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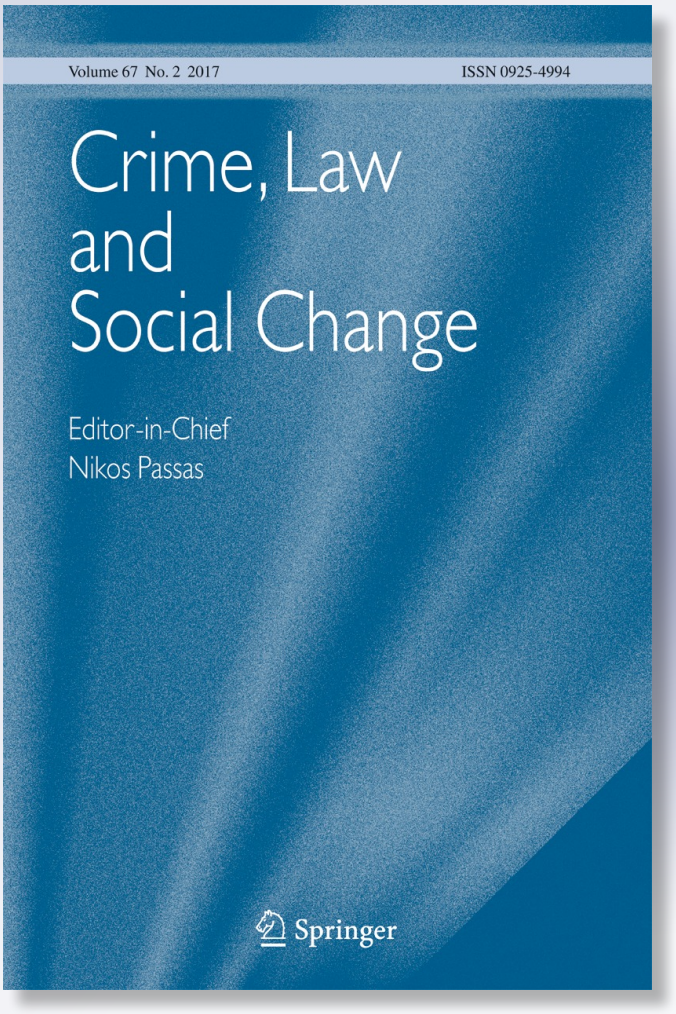

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Reparative justice, environmental crime and penalties for the powerful

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Abstract Environmental harms are frequently part and parcel of ordinary commercial practice. Powerful social interests not only perpetuate great harms, they also obscure and mask the nature of the harm production. They are also best placed to resist the criminalisation process generally. Indeed, when it comes to corporate criminality, recidivism is built-in to the endeavour to the extent that payment of fines is construed as simply part of the cost of doing business (whether related to processing and transferring of waste, or cutting down trees in particular sections of the forest). Unless substantial penalties are put into play, there is little deterrent. This paper proposes that reparative justice, with an emphasis on repairing harm within a generally more punitive context, would be more appropriate and effective. This is illustrated by consideration of recent cases heard in the New South Wales Land and Environment Court in which a number of private companies were penalised using an interesting variety of sanctions. Repairing harm should not be conflated with 'restorative justice' per se. This is important, since 'repairing harm' can be imposed upon offenders (especially corporate offenders) without necessarily involving consensual agreement and/or 'conferencing' methods of negotiation. Company personnel, including senior managers, change. But to change company practices, especially those that pertain to the economic profit margin, requires regulatory and enforcement systems that penalise and sanction in ways that are tailored to the size and activities of the corporation. For this to succeed, it is argued that specialist environmental courts with well developed problem-solving skills and capacities are required.

Introduction

Environmental harms are frequently built into ordinary commercial practice and the everyday routines of people. The law both facilitates and reinforces the legitimacy of

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this, for example, by granting licenses to factories to pollute air and water, albeit within certain limits [1, 2]. More egregious forms of harm are, however, subject to sanction. The penalties involved will vary depending upon whether the offender is dealt with through administrative, civil or criminal law mechanisms.

When it comes to corporate violations of environmental law, recidivism is built-in to the endeavour to the extent that payment of fines is construed as simply part of the cost of doing business (whether related to processing and transferring of waste, or cutting down trees in particular sections of the forest). Unless substantial penalties are put into play, there is little deterrent [3]. Powerful social interests not only perpetuate great harms, but also obscure and mask the nature of the harm production. Indeed, they are also best placed to resist the criminalisation process generally—truisms of *any* study of the crimes of the powerful (see for examples, [4, 5]).

Such truisms are compounded when the crime is an environmental crime. A perennial issue within green criminology, for instance, is the perception that the formal institutions of criminal justice do not take environmental crime seriously enough. There is plenty of evidence to substantiate this claim (see for example, [6–8]). The reasons why, range from social and legal ambiguities over definitions of harm to the inadequate operational knowledge of courts in responding to specific offences and/or in assigning suitable penalties for environmental offenders. There are nonetheless important exceptions to this general rule (see for example, [9–11]), and it is these to which this paper is directed.

As the central fulcrum upon which justice hinges, the dynamics and nature of the court have a major bearing on what occurs prior to a case, what happens during a case, and what happens after a case has been officially processed. Environmental crime has typically been assigned low value by magistrates and judges, as reflected objectively in sentencing outcomes (i.e., sentencing patterns over time in relation to various environmental offences) (see [12–14]), although this is due to a variety of legal and social reasons [1, 15].

Specialist environment courts, however, can and do have greater insight into the nature of environmental offences [11, 16, 17]. Such institutions represent a significant step-up when it comes to both comprehending the extent and nature of environmental harm and in providing remedies that best match the offence in question. For these courts, taking environmental crime seriously is their express mandate.

For the purposes of this paper, the main concern is to elaborate the innovative way in which one such court—the New South Wales Land and Environment Court in Australia [hereafter 'NSW LEC']—is creatively applying sanctions in order to penalise companies that have transgressed existing environmental laws. For illustrative purposes, the paper draws upon recent cases involving offences against the *National Parks and Wildlife Act 1974 (NSW)*. The intention is to demonstrate the ways in which the NSW LEC is, in effect, imposing a particular form of 'reparative justice' as part of its deliberations. Reparative justice, as defined here, refers to court efforts to make defendants repair the harm that they have caused when committing environmental offences. After briefly describing the contours of the New South Wales Land and Environment Court, the article provides an elaboration of diverse sanctions being applied by the NSW LEC in recent cases involving private companies.

The Land and Environment Court of New South Wales

The New South Wales Land and Environment Court was created by the *Land and Environment Court Act,* which was assented to on 21 September 1979. As noted by a former Chief Justice of the NSW LEC, the Court was not directly established to protect the environment [18]. Rather, it was established as part of the State's court system with a comprehensive and exclusive jurisdiction in planning and environmental matters. That said, the Court is nonetheless vested with wide discretionary powers under the relevant environmental legislation that it administers, and this inevitably has the consequence of resulting in the protection of the environment. For example, the *Environmental Planning and Assessment Act 1979*, which forms the basis for most of the decisions of the Court, includes among its objects, the encouragement of the protection of the environment and the encouragement of ecologically sustainable development.

Similarly, the Court needs to be cognisant of the elements constitutive of 'ecologically sustainable development' as outlined in the *Protection of the Environment Administration Act 1991 (NSW)*, where it is noted in Part 3, 6, (2) that ecologically sustainable development can be achieved through the implementation of the following principles and programs:

(a) the precautionary principle – namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, public and private decisions should be guided by:

(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and
(ii) an assessment of the risk-weighted consequences of various options,

(b) inter-generational equity – namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,
(c) conservation of biological diversity and ecological integrity – namely, that conversation of biological diversity and ecological integrity should be a fundamental consideration,
(d) improved valuation, pricing and incentive mechanisms – namely, that environmental factors should be included in the valuation of assets and services, such as:

(i) polluter pays – that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,
(ii) the users of goods and services should pay prices based on the full life cycle of goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,
(iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including

> market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.

The NSW LEC is part of the New South Wales court system, and has equal standing with the Supreme Court of New South Wales [19], the highest court at State level and which is only superseded by the High Court of Australia. The Court was established in the light of two key objectives: rationalisation (in which diverse environmental, planning and land matters could be dealt with in the single court) and specialisation (in which the Court was given wide jurisdiction in relation to the matters before it, and through appointment of appropriate personnel) [20]. The judges of the Court have the same rank, title, status and precedence as judges of the Supreme Court of New South Wales (see s9(2) of the *Land and Environment Court Act 1979*). The NSW LEC has a wide jurisdiction to hear and determine many different types of case. These are grouped by the relevant class of the Court's jurisdiction, and include Class 5 cases, namely, criminal proceedings for offences against planning or environmental laws.

The NSW LEC was essentially established as a 'one-stop shop' to hear matters within its jurisdiction on an exclusive basis [18], and it has developed over time to operate as a form of 'multi-door courthouse' [20]. It has three principal functions that span administrative, civil and criminal functions. First, it acts as an administrative tribunal, determining planning and building appeals on their merits. Second, it also acts in a supervisory role in regards to cases of civil enforcement of planning and administrative law and judicial review of administrative decisions in those fields. Third, it has a summary criminal jurisdiction that involves prosecution and punishment for environmental offences.

Sanctions available to the NSW LEC for enforcement and compliance purposes are provided under the *Protection of the Environment Operations Act 1997 (NSW)*. Traditional options include to impose a gaol sentence, to impose a fine, to order the offender to take clean-up action or steps to prevent the offence from continuing or recurring, and to order compensation to be paid to those who suffered damage to property as a result of the offence or who incurred costs in taking steps to clean up the harm caused by the offence.

Newer sentencing options expanded the types of measures that can be ordered by the court. For example, the *National Parks and Wildlife Amendment Act 2010* saw the insertion of 'Additional orders' (s205(1)) that provides:

> Orders.
>
> The court may do any one or more of the following:
>
> (a) Order the offender to take specified action to publicise the offence (including the circumstances of the offence) and its environmental and other consequences and any other orders made against the person,
> (b) Order the offender to take specified action to notify specified persons or classes of persons of the offence (including the circumstances of the offence) and its consequences and of any orders made against the person (including, for example, the publication in an annual report or any other notice to shareholders or a

company or the notification of persons aggrieved or affected by the offender's conduct),

(c) Order the offender to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit

(d) Order the offender to pay a specified amount to the Environmental Trust established under the Environmental Trust Act 1998, or a specified organization, for the purposes of a specified project for the restoration or enhancement of the environment or for general environmental purposes,

(e) Order the offender to attend, or to cause an employee or employees or a contractor or contractors of the offender to attend, a training or other course specified by the court,

(f) Order the offender to establish, for employees or contractors of the offender, a training course of a kind specified by the court.

The range of orders has been characterised as falling into two broad groups [21].

Orders aimed at restoration/preventing a recurrence of the offence

- Clean up orders
- Compensation orders
- Investigation costs orders (order the offender to pay costs and expenses incurred during the investigation of an offence)
- Monetary benefits penalty orders (order the offender to pay a sum up to the amount of the monetary benefit derived from the offence)
- Environmental audit orders (order the offender to carry out a specified environmental audit of activities carried on by the offender)

Orders aimed at punishing or deterring offenders

- Fines/custodial sentence
- Environmental service orders (order the offender to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit)
- Publication orders (order the offender to publish details of the offence and the orders made by the court in, for example, a newspaper and/or in a company's Annual Report)

The scope of its functions, the extent of its powers and the range of cases that come before it has ensured that the development of the NSW LEC since its establishment in 1979 has been marked by extension of jurisprudential boundaries and the consolidation of expertise in this area over time. The NSW LEC has also been noted for its emphasis on timely and efficient management of its cases, welcoming of constructive suggestions about its operations by user groups, a policy of assisting litigants as much as possible (such as minimising costs and easing rules of evidence in certain merit appeals), and endorsing mediation as an alternative to full-scale litigation [9, 18]. Another significant feature of the NSW LEC relates to open standing; that is, any person can bring proceedings to remedy or restrain a breach of a planning or environmental law, whereas traditionally a direct right or interest was required to invoke standing. This has ensured

cases that can be loosely described as 'public interest litigation', and the public interest rather than the private interest, have been a major characteristic of the jurisdiction of the Court [18].

The origins and functioning of the NSW LEC is based upon the idea that this court, from inception, has been conceptualised and constituted as a *problem-solving court*, with specific requirements to take heed of human interests, as well as those of natural objects and animals and plants. An emergent concern has been to *repair environmental harm* where possible and feasible. This has had an impact upon how the NSW LEC carries out its functions. In the Class 5 criminal cases domain, for example, efforts have been made to streamline processes, shorten trial duration and to negotiate outcomes.

A problem-solving court has the potential to expand the boundaries of 'good practice' in resolving conflicts over environmental matters. As part of this, it provides an opportunity to develop further the specific area of environmental jurisprudence. This is evident in regards to the NSW LEC insofar as it has concretely addressed a number of intersecting 'justice' considerations, ranging from substantive justice through to therapeutic justice ([20]b). Institutionalisation of specialist expertise thus reinforces and embellishes the further development of innovative practice and practical implementation of the law in relation to what have often formerly been simply abstract declarations of principle and emergent rights with little applied substance.

The emphasis on remediation and repairing harm evident in the decisions of the NSW LEC has prompted some commentators to describe it as engaging in forms of 'restorative justice' [9]. Similarly, 'naming and shaming' sanctions utilised by courts, including environment courts, have been equated with restorative justice [10, 22], presumably on the basis of the type moral reprobation associated with reintegrative shaming [23]. The label 'restorative justice' is, however, misleading. Typically, restorative justice approaches centre on empowering victims and involve multiple stakeholders in decision-making who participate largely on a voluntary basis in processes that take place outside of mainstream forums such as courts. They feature aspects such as restitution and reconciliation, and attempts to change how offenders think about their crimes [24]. These are not central features of how the NSW LEC operates in regards to corporate criminality, as explored and explained below. Indeed, close scrutiny of the literature shows that, to date, there is scant actual application of restorative justice in dealing with environmental issues [25].

Yet, regardless of actual implementation, there are nonetheless complexities here that warrant further critical scrutiny, not least of which is how or whether restorative justice can and should be utilised in regards to dealing with corporate criminality. Optimistic accounts suggest that restorative justice approaches do have a place in dealing with corporate wrongdoing (see [26]) including that involving environmental crime [27]. Others are more skeptical, and basing their arguments upon empirical research, suggest that the threat of stopping a company from doing new business is likely to be more effective than 'shaming' as a restorative justice technique of control [28]. Still others argue that the corporation is inherently criminogenic and that it is the politics surrounding social control and regulation that most counts in determining outcomes [29].

At the pragmatic level of judicial decision-making, what is important are the types of sanctions and remedies provided in legislation, and how the courts make use of what is available to them. As will be demonstrated below, the NSW LEC is using a full

repertoire of sanctions as part of criminal proceedings for offences against environmental laws. Given the lack of such options in other jurisdictions, for example, in the European Union (see [3]), this provides an exemplar of good practice that could provide direction for potential legal reforms elsewhere.

Reparative justice and crimes of the powerful – selected cases

In this section, a series of recent judgements are reviewed in order to illustrate different tactical decisions taken by the NSW LEC in responding to offences perpetrated by companies in relation to the *National Parks and Wildlife Act 1974 (NSW)*. All of the offences were strict liability offences, so the key issue was not determination of guilt but the sanction appropriate to the transgression in question. Basically, strict liability means that regardless of intent or fault, if someone commits an act (or omission) that is strictly prohibited by law then they must be held to account. Strict liability laws thus punish people regardless of their state of mind, although the defendant may in defence plead 'honest and reasonable mistake of fact' and if this is supported by some prima facie evidence the prosecution will have to rebut this defence beyond reasonable doubt [30]. Strict liability offences are regarded as so undesirable as to merit the imposition of criminal punishment; yet, maximum penalties for strict liability offences are generally lower than for crimes committed with intent [30].

While 'guilty' in the eyes of the law regardless of intent, recklessness or negligence, subjective factors such as the latter do nonetheless come into play at the sentencing stage, where judges weigh up such factors as part of sentencing determinations. As observed by Preston [31], 'A strict liability offence that is committed intentionally or negligently will be objectively more serious than one which is committed unintentionally or non-negligently'. Intent is thus still important in environmental crime cases. But consideration of intent is not relevant to assessment of guilt or innocence as, depending on the legislation, the act is in and of itself may be considered worthy of sanction. Rather, intent is taken into account, in certain circumstances, as a factor of sentencing.

The companies that are dealt with by the NSW LEC vary in size, composition and viability. This, too, is reflected in its decisions. For example, in cases where the 'company' in effect has been a one-person outfit and the offender is elderly and in debt, the Court has handed down sentences that take this into account (by adjusting fines downwards, for example). Defendants such as property development companies and state authorities (such as the Forestry Commission) are likewise dealt with in accordance with their institutional status and financial position, and are punished accordingly.

The cases below involved companies with substantial holdings and/or whose directors had significant knowledge of the harm being perpetrated. They were prosecuted under s175B of the *NPWA*, 'offences by corporations', and in some instances the manager was prosecuted as part of the proceeding. This is provided for in sections of the *National Parks and Wildlife Amendment Act 2010 No38* pertaining to offences by corporations under which each person who is a director of a corporation or who is concerned in the management of the corporation is taken to have contravened the same provision (subject to specific exceptions). These cases were selected in order to demonstrate the different sanctions actually applied by the NSW LEC in particular

circumstances, with particular reference to the reparative as well as the punitive elements.

Case 1

Garrett v Williams [2007] NSWLEC 56

The defendant was convicted of offences in violation of the *National Parks and Wildlife Act 1974 (NSW)*. This pertained to picking plants that were part of an Endangered Ecological Community [EEC], through the act of mass clearing and mulching of 2.9 ha. The clearing of the land related to preparing the way for subdivision consent by undermining the status of the area as worthy of conservation. The defendant's actions were in blatant disregard of the advice of his own consultant and the NSW LEC deemed that he must have known that what he was doing was wrong.

The aggregate fine imposed by the court was $330,000, plus prosecutor's costs of $85,000. The defendant was also ordered to undertake 400 h of community service.

There were clear concerns here to express general and specific deterrence, and if 'time is money' the scale of the penalty is considerable. The reparative element lies in the fact that the penalty fine was to be paid into the *National Parks and Wildlife Fund*. It also is relevant that, rather than imprisonment, the NSW LEC determined that the defendant was a suitable person for community service work (although, in this instance, the content of this was not specified, but subject to the control and authority of the Probation and Parole Service). The punitive element is found in the scale of the fine and in the order to undertake community service.

Case 2

Gordon Plath of the Department of Environment and Climate Change v Fish; Gordon Plath of the Department of Environment and Climate Change v Orogen Pty Ltd. [2010] NSWLEC 144

The defendant was convicted of offences in violation of the National Parks and Wildlife Act 1974 (NSW). This pertained to an act or omission causing damage to the habitat, not being critical habitat, of a threatened species knowing the land concerned was habitat of that kind, through the act of felling vegetation and habitat of the Koala.

The company Orogen was fined $10,000 and Fish the sum of $5000, plus prosecutor's costs and both were subjected to an *Environmental Service Order*, and a *Publication Order*. The NSW LEC acknowledged that the defendants had been subjected to extra-curial punishment – that is, any serious loss or detriment an offender has suffered or will suffer as a result of committing an offence, quite apart from any punishment imposed by a sentencing judge. In this instance, the defendants submitted that there was adverse impact on professional reputation and their professional embarrassment resulting from the offence, and this constituted extra-curial punishment.

The reparative element lies in orders to conduct substantial parts of a Koala habitat mapping project (as spelled out in a submitted exhibit put forward by the defendants).

The Targetted Koala Habitat Utilisation Assessment Project cost $17,400 to prepare, and was accepted by the NSW LEC as the basis for a work order.

There was a reprobation element as well insofar as the defendants were subject to a publication order. This involved publication of the following notice in the *Sydney Morning Herald* (the newspaper of record in New South Wales) and in the *Newsletter of the Ecological Consultants Association of NSW*:

> *Environmental consultant convicted of causing damage to koala habitat at Taylors Beach, Port Stephens*
>
> *Orogen Pty Ltd and its director Anthony Fish have been convicted in the Land and Environment Court of causing damage to habitat of threatened species, namely the Koala, knowing that the land concerned was habitat of that kind. Orogen and Mr Fish provided a developer with advice on what vegetation could be lawfully cleared on a property but failed to advise that damaging the habitat of the Koala was unlawful under the National Parks and Wildlife Act. Both Orogen and Mr Fish were aware that the property contained habitat of the Koala and Koala movement corridors. Vegetation containing Koala habitat was subsequently cleared. The offences occurred at a proposed development site at 60 Port Stephens Drive, Taylors Beach, at the intersection of Sky Close.*
>
> *Orogen and Mr Fish both pleaded guilty. Orogen and Mr Fish were fined a total of $15,000. The company was also ordered to pay the prosecutor's costs and investigation expenses.*
>
> *This advertisement was placed by order of the Land and Environment Court and paid for by Orogen Pty Ltd and Mr Fish.*

The significance of this case therefore is twofold. First, the defendants were ordered to undertake a specific project directly related to the nature of the harm associated with the original offence. Secondly, the NSW LEC specified the exact wording of the publication order, and where it was to be published.

Case 3

Chief Executive, Office of Environment and Heritage v Coffs Harbour Hardwood Sales Pty Ltd. [2012] NSWLEC 52

The defendant was convicted of offences in violation of the *National Parks and Wildlife Act 1974 (NSW)*. This pertained to picked plants of an endangered species and damage to vegetation on or in land reserved under the Act, and involved logging operations for a log haulage route in which 13 Newry Golden Wattle were killed and 8 damaged.

The defendant was fined $45,000 on one offence and $40,000 on another, and ordered to pay prosecutor's costs of $26,000. A publication order was issued for the Coffs Harbour Advocate and the Bellinger Courier Sun. There was also imposition of an *environmental service order* to the effect that the defendant was ordered to design

and erect strainer posts and a gate in a specific location with the sign saying 'Trail closed for Rehabilitation'. The defendant was also ordered to plan and carry out works for the mitigation and/or prevention of soil erosion in Jaaningga Nature Reserve caused by the defendant's clearing. This case is significant insofar as it also involved reparation of the specific harm caused by the defendant.

Case 4

Chief Executive of the Office of Environment and Heritage v Rinaldo (Nino) Lani [2012] NSWLEC 115

The defendant was convicted of offences in violation of the *National Parks and Wildlife Act 1974 (NSW)*. This pertained to by act or omission causing damage to the habitat, not being critical habitat, of a threatened species knowing the land concerned was habitat of that kind, through the act of clearing habitat of the squirrel glider.

The defendant was fined $20,000, ordered to pay 75 % of prosecutor's costs, and subject to a publication order. The need for specific deterrence was generated by the defendant's conduct that indicated an attitude of disregard towards the system of environment protection legislation and planning control. In the words of the NSW LEC, 'they need to be taught a lesson which will, hopefully, discourage them from like conduct in the future' [at 56].

There were two reparative elements in this case. First, the penalty fine was to be paid into the National Parks and Wildlife Fund for the specific purpose of mapping and study of the squirrel glider populations in Booti Booti National Park and any Crown land or council controlled land in the Foster area along with the study of the connectivity of these areas within the urban landscape of the Foster area.

Secondly, the defendant was subject to the following directions:

(5) *Within three weeks of the date of these orders, the defendant, pursuant to section 200(1)(d) of the National Parks and Wildlife Act, shall retain consultants with the following expertise, being consultants acceptable to the prosecutor:*

   a. *a bush regenerator;*
   b. *an ecologist; and.*
   c. *an expert with special knowledge of the threatened species squirrel glider (Petaurus norfolcensis).*

(6) *Within 11 weeks of the date of these orders, the defendant shall prepare a remediation plan for Area B in the map annexed to these orders relating to the land at lot 22, deposited plan 843,479 located near Southern Parkway, Foster, to include the following:*

   a. *regeneration of cleared vegetation;*
   b. *a timeframe for all actions proposed as part of the remediation plan implementation; and.*
   c. *any other actions the consultants deem to be required to remediate the site.*

(7) *Within 12 weeks of the date of these orders the defendant shall provide the remediation plan as produced in accordance with Order (6) above to the prosecutor.*
(8) *No later than 20 weeks after the date of these orders the defendant shall cause the consultants to carry out all works required by the remediation plan and in accordance with the time frame under the remediation plan.*
(9) *The defendant shall provide copies to the prosecutor of all retainers and instructions given to the consultants at the same time as they are given to the consultants.*
(10) *In the event that any or all of the consultants are unable to continue to act pursuant to these orders, they may be replaced by the defendant engaging a replacement consultant acceptable to the prosecutor.*
(11) *Schedule 7 to the Uniform Civil Procedure Rules 2005 is directed to apply to the performance of the duties of the consultants as if they are parties' single expert witness in these proceedings.*
(12) *Notwithstanding Order (11) above, the defendant shall pay the professional fees, costs and expenses of the consultants.*

This case was significant because the fine imposed, while directed to the National Parks and Wildlife Fund (a general pool used for environmental purposes) it was nonetheless specified as to how the money was to be spent – namely, for specific defined purposes. Likewise, remediation was ordered for specific rehabilitation purposes and, as the passage above indicates, the NSW LEC was very precise in its instructions so that the performance would be of standard and the tasks undertaken.

Case 5

Plath v Vaccount Pty Ltd. t/as Tableland Timbers [2011] NSWLEC 202

The defendant was convicted of offences in violation of the *National Parks and Wildlife Act 1974 (NSW)*. This pertained to the unlawful harvest of trees in a national park, and involved the felling of 503 trees.

The defendant was fined $73,000, and ordered to pay prosecutor's costs and disbursements of $47,100 and prosecutor's investigation costs to the amount of $2900. The defendant was ordered to pay a specific recipient, the Northern Rivers Catchment Management Authority, the fine amount to be used for general environmental purposes.

Notably, the NSW LEC also ordered that all future public references by Vaccount Pty Ltd. t/as Timberlands Timbers to the payment above shall be accompanied by the following passage:

> "The contribution by Vaccount Pty Ltd, trading as Timberland Timbers, to the Northern Rivers Catchment Management Authority is part of a penalty imposed on it by the Land and Environment Court of NSW after it was convicted of damaging reserve land, being an offence against s 156A of the *National Parks and Wildlife Act 1974*".

This case features the payment to a specific agency for general environmental purposes. The additional reference to any publicity pertaining to the payment of the fine is important as well. The literature on 'greenwashing' is particularly relevant here, in that it has been observed that compliance with regulations (or in this case, with a court order) are sometimes used by companies as part of a public relations exercise in which they claim to be environmentally virtuous because of the compliance or financial contribution [32, 33]. The NSW LEC has forestalled this by imposing the above order.

Reparative justice not restorative justice

The tailoring of court outcomes across these five cases illustrates the flexible use of sanctions, which is enhanced when a wide range is available to a court. The number and types of sanction were expanded with the passing of the *National Parks and Wildlife Amendment Act 2010 No38*, and this is reflected in Court sanctions post-2010. Thus while community service was used solely for deterrent purposes in the 2007 case above (since it was imposed as a general criminal justice sanction and implemented through that system), after the legislative changes of 2010 community service has been re-directed to specific environmental purposes and thus has become reparative as well as deterrent.

In summary, the New South Wales Land and Environment Court was able to draw upon selected measures which best suited each particular situation, and that combined punitive as well as reparative elements:

Fines
General.
Directed to Environmental Fund.
Directed to Specific Environmental Project.

Costs.
Prosecutor costs.
Investigation costs.

Community Service Order.
General community benefit.
Reprobation (in relation to defendant).
Publication Order.
Public Notice (in regards to specific site).
Publicity related to Fine Order (so as not to benefit from financial contribution ordered as part of an offence resolution).

Rehabilitation (in relation to environment).
Environmental Service Order.
Monitoring.
Rehabilitation/remediation.

While typically criminologists and legal scholars have been critical of criminal justice responses to corporate harm and crimes of the powerful (for being too lenient

or not addressing underlying issues and power structures) [4, 15], this article has provided a somewhat more optimistic account. The reason for this, however, is that the prosecutions have taken place within a specialist court, with a clear focus on repairing harm and ensuring environmental health and wellbeing. Moreover, the NSW LEC has sufficient status (as equivalent to a higher court) and sanctions (fines through to service orders, as well as imprisonment) at its disposal to authoritatively and expeditiously punish the powerful in ways that have some substance.

It is notable that custodial sentences are not common in Australia or indeed internationally for environmental crimes [30, 34]. A fine is the most common sanction in places such as the USA, the UK, Belgium, Canada and Australia (see [1]. [14, 34–37]). Yet, if the purpose of the NSW LEC is seen to reside primarily in terms of reparation of harm and deterrence of future offending, then what counts is how sanctions can best contribute to these purposes. Fines, in this instance, are not simply a 'cost of business' [2]. They are intended to be large enough to have deterrent effect but, just as importantly, they are translated into meaningful projects and programs that attempt to concretely remediate the damage and repair the harm. The linking of fines to specific environmental purposes thereby marks it off from more generic fine schemes in which the money is channelled into consolidated revenue.

At a normative level, it is also important to highlight the inherent public interest orientation of the NSW LEC. This likewise translates into a concern with repairing environmental harm, but doing so in ways that involve general and specific deterrence. Offenders are likely to suffer public denunciation as well as financial loss, both in the form of direct fines and in efforts demanded of them to undertake remedial work.

Reparative justice, with an emphasis on repairing harm within a generally more punitive context, would thus seem to be more appropriate and effective in dealing with corporate crime than traditional sanctioning responses. However, repairing harm should not be conflated with 'restorative justice' per se. The restorative justice perspective is informed by concepts such as harm reparation, social restoration, community harmony, and problem-solving. A retributive system of justice is essentially punitive in nature, with the key focus on using punishment as a means to deter future crime and to provide 'just deserts' for any harm committed. A restorative approach is concerned with promoting harmonious relationships by means of restitution, reparation, and reconciliation involving offenders, victims, and the wider community [38, 39]. The benefits of restorative justice are seen to be its emphasis on active agency (people doing things for themselves), cost-effectiveness (compared with detention or imprisonment), victim recognition and engagement (often through face-to-face meetings with offenders), and community benefit (through participation and through community service).

One emergent aspect of environmental courts as specialist problem-solving courts is the increasing attention being paid to the notion of 'restorative justice' as applied to this area of jurisprudence [27, 40]. In New Zealand, for example, relevant sections of both the *Sentencing Act 2002 (NZ)* and the *Victims' Rights Act 2002 (NZ)* contemplate restorative justice intervention [41] and restorative justice processes have long been utilised by the New Zealand Environment Court [42]. According to Hamilton [41], as illustrated by the New Zealand cases, restorative justice conferences can be utilised across a wide variety of offences (e.g., pollution, both air and water; breach of conditions of development consent; and destruction of trees); a wide variety of victims (i.e., individuals; communities; and the environment); and a wide variety of outcomes

(e.g., a defendant apology; payment of costs; tree planting). New Zealand applications (and exceptionalism) aside, discussion of restorative justice specifically in relation to the environment has tended to consist mainly of abstract pronouncements by environmentally-minded commentators (e.g., on the importance of listening to the voices of Nature) and extra-judicial comment (e.g., on taking into account nonhuman interests in court deliberations), rather than case law as such (see [40, 43–45]).

Within the context of the criminal law and particular mandate of the New South Wales Land and Environment Court, there is no specific or explicit reference to 'restorative justice' per se as a method or remedy. The *Protection of the Environmental Operations Act 1997 – S 250* does make reference to an additional order (c) the offender to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit; and subsection (1 A) allows that without limiting subsection (1)(c), the court may order the offender to carry out any social or community activity for the benefit of the community or persons that are adversely affected by the offence (a 'restorative justice activity') that the offender has agreed to carry out. While clearly oriented toward 'repairing the harm', this does not necessarily include victim-offender interactions and exchanges characteristic of the restorative justice *process* more generally, where the emphasis is on repairing the relationship between offender and victim [16, 24]. In the history of the NSW LEC there has in fact been only one instance in which restorative justice, involving processes of mediation and community conferencing, has been used, although a number of opportunities to do so have occurred over time [46, 47].

By contrast, reparative justice is different from restorative justice (in its conventional sense) precisely because 'repairing harm' can be *imposed* upon offenders (especially corporate offenders) without necessarily involving consensual agreement and/or 'conferencing' methods of negotiation. Company personnel, including senior managers, change. But to change *company practices*, especially those that pertain to the economic profit margin, requires regulatory and enforcement systems that penalise and sanction in ways that are tailored to the size and activities of the corporation. The reparative justice approach can provide greater deterrent effect than the usual deterrence-based approaches precisely because of what it demands of offenders by way of public exposure, enforceable undertakings, and substantial commitments of time and resources to environmental remediation. Harm reduction and a punitive approach can operate in tandem and need not be seen as in opposition.

The complexities and harms associated with environmental crime demand responses that are themselves flexible and multi-dimensional. From the point of view of jurisprudence and the operation of the court, specialist environment courts that operate on the basis of problem-solving methods are well placed to put reparative justice into practice. Such an approach also generates concrete examples that demonstrate that suitable penalties for the powerful are indeed possible. Care should be taken to not romanticise or over-inflate the positive work of the New South Wales Land and Environment Court or to downplay the wider context within which it carries out its work. It, too, has been subjected to intense political pressure and corporate criticism for its decisions, especially by the mining industry and particularly around planning issues. But from the point of view of identifying 'best practice', this particular court, with well over thirty years' experience, seems to be at the cutting edge of 'what could be' and 'what should be'. There are important lessons to be learned, and much work yet to be done.

Cases

Garrett v Williams [2007] NSWLEC 56

Gordon Plath of the Department of Environment and Climate Change v Fish; Gordon Plath of the Department of Environment and Climate Change v Orogen Pty Ltd. [2010] NSWLEC 144

Chief Executive, Office of Environment and Heritage v Coffs Harbour Hardwoods Sales Pty Ltd. [2012] NSWLEC 52

Chief Executive of the Office of Environment and Heritage v Rinaldo (Nino) Lani [2012] NSWLEC 115

Plath v Vaccount Pty Ltd. t/as Tableland Timbers [2011] NSWLEC 202

References

1. Bell, S., & McGillivray, D. (2008). *Environmental Law [7th edition]*. London: Oxford University Press.
2. Bricknell, S. (2010) Environmental Crime in Australia. AIC Reports Research and Public Policy Series 109. Canberra: Australian Institute of Criminology.
3. Chin, S., Veening, W. & Gerstetter, C. (2014) European Union Action To Fight Environmental Crime [EFFACE], Policy Brief 1: Limitations and challenges of the criminal justice system in addressing environmental crime http://www.efface.eu [accessed February 2016].
4. Barak, G. (Ed.) (2015). *The Routledge international handbook of crimes of the powerful*. New York: Routledge.
5. Rothe, D., & Kauzlarich, D. (2016). *Crimes of the Powerful: An Introduction*. London: Routledge.
6. South, N., & Brisman, A. (Eds.) (2013). *The Routledge International Handbook of Green Criminology*. New York: Routledge.
7. White, R. (2010). 'Prosecution and Sentencing in Relation to Environmental Crime: Recent Socio-Legal Developments', Crime. *Law and Social Change, 53*(4), 365–381.
8. White, R., & Heckenberg, D. (2014). *Green Criminology: An Introduction to the Study of Environmental Harm*. London: Routledge.
9. Walters, R., & Westerhuis, D. S. (2013). Green crime and the role of environmental courts. *Crime, Law and Social Change, 59*(3), 279–290.
10. Westerhuis, D. (2013). A Harm Analysis of Environmental Crime. In R. Walters, D. S. Westerhuis, & T. Wyatt (Eds.), *Emerging Issues in Green Criminology*. Hampshire: Palgrave Macmillan.
11. White, R. (2013). 'Environmental Crime and Problem-Solving Courts', Crime. *Law and Social Change, 59*(3), 267–278.
12. de Prez, P. (2000a). Excuses, excuses the ritual trivialisation of environmental prosecutions. *Journal of Environmental Law, 12*(1), 65–78.
13. de Prez, P. (2000b). Beyond judicial sanctions: the negative impact of conviction for environmental offences. *Environmental Law Review, 2*, 11–22.
14. Fogel, C., & Lipovsek, J. (2013). Green Crime in the Canadian Courts. *Journal of Politics and Law, 6*(2), 48–52.
15. White, R. (2011). *Transnational environmental crime: toward an eco-global criminology*. London: Routledge.
16. Hamman, E., Walters, R., & Maquire, R. (2015). 'Environmental Crime and Specialist Courts: The Case for a 'One-Stop (Judicial) Shop' in Queensland. *Current Issues in Criminal Justice, 27*(1), 59–77.
17. Pring, G. & Pring, C. (2009) Greening Justice: Creating and Improving Environmental Courts and Tribunals. The Access Initiative.
18. Pearlman, M. (2010). 20 years of the land and environment court of NSW. *Australian Planner, 38*(1), 45–49.
19. Environmental Defenders Office (2013) Fact Sheet 2.4 The Land and Environment Court. Sydney: EDO. http://www.edo.org.au/edonsw/site/factsheetprint/fs)2.4_print_php [accessed 8 May 2013].

20. Preston, B. (2011a). Operating an environment court: the experience of the Land and Environment Court of New South Wales and 12 benefits of judicial specialisation in environmental law. In *Keynote Address, Renewing Environmental Law: A Conference for Public Interest Environmental Law Practitioners, University of Victoria Environmental Law Centre, West Coast Environmental Law and Ecojustice*. Vancouver: British Columbia.
21. New South Wales Department of Environment and Heritage (2013) Guidelines for seeking environmental court orders. Sydney: Environment & Heritage. http://www.environment.nsw.gov.au/legislation/environ_courtorders.htm [accessed 8 May, 2013].
22. Bisschop, L., & Vande Walle, G. (2013). Environmental victimization and conflict resolution: a case study of e-waste. In T. Wyatt, R. Walters, & D. Westerhuis (Eds.), *Debates in Green Criminology: Power, Justice and Environmental Harm*. Basingstoke: Palgrave Macmillan.
23. Braithwaite, J. (1989). *Crime, shame and reintegration*. Cambridge: Cambridge University Press.
24. Wormer, K., & Walker, L. (Eds.) (2012). *Restorative Justice Today: Practical Applications*. Los Angeles: Sage.
25. Hall, M. (2015). *Exploring green crime: introducing the legal, social and criminological contexts of environmental harm*. London: Palgrave Macmillan.
26. Braithwaite, J. (2002). *Restorative justice and responsive regulation*. New York: Oxford University Press.
27. Nurse, A. (2016). *An Introduction to Green Criminology & Environmental Justice*. London: Sage.
28. Levi, M. (2003). Suite Justice or Sweet Charity? Some Explorations of Shaming and Incapacitating Business Fraudsters. In E. McLaughlin, R. Fergusson, G. Hughes, & L. Westmarland (Eds.), *Restorative Justice: Critical Issues*. London: Sage in association with The Open University.
29. Tombs, S., & Whyte, D. (2015). *The corporate criminal: why corporations must be abolished*. London: Routledge.
30. Bates, G. (2013). *Environmental Law in Australia*. Sydney: LexisNexis Butterworths.
31. Preston, B. (2007). Principled sentencing for environmental offences – part 1: purposes of sentencing', criminal law. *Journal, 31*(1), 91–105.
32. Beder, S. (2002). *Global Spin: The corporate assault on environmentalism*. Totnes: Green Books.
33. Pearse, G. (2012). *Greenwash: Big brands and carbon scams*. Collingwood, Victoria: Black Inc..
34. Billiet, C., & Rousseau, S. (2014). How real is the threat of imprisonment for environmental crime? *European Journal of Law and Economics, 37*, 183–198.
35. Faure, M., & Heine, G. (2000). *Criminal Enforcement of Environmental Law in the European Union*. Copenhagen: Danish Environmental Protection Agency.
36. O'Hear, M. (2004). Sentencing the Green-Collar Offender: Punishment, Culpability, and Environmental Crime. *The Journal of Criminal Law and Criminology, 95*(1), 133–276.
37. Pepper, R. (2012) 'Recent Developments in Sentencing for Environmental Offences', Australasian Conference of Planning and Environment Courts and Tribunals, Perth, 28 August-2 September 2012.
38. King, M., Freiberg, A., Batagol, B., & Hyams, R. (2009). *Non-Adversarial Justice*. Sydney: The Federation Press.
39. White, R., Haines, F., & Asquith, F. (2012). *Crime and Criminology*. South Melbourne: Oxford University Press.
40. Preston, B. (2011b). The use of restorative justice for environmental crime', criminal law. *Journal, 35*, 136–145.
41. Hamilton, M. (2008). Restorative justice intervention in an environmental law context: Garrett v Williams, prosecutions under the resource management act 1991 (NZ), and beyond', environment and planning law. *Journal, 25*, 263–271.
42. McElrea, F. (2004) 'The Use of Restorative Justice in RMA Prosecutions', Salmon Lecture 2004 to the Resource Management Law Association, 27 July 2004; see also Resource Management Journal No.1.
43. Besthorn, F. H. (2004). Restorative justice in environmental restoration - the twin pillars of a just global environmental policy: hearing the voice of the victim. *Journal of Societal and Social Policy, 3*(2), 33–48.
44. Besthorn, F.H. (2012) 'Speaking Earth: Environmental Restoration and Restorative Justice', in K. Wormer & Walker (eds), Restorative Justice Today: Practical Applications. Los Angeles: Sage.
45. White, R. (2016). Four Problems Facing Environment Courts in Dealing with Nonhuman Environmental Victims. In T. Spapens, R. White, & W. Huisman (Eds.), *Environmental Crime in Transnational Context: Global issues in green enforcement and criminology*. Farnham: Ashgate.
46. Hamilton, M. (2014). Restorative justice intervention in an aboriginal cultural heritage protection context: conspicuous absences?', environment and planning law. *Journal, 31*, 352–367.
47. White, R. (2015). Indigenous Communities, Environmental Protection and Restorative Justice. *Australian Indigenous Law Review, 18*(2).