in Environmental Prosecution*.^{xxi} Her paper notes a number of developments in the Australian jurisdictions:

- The introduction of alternative sentencing mechanisms in Victoria under s 67AC of the *Environment Protection Act 1970* which enables the Court to require the offence to be publicised in the media or by notice to specified persons or groups of persons, to make an order requiring the offender to carry out a specified restoration or enhancement project either related to the harm caused by the offence or in relation to some positive environmental effect unrelated to the offence, or to require the offender to prepare an environmental audit regarding its activities. Significantly, such orders can be made in combination with each other, fines can be imposed in addition, and fines can be imposed and orders made without conviction.
- The introduction of a new enforcement culture in Western Australia following release by the Minister for the Environment of the *Review of the Enforcement and Prosecution Guidelines of the Department of Environmental Protection of Western Australia* in February 2003.^{xxii}

One of the difficulties identified with the existing enforcement guidelines (dating from January 2001) was that the tone of the document and language used appeared “to strongly discourage prosecution except when all other avenues have been exhausted”. While reflecting on the reasons for the acceptance of the “last resort” policy which had been adopted by environmental agencies elsewhere in the past, [the review] considered that the approach “reflected resource constraints, inadequate training, discomfort with using the ‘stick’ and a lack of organization self-confidence leading to a reticence about offending those who were seen to wield power and influence”. Following [the] recommendations ... A revised Enforcement and Prosecution Policy was released in November 2004. One of the Principles of Enforcement states that “prosecution is an enforcement tool to be employed where it is the appropriate response to a particular circumstance and is not an enforcement option to be applied only as a last resort”. The position could not be made clearer.

- The imposition of a record \$450,000 penalty by the Federal Court of Australia under the *Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth) regarding the unauthorised clearance of an internationally important wetland. Martin observed:^{xxiii}

This is the heaviest penalty yet to be imposed on an Australian landholder for damage to the environment and is the first civil prosecution against a party in relation to a matter of national environmental significance under the EPBC Act.

- The tiered approach to enforcement in New South Wales where significant fines (e.g. \$250,000 in one case) have been imposed for offences requiring proof of *mens rea*.
- Martin also made some interesting observations in her paper on factors that may influence prosecution for environmental offences, such as, the nature of the entity empowered to prosecute (e.g. State or Federal regulatory agency, or a Local Authority), and where the fine is paid (e.g. to the prosecuting agency or authority, or directly to the affected community). She also noted that statistical data can be misleading. For example, higher prosecution volumes (e.g. New South Wales) can be a symptom of higher levels of offending, a more litigious culture, better resourced enforcement agencies and authorities, or simply a greater number of prosecuting authorities where prosecution is a function of Local Government. Similarly, reduced prosecution volumes (e.g. Victoria) may simply reflect the complexity of contentious cases taking more than average time to be tried by the Courts.

What lessons can be drawn from the Australian experience? Clearly, the alternative sentencing mechanisms available in Victoria are much wider than the powers available to the District Court in New Zealand given that no connection is required between the harm caused by the offence and any positive contribution that may be made. Provision is made for environmental offsets to be made by financial contributions required as conditions under s 108(10)(a) of the RMA on the grant of resource consent, accordingly extending the scope of matters that may be included in an enforcement order made by the Court following prosecution for an offence against the RMA would appear to have merit as a legislative amendment that would accord with the purpose of the statute. Similarly, adopting uniform enforcement guidelines that view prosecution as a remedy to be used in appropriate cases, rather than only as a last resort, could have an influence on the number of prosecutions brought by Local Authorities. There appears to be a willingness in Australia to impose more severe penalties where matters of national importance are affected (e.g. clearance of significant native vegetation), which questions whether guideline sentences for similar offences in New Zealand are appropriately severe and act as a deterrent to future offending. Generally, data on Local Authority enforcement decisions (e.g. the reasons why the number of prosecutions appears to be in gradual decline) is not available, and enhanced monitoring by the Ministry for the Environment would be required in order to enable empirical analysis to answer the observations made by Martin about the factors that may influence prosecution for environmental offences.

SENTENCING PRINCIPLES

Sentencing is also a *discretionary* activity. For example, Professor Geoff Hall has observed that:

The task of a sentencing Judge is not an easy one; indeed no task confronting the criminal Court is more of an enigma than that of sentencing a convicted offender. The sentencing Judge is vested with a discretion which requires the balancing of the often competing demands of sentencing. He or she must weigh, usually intuitively, the various purposes of punishment, consider the circumstances of the offence and the characteristics of the offender, and choose the sentencing alternative that does justice to the offender, the victim and the community alike.^{xxiv}

Sentencing discretion is influenced by a number of matters including legislative guidance, appellate guidance, guideline judgments, and tariffs. The objective is to ensure that a principled approach is adopted, and to achieve consistency without losing sight of other competing demands.

Apart from prescribing the sentences that can be imposed by the Court, legislation normally reserves “a large measure of discretion” to the sentencing Judge in determining the appropriate sentence to be imposed in individual cases. This pragmatic approach arises because it would be difficult for Parliament to “foresee and provide for the infinite variety of circumstances that may, and will arise” over time.^{xxv}

In general terms, the maximum penalty will provide a comparative indication of “the seriousness with which the class of offence is regarded by [Parliament]”.^{xxvi} However, in practice the maximum penalty will not be relevant in all cases because it will normally be reserved for the “most serious” offending. Indeed, prosecution trends under the RMA demonstrate that “less severe” sentences are normally imposed.^{xxvii}

The RMA does not impose mandatory penalties, and does not include any express statutory presumption as to the penalty that should be imposed in any particular case. However, s 5 clearly anticipates that adverse effects will be avoided, remedied, or mitigated. From an economic perspective this indicates that adverse effects are to be internalised. Accordingly, this implies that punishment should be a strong influence on determining the level of any fines imposed in cases where offending has materially benefited the offender.

Similarly, the RMA does not contain any statutory or procedural restrictions that could affect the sentencing Court’s discretion. For example, in *Machinery Movers* the High Court noted:

Like many other statutes, the RMA is silent on the matters which may be taken into account on sentencing. To a large extent, the relevant criteria must be inferred from a consideration of the broad legislative objectives.^{xxviii}

The general sentencing principles in ss 7-9 of the *Sentencing Act* 2002, the presumption against imprisonment in s 16 of the Act, the guidance on permitted

combinations of sentences in s 19 of the Act, the prohibition against imprisonment unless the offender has been advised of his or her right to legal counsel in s 30 of the Act, and the requirement under s 40 of the Act for means testing of offenders when fines or reparation are imposed, will therefore be relevant to sentencing under the RMA in the absence of any specific statutory guidance relevant to environmental offences. The sentencing principles in ss 7 and 8 of the Act provide:

7. Purposes of sentencing or otherwise dealing with offenders

(1) □ □ The purposes for which a court may sentence or otherwise deal with an offender are—

- (a) □ □ to hold the offender accountable for harm done to the victim and the community by the offending; or
- (b) □ □ to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
- (c) □ □ to provide for the interests of the victim of the offence; or
- (d) □ □ to provide reparation for harm done by the offending; or
- (e) □ □ to denounce the conduct in which the offender was involved; or
- (f) □ □ to deter the offender or other persons from committing the same or a similar offence; or
- (g) □ □ to protect the community from the offender; or
- (h) □ □ to assist in the offender's rehabilitation and reintegration; or
- (i) □ □ a combination of 2 or more of the purposes in paragraphs (a) to (h).

(2) □ □ To avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to.

8. Principles of sentencing or otherwise dealing with offenders

In sentencing or otherwise dealing with an offender the court—

- (a) □ □ must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and
- (b) □ □ must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and
- (c) □ □ must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
- (d) □ □ must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
- (e) □ □ must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and
- (f) □ □ must take into account any information provided to the court concerning the effect of the offending on the victim; and
- (g) □ □ must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set

out in section 10A; and

(h) □ □ must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and

(i) □ □ must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and

(j) □ □ must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10).

The sentencing principles in ss 7 and 8 of the Sentencing Act were considered in relation to the prosecution of environmental offences in *Selwyn Mews Ltd v Auckland City Council*.^{xxix} Generally, the decision confirms the relevance of the principles regarding offences against the RMA, but questions the applicability of s 9 regarding consideration of aggravating and mitigating factors because this provision is drafted in terms which are more relevant to general criminal offending than environmental offences. The High Court held:

[36] ... [The Sentencing Act 2002] calls for a systematic approach to sentencing, commencing with a consideration of the purposes of sentencing under s 7. Not all those purposes will always be relevant to sentencing in environmental cases. For example, in some cases the harm done may be to the community generally rather than specific members of it. Reparation to particular victims may be relevant in some cases but not others. Rehabilitation will have no relevance to corporate offenders and may not be relevant to individuals who are otherwise of good character.

[37] But many of the purposes of sentencing in s 7 will usually be relevant in environmental cases including holding the offender accountable for harm done; promoting a sense of responsibility for the harm; denunciation and deterrence (both personally and generally).

[38] The principles of sentencing in s 8 will also be relevant particularly (under s8(a)) the gravity of the offending and the degree of culpability involved. That will include the extent of any damage or adverse effects caused to the environment and the extent to which there was deliberate or reckless conduct. As well, the court will need to consider the issues of seriousness of the offence and penalties under s 8(b), (c), and (d); consistency in sentencing levels under s 8(e); the effects on victims under s 8(f) where applicable; and the particular circumstances of the offender under s 8(h) and (i). Where there are issues about mitigating any adverse effects on the environment such as repairing damage or clean up work, then s 8(j) and 10 will become relevant.

[39] Aggravating and mitigating factors under s 9 are to be considered. Although a number of these do not have particular relevance in environmental cases, the matters to be considered are not exclusive: s 9(4).

Section 9(4) of the *Sentencing Act* therefore provides the Court with flexibility to consider (where relevant) other factors not listed in the statute when deciding RMA prosecutions. For example, in *R v Borrett* the Court of Appeal when deciding an appeal against a sentence of imprisonment for unauthorised clearance of native bush and earthworks in the Waitakere Ranges in contravention of the rules in the relevant District Plan, and an interim enforcement order made by the Environment Court, referred to the aggravating factors recorded in the decision under appeal and held:^{xxx}

[18] The appellant's view seems to be that he is entitled to do what he likes on his land and that what he has done does not impact on the wider environment. He is, of course, wrong on both those counts. The Resource Management Act recognises that the rights of a land owner are subject to broader public considerations. As to the wider environment, it can be destroyed by incremental activities such as those undertaken by the appellant.

[19] The special nature of the area in which the property is situated must be emphasised. The appellant is fully aware of the restrictions upon activities that may be undertaken in that area.

[20] There is no doubt that the history of activity on the site is one of contempt both for the provisions of the Resource Management Act and for the orders of the Environment Court. It is appropriate in those circumstances that a significant penalty be imposed. We consider that the District Court Judge was entirely correct in determining that imprisonment was the appropriate response to the contempt shown by the appellant.

[21] We take the view, however, that what was required by the nature of the offending was a short prison sentence sufficient to make it clear to the appellant that the Courts would not countenance behaviour such as his, but no more than was required for that purpose. We consider that 20 weeks was excessive and we concluded that the appropriate term was one of 12 weeks imprisonment.

[22] As to the costs order, we note that the appellant and his wife still owe some \$9,000 from the earlier fines imposed. Their circumstances are such that it is not possible to say that the appellant has the financial means to meet the additional imposition of a costs order. In those circumstances we concluded that this was not a case where a monetary penalty should be added to the prison sentence and for that reason we quashed the costs order.

Empirical research indicates that the utility of sentencing guidelines is dependent on the attitude of sentencing Judges toward their introduction. For example, surveys undertaken by Timmins found that Judges exhibit a strong preference for optional sentencing guidelines that “can be used on a case-by-case basis”, and that the implementation of sentencing guidelines by Judges is more likely to be influenced by peer pressure from within the Judiciary rather than concerns about public perception. As a result Timmins considered that Parliament should be concerned about such matters as they “might be important in determining compliance” with sentencing legislation, and observed that Parliament may also wish “to consider the potential impact of such reforms on sentencing outcomes such as disparity and prison populations”.^{xxxi} In particular, the research found that experimentation with different sentencing guidelines could produce differing results by decreasing or increasing disparity between sentencing outcomes regarding the same type of offending (e.g. aggravated burglary).

The conclusions reached by Timmins have been echoed in a paper prepared for the Legislation Advisory Committee by Justice William Young, President of the Court of Appeal. For example, he stated:^{xxxii}

Those who promote legislation which will affect the conduct and outcomes of everyday litigation necessarily rely heavily on the willingness and ability of the courts to implement the underlying legislative policies.

When examining the “congruence” between the provisions of the *Sentencing Act* 2002 and sentencing practice Justice Young found that the statute differed from practice in two important respects. First, the Act does not include any reference to the “starting point” used in the context of determining what the appropriate sentence of imprisonment should be. Second, tariff sentencing is also not addressed in the Act. These discrepancies between legislation and practice led Justice Young to comment:^{xxxiii}

A legal purist might be dismayed by the differences between actual sentencing practice and what appears to be contemplated by the Act. But these differences (and what they imply as to legislative understanding of the way sentencing is carried out) are of practical significance as well. This is because a legislative system which builds on existing judicial practice is unlikely to function as intended if there is any significant misunderstanding as to what that practice actually is. Such misunderstanding might account for some of the difficulties and perhaps anomalies which have arisen in respect of sentencing for murder and the fixing of minimum terms in relation to determinate sentences.

Notwithstanding these discrepancies between the provisions of the *Sentencing Act* and judicial practice, the legislative objective of increasing sentences for the most serious offenders appears to have been met regarding the prosecution of offences against the RMA. The first two sentences of imprisonment have been imposed since the Act was passed, and there has been a small increase in the level of fines imposed with the highest fines having increased from \$50,000 to \$55,000 since the Act was passed.

APPELLATE GUIDANCE

The development of appellate guidance has arisen as a direct consequence of the provision made for appeals against sentence in the *Sentencing Act* and its statutory predecessors. Professor Hall summarises the benefits of appellate guidance as follows:^{xxxiv}

Appellate review enables questions of policy and principle to be raised and resolved. It facilitates the development of a measure of consistency, without undermining the importance of judicial discretion in the individual case. Appellate review is a now well-established means of controlling sentencing discretion, reducing sentencing disparity and giving general guidance on sentencing principles.

As a result it is now common practice for sentencing Judges to refer to previous decisions either to refer to the principles set out in leading judgments, or to provide an indication of the “type and level of sentence regarded as appropriate in similar cases”.^{xxxv} However, the practice of referring to previous sentencing decisions has raised the question of whether such decisions should be regarded as precedents or guidelines? The English Court of Appeal resolved this question in *R v De Havilland* by preferring to regard previous sentencing decisions as guidelines. The Court held:^{xxxvi}

As in any branch of the law which depends on judicial discretion, decisions on sentencing are no more than examples of how the Court has dealt with a particular offender in relation to a particular offence. As such they may be useful as an aid to uniformity of sentence for a particular category of crime; but they are not authoritative in the strict sense ... the sentencer retains his discretion within the guidelines, or even to depart from them if the particular circumstances of the case justify departure.

In terms of their potential utility to the sentencing Court, Professor Hall has divided previous sentencing decisions into four broad categories. First, precedent decisions dealing with statutory interpretation of relevant legislative provisions. Second, decisions which set out rules of practice relevant to the exercise of sentencing discretion. Third, guideline judgments relevant to the type and level of sentence that may be appropriate. Fourth, decisions which provide practical examples of the application of sentencing guidelines. In particular, Hall observed:^{xxxvii}

The relatively recently developed “guideline judgment” ... seems destined to become the most important vehicle of the future for the formulation and dissemination of judicial sentencing policy. On any narrow view of the doctrine of precedent, such guidelines ... must be considered obiter, but it is clearly intended that they should be observed by the trial Courts, although they are not to be slavishly followed or blindly adhered to when the facts of a particular case warrant departure from them.

However, Professor Hall also identifies three disadvantages of guideline decisions in sentencing. First, the approach is *ad hoc* and fact specific. Second, the process of identifying guideline decisions is “time-consuming” and requires analysis of all sentencing decisions. Third, the selected guideline decisions may be inconsistent and therefore prove difficult to apply in practice.^{xxxviii}

The utility of guideline judgments therefore derives from their potential to assist sentencing Courts to develop a consistent and uniform approach to sentencing in similar cases. Professor Hall observes that:^{xxxix}

Guideline judgments are judicial narrative guidelines that are intended to give authoritative guidance to trial Judges in a certain sphere of sentencing. They are judgments that go beyond the point raised in the particular appeal and which outline general principles of sentencing for given offences.

A flexible approach is required to the application of guideline judgements in order to avoid a “rigid or mathematical” approach to sentencing. For example, in *R v Clotworthy Tipping* J noted that:^{xl}

Within which category an individual case falls, and where within the band applicable to that category, are matters of judgment depending on all the relevant circumstances of the case. While categories and bands are useful guides in the sentencing process, the question of what sentence is appropriate to the individual case is ultimately a matter of judgment on the basis of all the relevant factors. Care must be taken not to let categorisation result in too rigid or mathematical an approach.

The penalties imposed in guideline judgments provide a general indication of the type and level of sentence or “tariff” that may be appropriate in similar cases. Professor Hall has, however, noted that tariffs have been limited to “straightforward subjects ... which call for the imposition of retributive or deterrent sentence”.^{xli}

APPLICATION OF GUIDELINE JUDGMENTS

Guideline judgments are likely to be of greatest value to the sentencing Court where they “differentiate between the relative gravity of specific offences”, or where they provide a starting point or benchmark for sentencing, or where they define aggravating or mitigating circumstances that should be had regard to when sentencing.^{xlii}

For example, the decision of the High Court in *Machinery Movers Ltd v Auckland Regional Council* has exerted considerable influence on sentencing under the RMA.^{xliii} The case involved an appeal against sentence regarding an unauthorised discharge of timber treatment chemicals into a stream. In the absence of any specific New Zealand authority the High Court cited with approval the sentencing guidance provided by the Canadian decision in *R v Bata Industries Ltd*. The Court in *Bata* held:^{xliv}

Breaches of these regulations and laws must be dealt with in such fashion as to prevent their repetition and to foster the principle of environmentally responsible corporate citizenship ... The purpose of sentencing an offender is to protect the public, to deter and rehabilitate the offender, to promote compliance with the law, and to express public disapproval of the act ... There are unique sentencing considerations to bear in mind in public welfare offences, but there can be no doubt that the protection of the public is the primary consideration in sentencing in this field.

Within the subtopic of public welfare offences, environmental offences have their own set of special considerations ... The severity of the sentence should vary in accordance with several factors, including:

- A. The nature of the environment affected;
- B. The extent of the damage afflicted;
- C. The deliberateness of the offence;
- D. The attitude of the accused.

In sentencing corporations convicted of environmental offences, the Court should consider:

- A. The size, wealth, nature of operations and power of the corporation;
- B. The extent of attempts to comply;
- C. Remorse;
- D. Profits [generated] by the offence;
- E. Criminal record or other evidence of good character.

When a Court imposes a penalty in respect of an environmental offence, the level should reflect the gravity of that particular offence and leave room for the most serious of circumstances. The harshest sentences ought to be reserved for the worst possible factual situation.

The decision in *Machinery Movers* has been regularly cited in subsequent prosecutions under the RMA, and the guidelines in *Bata* have been referred to by the sentencing Courts. More recently, the decision of the High Court in *Selwyn Mews* confirmed that the *Sentencing Act* 2002 applies generally to all sentencing decisions, including offences against the RMA. The Court also confirmed the continued relevance of the decision in *Machinery Movers* to sentencing under the RMA, but held that *Machinery Movers* must now be applied in light of the provisions of the *Sentencing Act*. The decision in *Selwyn Mews* (as noted above) also provides guidance on the application of relevant provisions of the *Sentencing Act* to offences against the RMA. The Court held:

[40] In environmental cases, fines will most often be the appropriate penalty. There are a number of provisions of the Sentencing Act relevant to fines. Section 13 provides that a fine must be imposed unless any of the specified exceptions in s 13(1)(a), (b), (c), or (d) applies. Other provisions relevant to fines are s 14 and 39 to 43. Obviously, the capacity of the offender to pay a fine will be very relevant and the court has power to order an offender to make a declaration of financial capacity if necessary. That might have been a useful tool in the present case.

[41] Under the Resource Management Act, the court also has power to impose a sentence of imprisonment or community work: s 339(1) and (4). If a sentence of imprisonment is being considered, s 16 of the Sentencing Act is important. First, regard must be had to the desirability of keeping offenders in the community so far as practicable in terms of s(1). Secondly, there is a presumption against imprisonment under s 16(2). Section 8(g) is also relevant (the least restrictive outcome in the circumstances).

[42] Under the Resource Management Act, enforcement orders under s 314 may also be made either instead of or in addition to other penalties: s 339(5). As monetary orders may be made under s 314(d), reparation under the Sentencing Act may have less relevance in environmental cases but the power exists under s 12, 14 and 32 to 38. Where a monetary order is not made under s 314(d), attention must be given to s 12 of the Sentencing Act which requires a reparation order to be made where a victim has suffered loss or damage to

property unless it would create undue hardship or there are other special circumstances rendering such an order inappropriate.

Subsequently, in *R v Conway* the Court of Appeal determined an appeal against sentence regarding offences of discharging contaminants onto land in circumstances where they may enter water, and failure to comply with abatement notices issued by the Auckland Regional Council and enforcement orders made by the Environment Court.^{xlv} The facts of the case related to the operation of an unauthorised scrap yard in Otara in close proximity to a stream that flowed into the sensitive environment of the Tamaki Estuary, in contravention of the rules in the relevant Regional and District Plans. Mr Conway was sentenced to three months imprisonment, Cash for Scrap (his company) was fined \$25,000, and Millennium Investments (the land owner) was fined \$15,000. The principal issue on appeal was whether Mr Conway should have been sentenced to community work or a term of imprisonment. Heath J stated:

[59] The starting point is the need to view the sentence of community work as a real and effective alternative to imprisonment ... However, it is clear that a community based sentence (while being a real and effective alternative) may not be an appropriate sentence in cases where accountability for harm done to the community, deterrence and denunciation are the most important sentencing goals ...

[64] The sentencing goals that influenced Judge Doogue to impose a term of imprisonment were accountability for the harm done to the community (s 7(1)(a) Sentencing Act), denunciation (s 7(1)(c)) and deterrence (s 7(1)(f)). All of those goals are specifically mentioned in s 16(2)(a) in relation to the imposition of a sentence of imprisonment.

[65] In our view, the Judge was right to choose the sentencing option that best met the goals of accountability, denunciation and deterrence. There is a world of difference, in the minds of most members of the community, between a sentence of imprisonment and a sentence of community work ... A short sentence of imprisonment may well deter Mr Conway from behaving in this way again. He will realise that further offending of this type is likely to result in a longer period of imprisonment. Equally, it may well deter other members of the community, of similar mind to Mr Conway, from ignoring or deliberately flouting the provisions of the [RMA] or orders of the Environment Court.

[66] If a sentence of imprisonment were not imposed potential offenders might well regard the economic risk of a fine, or the possible sanction of community work, as a risk worth taking to gain profit from illegal activities ...

In arriving at this decision the appellate Court found that it was required to apply the RMA and the *Sentencing Act* in “harmony”, that the *Sentencing Act* was intended to apply to all sentencing, that following *Machinery Movers* protection of the public was the primary consideration when sentencing offenders under the RMA, and that the proper approach to sentencing for environmental offences was that set out in *Selwyn Mews*.^{xlvi} The decisions in *Borrett* and *Conway* also demonstrate that the legislative objective of increasing the sanctions imposed on the worst offenders is being implemented in the RMA context. For example, Justice Young noted:^{xlvii}

I do not have any statistics which indicate, one way or the other, whether the enhanced relevance of statutory maxima has had significant impact on the lengths of prison sentences which are being imposed. What I can say, however, is that the new legislation has been recognised by the Court of Appeal in guideline sentencing judgments as a factor which must be recognised when tariffs are imposed. This will have a filter down effect on sentencing decisions.

The sentence imposed in *Borrett* clearly provided a guideline for the Court in *Conway* which also considered that a short, sharp, shock was required to curb non-compliance with the RMA by the offender.

CONCLUSIONS

A broad range of enforcement tools are provided in the RMA to deal with breaches of the statute, including prosecution. From 1994 onwards the New Zealand Courts have developed a principled approach to sentencing for environmental offences. As a result there has been a large measure of consistency in the fines imposed by the Courts for offences against the RMA. The level of fines imposed under the RMA, however, remains low when compared with emerging trends from the Commonwealth of Australia and New South Wales. Whilst the *Sentencing Act* 2002 has encouraged the Courts to experiment with a wider range of sentencing options and has resulted in the first two sentences of imprisonment being imposed under the RMA, the approach of Local Authorities to prosecution remains one of “last resort”.

APPENDIX

9. Aggravating and mitigating factors

(1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:

(a) that the offence involved actual or threatened violence or the actual or threatened use of a weapon:

(b) that the offence involved unlawful entry into, or unlawful presence in, a dwelling place:

(c) that the offence was committed while the offender was on bail or still subject to a sentence:

(d) the extent of any loss, damage, or harm resulting from the offence:

(e) particular cruelty in the commission of the offence:

(f) that the offender was abusing a position of trust or authority in relation to the victim:

(g) that the victim was particularly vulnerable because of his or her age or health or because of any other factor known to the offender:

(h) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and

(i) the hostility is because of the common characteristic; and

(ii) the offender believed that the victim has that characteristic:

(ha) that the offence was committed as part of, or involves, a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002):

(i) premeditation on the part of the offender and, if so, the level of premeditation involved:

(j) the number, seriousness, date, relevance, and nature of any previous convictions of the offender and of any convictions for which the offender is being sentenced or otherwise dealt with at the same time.

(2) In sentencing or otherwise dealing with an offender the court must take into account the following mitigating factors to the extent that they are applicable in the case:

(a) the age of the offender:

(b) whether and when the offender pleaded guilty:

(c) the conduct of the victim:

(d) that there was a limited involvement in the offence on the offender's part:

(e) that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding:

(f) any remorse shown by the offender, or anything as described in section 10:

(g) any evidence of the offender's previous good character.

(3) Despite subsection (2)(e), the court must not take into account by way of mitigation the fact that the offender was, at the time of committing the offence, affected by the voluntary consumption or use of alcohol or any drug or other substance (other than a drug or other substance used for bona fide medical purposes).

(4) Nothing in subsection (1) or subsection (2)—

(a) prevents the court from taking into account any other aggravating or mitigating factor that the court thinks fit; or

(b) □ □ implies that a factor referred to in those subsections must be given greater weight than any other factor that the court might take into account.

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ⁱ See ss 11-15 of the RMA.

ⁱⁱ See ss 310-313 in Part 12 of the RMA.

ⁱⁱⁱ See ss 314-321 in Part 12 of the RMA.

^{iv} Local Authorities may, by warrant under s 38 of the RMA, appoint any Local Authority employee; the employee of another Local Authority; any person employed by the Department of Conservation or the Ministry for the Environment or the Maritime Safety Authority to carry out the functions and powers of enforcement officers under the RMA.

^v See ss 322-325B in Part 12 of the RMA.

^{vi} See ss 338-343 in Part 12 of the RMA. Criminal jurisdiction under the RMA is exercised by Environment Judges sitting in the District Court as District Court Judges. All Environment Judges also hold warrants to sit as District Court Judges.

^{vii} See ss 9 & 338 of the RMA.

^{viii} See ss 11 & 338 of the RMA.

^{ix} See ss 12 & 338 of the RMA.

^x See ss 13 & 338 of the RMA.

^{xi} See ss 14 & 338 of the RMA.

^{xii} See ss 15 & 338 of the RMA.

^{xiii} See s 338 of the RMA.

^{xiv} DC Otahuhu, CRN 3048009825, 27 September 1993, Judge Willy.

^{xv} DC Auckland, CRN 9048006616-9, 29 September 2000, Judge Whiting.

^{xvi} District Court, T031951, 4 September 2003, Judge McElrea at paragraph 26.

^{xvii} [1998] 1 NZLR 104.

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^{xix} DC New Plymouth, CRN 5043008689, 22 October 1996, Judge Bollard.

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- ^{xx} MfE pp6-14.
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- ^{xxv} *Fisheries Inspector v Turner* [1978] 2 NZLR 233 at 237 per Richardson J.
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- ^{xxxvi} (1983) 5 Cr App R (S) 109 at 114.
- ^{xxxvii} Hall, p6.
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- ^{xli} Hall, p48.
- ^{xlii} Hall, p8.
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- ^{xliv} (1992) 9 OR (3d) 329 dealing with liability, and 7 CELR (NS) 293 dealing with sentencing.
- ^{xlv} Court of Appeal, CA234/04, 8 November 2004, William Young, Randerson, and Heath JJ (reasons for judgment of the Court delivered by Heath J).
- ^{xlvi} Ibid, paragraphs [60]-[63].
- ^{xlvii} Young, W *Judicial implementation of legislative policy: Ruminations on the impact of the Sentencing Act 2002 on sentencing practice and prison matters* Legislation Advisory Committee, paragraph 9.