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Green crime and the role of environmental courts

Reece Walters · Diane Solomon Westerhuis

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Abstract Environmental issues continue to capture international headlines and remain the subject of intense intellectual, political and public debate. As a result, environmental law is widely recognised as the fastest growing area of international jurisprudence. This, combined with the rapid expansion of environmental agreements and policies, has created a burgeoning landscape of administrative, regulatory and judicial regimes. Emerging from these developments are increases in environmental offences, and more recently environmental crimes. The judicial processing of environmental or 'green' crimes is rapidly developing across many jurisdictions. Since 1979, Australia has played a lead role in criminal justice processing of environment offences through the New South Wales Land and Environment Court (NSW LEC). This article draws on case data, observations and interviews with court personnel, to examine the ways in which environmental justice is now administered through the existing court structures, and how it has changed since the Court's inception.

Introduction

Contemporary discourses in green criminology seek to focus the criminological lens on the ways in which environmental harm is relevant to issues of crime and justice [5, 7, 31, 43]. Beirne and South argue that Green Criminology intersects diverse narratives in exploring the harms that people, states and corporations commit in the business of their everyday activities. As a result, they argue, the emerging critical criminological perspective includes 'harms' such as, but not limited to, 'exploitation, modes of discrimination and disempowerment, degradation, abuse, exclusion, pain, injury, loss and suffering' [5, p iv]. Such definitions of harm are often expressed in the judgements of cases, often within an ecocentric understanding of human and nature interaction. This is considered here to be an evolution of a shift that can be

R. Walters (✉)
Queensland University of Technology, Brisbane, Australia
e-mail: reece.walters@qut.edu.au

D. S. Westerhuis
Environmental Arts and Research, NSW, Australia

identified as early as the 1970s, when debate emerged regarding the standing of trees in a court of law in the USA [34]. Ecological justice argues that an environmentally-centred perspective, which upholds the importance of living creatures as well as inanimate and non-living objects (such as air, land, and water), provides useful insights for guiding future economic and developmental decisions. It asserts the intrinsic value and equal status of non-humans but explores the potential for sustainability while utilising environmental resources for fundamental human needs.

The above notions of justice provide perspectives or theoretical parameters for underpinning policy and practice. How might such perspectives be mobilized in practice? This is a mere beginning—a way of thinking about how increasing scholarship, policy and practice involving crimes against the environment can be mobilized around processes of alternative and new forms of justice (see [41]). It also furthers the work of Kibert [14], who has asserted that 'green justice' seeks to redress the discrimination of ethnic and socially-disadvantaged minorities who experience 'environmental racism' and the disproportionate effects of air pollution and advanced capitalism. As a concept, 'green justice' has been used by activists and left scholars to examine environmental injustice—the plight of the poor and powerless at the hands of affluent, industrial economies [1]. Others have used the phrase to discuss environmental law and policy and the use of court processes [12]. Therefore, the usage of 'green justice' resonates in discourses of protest, resistance and anti-capitalism, but also within legal debates about the role of law.

Emerging forms of green justice

The ongoing protection and regulation of the environment continues to witness a global increase in law and policy [3]. The rapidly expanding body of environmental law and the continuing increase in environmental enforcement and regulatory agencies, has created a whole range of administrative arrangements involving 'risks', 'liabilities' and 'responsibilities'[6]. This expansion has occurred concomitantly with acceleration in domestic and international environmental policing initiatives, taskforces and multilateral agreements [37, 43]. As a result, the rise of environmental law and policy has necessitated the development of political, legal and administrative apparatuses that can service evolving environmental regimes. Some countries, more than others, are experiencing the impacts of increased environmental oversight, accountability and regulation. For example, the powers and resources of the Environment Protection Agency in the United States have expanded so significantly that Chicago-based law firm Much Shelist now advises its clients that the:

> 'EPA Administrator Lisa Jackson has summarized her agency's renewed emphasis on environmental enforcement activities by saying, "EPA is back on the job." In fact, the agency has received the largest enforcement budget in its history, and has nearly doubled its list of enforcement priorities for fiscal years 2011 through 2013. The EPA is not alone. The entire alphabet soup of federal agencies—including the FDA, SEC, FTC, OSHA and their state counterparts—have ramped up enforcement activities in recent years. As a result, there is a significantly greater likelihood that your business will be subject to some type of investigation.' [39 p1].

This increase in environmental regulation and oversight is driven by political and social movements that seek to both preserve and 'sustainably' develop the environment. Moreover, it has emerged from recognition that 'the environment' has become big business for commercial enterprises and governments alike. The increase in worldwide 'green business' has grown exponentially with annual fora and summits seeking to harness ideas and develop partnerships for environmentally friendly fiscal opportunities, such as the 3GF Global Green Growth Forum 2012, initiated by the Government of Denmark and developed with support from a number of partners including corporations, governments, and others [20]. Indeed, corporate greenwashing, complete with environmental awards and emerging partnerships with environmental activists, has become an essential part of global business [18]. Such booming green industries reveal ongoing tensions and legal conflicts between the priorities of free trade and the imperatives of environmental protection [40]. They also reveal an emerging raft of precautions, liabilities and assessments that require corporate and state compliance. In addition, it is not only legal activities that have become the focus of regulatory authorities but also illegal entities. The rapidly expanding illegal networks of operators who exploit the environment for substantial profits have been widely acknowledged. For example, the Environment Investigation Agency, an international campaigning organisation which is committed to investigating and exposing environmental crime, notes that: 'Environmental crime is currently one of the most profitable forms of criminal activity and it is no surprise that organised criminal groups are attracted to its high profit margins' [4 p2].

As a result, international agreement and policing initiatives such as the Interpol Environmental Crimes Committee, the United Nations Development Goals, the Lusaka Agreement, the Asian Regional Partners Forum on Combating Environmental Crime (ARPEC) and the Partnership Against Transnational Crime through Regional Organized Law Enforcement, to mention just a few, have created transnational partnerships that have witnessed rapid increases in illegal seizures and arrests [42]. The mobilization of transnational enforcement initiatives [11] and the expansion of international environmental laws have created expectations for nation states to develop legal mechanisms for processing environmental offences. At an international level, there have been numerous calls for the creation of an international court. In 1988 the International Court of the Environment Foundation was established in Rome, which continues to promote and harness relevant international bodies to establish an International Environment Court [25]. Moreover, for the past decade senior judges from various jurisdictions have identified that although there are increasing international and domestic environmental laws 'miscreant corporations and backsliding government' were unwilling to self-regulate or enforce laws, and they point to the necessity for an international environmental judiciary [13]. Such a body would strengthen existing frameworks of environmental governance and guide future policy and legal development [41].

The emergence of environmental courts

From the 1973 Convention *on International Trade in Endangered Species of Fauna and Flora* (CITES) to the Montreal Protocol, Basel Convention and the Kyoto

Protocol, nation states have created regulatory and legal mechanisms to ensure compliance with international environmental law. In 2010, the World Resources Institute published *Greening Justice: Creating and Improving Environment Courts and Tribunals* [29], a synthesis of the global legal responses to these emerging environmental agreements. The report found that specialized proceedings for environmental matters have proliferated over the past decade, with 41 countries at the time offering 'green chambers', specialised judges and tribunals [29]. While retaining national or local characteristics, all these environmental judicial settings undertake specialist roles. The jurisdiction of these courts varies: some are civil (non-criminal) courts, which may include courts of arbitration of planning and dispute resolution or appeals from other courts; some are purely administrative courts and some are criminal courts. The vast majority of dedicated environmental courts are focused on regulating, licensing and policing the natural environment and its resources.

The New South Wales Land and Environment Court (NSW LEC), established in 1979, is one of world's earliest of these courts, and consists of dedicated environment courts [17]. Throughout the past three decades it has established a substantial amount of environmental jurisprudence with both a civil and criminal jurisdiction [24]. The authors have undertaken a critique of the proceedings of the court, through observation, case analyses and interviews with court personnel including judicial officers; defence attorneys and state proescutors, providing useful insights into the benefits and limitations of a dedicated environmental court. A total of 7 days were spent observing courtroom proceedings in both the criminal and civil jurisdictions. As proceedings are open to the public but rarely attract individual not involved in a case, our presence often provoke interest, notably from the accused and their defence counsel. Such interests resulted in several discussions with convicted offenders who were business proprietors and environmental consultant, eager to ensure that their remorse and efforts to compensate were duly noted, and that they has gone to great lengths to comply and co-operate with government regulators and enforcement bodies.

Overview of the New South Wales land and environment court

The NSW LEC is the earliest of three environmental courts in Australia. The most recent, the South Australian Environment, Resources and Development (ERD) Court is a specialist court established in 1993 to deal with disputes and the enforcement of law relating to the development and management of land, the natural and built environment and natural resources. This court is at the same level in the court hierarchies as a Magistrates Court, and may deal with minor indictable offences, however it is limited to sanctions of a maximum of $300, 000 or 2 years imprisonment. As a Magistrates Court, the ERD does not have jurisdiction in respect of major indictable offences. The Queensland Planning and Environment Court (PEC) developed out of the earlier Local Government Court and was established in 1991 to deal with planning matters. As noted by Rackemann [30], other than the power to hear cases of contempt, this court does not have jurisdiction in development or environmental criminal matters, which are heard in the Magistrates Court or the District Court (where PEC judges may also preside).

Shifts over time- the 1980s

In 1979 the Land and Environment Court Act 1979 (NSW) was enacted, which, in S17, brought together diverse licensing regulations under the surveillance of the LEC. The outcome is the NSW LEC, a court which is 'an independent judicial body with the power to compel compliance with environment law through civil and criminal enforcement' [10, p4].

Cases before the court are classified by type. Classes 1 to 4 include environmental planning and protection appeals, tree disputes, valuation, compensation and Aboriginal land claims, civil enforcement and judicial reviews. Class 5 cases are criminal cases. Class 6 and 7 cases are criminal appeals against convictions and sentences for environmental offences by Local Courts, and Class 8 cases are civil mining matters (since 2009) [16]. In the non-criminal class cases, conciliation or mediation are required. Judges preside over all class 4, 5, 6 and 7 matters.

The Minister of Planning and the Environment, when announcing the creation of the LEC stated: 'the proposed new Court is a somewhat innovative experiment in dispute resolution mechanisms. It attempts to combine judicial and administrative dispute resolution techniques and it will utilize non legal experts as technical and conciliation assessors' (cited in [36, p274]). In the 1980s, these administrative dispute resolution techniques were confined to the civil cases of the LEC.

The creation of the LEC was followed by more complex environmental legislation in response to community concerns, interwoven through federal, state and local government legislation and regulations. During the 1980s new environmental laws increased the administrative review and civil and criminal enforcement jurisdiction of the LEC. Relevant legislation included the *Environmentally Hazardous Chemicals Act 1985* (NSW) and the *Environmental Offences and Penalties Act 1989* (NSW). The legislation was a response to community concerns regarding environmental harms.

Another response included shifts in policy regarding the prosecution of criminal cases. The State Pollution Control Commission (SPCC, later to become the NSW Environment Protection Authority) took up a 'get tough on environmental crime' policy, which was to show up dramatically in the LEC statistics for prosecutions in class 5 cases (see Fig. 1). Justice Stein [33 p4] explained the outcome in this way:

> 'In its 1983–1984 Annual Report, the SPCC [State Pollution Control Commission] announced a change in policy from one based upon conciliation and education to one emphasising prosecution if sufficient evidence exists "unless there are quite exceptional circumstances". The later rise in prosecutions (in 1989, 1990 and to a lesser extent 1991) was a somewhat belated reflection of this change in policy'.

Such an approach was unique at the time; elsewhere there was considerable reluctance to prosecute, or to treat environmental offences as a crime, rather than as an infringement of a regulation. For example in New Zealand, the policy until at least 2001 was to pursue prosecution 'only after careful assessment of the likelihood that it will proceed on a non-defended basis, and only after other enforcement options had been exhausted' [38, p2].

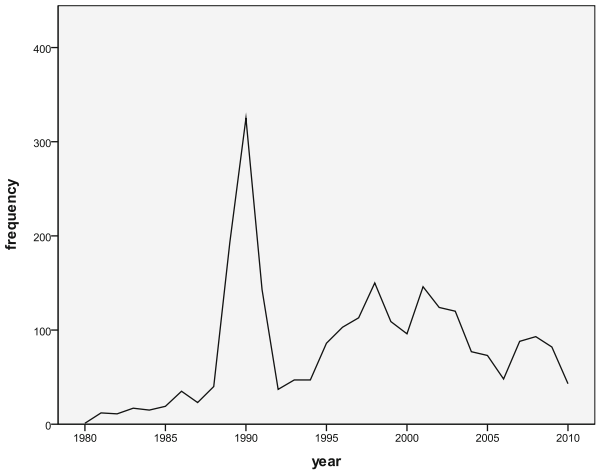

Fig. 1 Criminal cases in the NSW Land and Environment Court 1980–2010

The 1990s

Allowing for the lapse of time for shifts to show in the reported statistics, it could be said that the numbers of offences, and cases heard in the NSW LEC, fluctuated over the next two decades (see Fig. 1). Within that mix, as Justice Pain points out, there was a continuum between 'cooperative regulatory schemes and coercive criminal sanctions' [22, p21]. The peak of the early 1990s, with its focus on 'prosecution if sufficient evidence exists', perhaps culminated in the first case in the NSW LEC in which a custodial sentence was given for an environmental offence in 1997. The case was unusual, in that the offender was convicted of wilful disposal of effluent from a caravan park into a river through a system of underground pipes he had installed in order to avoid disposal costs. Considering the need for proportionality between sentence and circumstances of crime, and the need for sentence to act as general deterrent, Justice Lloyd ordered 12 months imprisonment, a fine of $250,000 plus prosecutor's costs of $170,000 (Environment Protection Authority v Gardner [1997] NSWLEC 169). This peak was never reached again; there have been consistently much fewer cases since the turn of the century for Class 5 cases, as shown in Fig. 1.

The changes to processes of legal enforcement appear instrumental in the reduction of prosecution of environmental offences during this period. This was apparent in the process and performance in the court; when the court was established a rule was promulgated that judges would not robe. However as Pearlman explains, this soon changed:

> 'as cases became more complex, and, more importantly, as the penalties for environmental offences became more severe, the judges felt that there was a need to reinforce the status of the Court as a superior court of record, especially in relation to environmental prosecutions. Accordingly, in 1998, the judges resolved to robe when sitting in cases in those classes of the Court's jurisdiction' [23, p4].

2000–2012

Although there was some debate about wigs, robes are still worn today in Class 5 cases. While this may seem a superficial shift, this was a different strategy to emphasise the seriousness of environmental crime, following the more overt emphasis on prosecution of environmental crime a decade before.

Once prosecution is undertaken, it is apparent that much negotiation takes place during a trial, for example when considerations are undertaken for the terms of orders for environmental remediation or publication orders. In some cases reparation is undertaken prior to sentencing, which can then be a mitigating factor for the judge to consider upon sentencing. The decision to prosecute may also be an outcome of negotiation or arbitration. *Mens rea* is clearly a factor in any negotiation, and although 'plea bargaining' is not legislated there are clearly cases in which the sanction is mediated between the parties before the final hearing, although the Judge in sentencing makes the final decision.

It is clear that approaches to Class 5 criminal cases have recently shifted somewhat. In 2012 an amendment to the *Criminal Procedure Act* 1986 (NSW) allowed provision for case management procedures and preliminary conferences in Class 5 cases in the NSW LEC. They are now case managed weekly by a List Judge; a move intended to reduce delays in trial and sentencing proceedings. Such case management is ostensibly to make more efficient the court processes, for example to make appropriate directions for preparation for trial or sentence hearing and to allow the entry of pleas prior to the trial. This change highlights a shift in attitude towards Class 5 criminal cases, to one in which many cases are treated more like planning cases with negotiations between prosecution and defence, who 'consider a range of issues that may provide an opportunity for an early plea of guilty, or shorten the duration of the trial' [15, p15]. This appears to increase the use of negotiated non-criminal outcomes, including self-reporting and self-regulation, which appear as alternatives to criminal sanctions. The impact this may have on the number of criminal cases in the LEC is yet to be seen, but we can predict that this should increase the downward trend in the number of Class 5 cases, from 2007 to 2010 (see Fig. 1).

In our observations in the contemporary LEC courts, cooperation and negotiation are essential elements of court justice, blending with the customary adversarial law system of other Australian courts. Defendants who had plead guilty will often take considerable steps before the hearing to demonstrate reparation and remorse, which may include action plans with local councils, financial compensation, organisational investment and apologies in newsletters and newspapers (the shame factor). These are also actions which may be required by the courts of offenders upon sentencing. One defence barrister in the LEC observed that: *'there is a lot of flexibility in this court that you don't get in other courts. It can be pretty laid back, but it's a serious courtroom and a lot of time is spent understanding the impact on the environment and how the defendant can deal with the problem they've caused'*.

This salient comment may be the key to understanding the NSW LEC and its processes, where the foci of justice are environmental harms, scientific evidence to assess such harms, and attempts at reparation. These are what set the NSW LEC apart from other criminal courts in unique attempts to achieve environmental justice.

Restorative justice

The location of criminal class matters within a court which presides over civil matters more commonly resolved through arbitration, mediation or conciliation, can have promising outcomes for a restorative justice approach for environmental crime. First attempted in the NSW LEC by Chief Justice Preston [see 26], the restorative justice approach combines such possibilities as negotiation processes outside the courts, particularly conferencing, comparable to those used in juvenile justice conferences [35]. Conferencing, also described in Australia as Transformative Justice Australia (TJA) [19], is used to resolve conflict amongst groups.

The potential for this process, which focuses on the harms caused by the offence, was realised in 2007. In *Garrett v Williams* (2007) 151 LGERA 92, a mining company knowingly committed two offences, excavating in an Aboriginal place and causing harm to Aboriginal objects, contrary to the *National Parks and Wildlife Act 1974 (NSW),* under which Williams should have sought consent. Williams pleaded guilty, and Preston offered the opportunity of a conference, which proceeded prior to sentencing. Members of the local Wilyakali people, the prosecutors, Williams and other interested parties undertook the conference in a community hall at Broken Hill, near the site. There were two outcomes of this case: the sentencing of the court, and the agreements reached within the conference. Both were positive in the processing of restorative justice, and its future use in courts. The conference proceedings were offered as evidence in the sentencing, in which Preston noted Williams' apology and cooperation with the conference, his payment for the costs of the conference, and the outcomes of the conference process. Because of these factors, Williams was fined a minimal sum of $1,400 plus costs.

The agreements reached between the parties at the conference portended future healthy relationships between the mining company and the indigenous land carers. The agreements included a comprehensive survey of the area and a Management Plan, undertaken by the Wilyakali Corporation and the mining company. Agreements about the development of tourist walks, employment opportunities for locals at the mine, future meetings and consultation were just some of the outcomes of the conference. This is clearly a very different sort of justice to that of the decade before in which the offender was imprisoned. Preston describes how such restorative justice practices may be used at all stages of environmental criminal cases: pre-charge, pre-conviction, pre-sentence or post-sentence, and that referrals can be made for restorative justice approaches in each case from the police, prosecutor or equivalent environmental regulatory agency, by the court or probation or correction service [26, p6]. This is innovative, for the NSW LEC is a specialist environmental court yet is instituting restorative justice processes practiced particularly in Children's Courts in Australia, which specifically aim to reduce recidivism and to reintegrate (young) people into their communities.

Such transference of principles is significant; restorative justice processes require the recognition of victims and identification of the harm they have suffered from an offence. The harms suffered by the environment are a major focus in sentencing in the NSW LEC. While the recognition of the environment as victim may not always be explicit, it is commonplace, and evident in Preston's environmental version of restorative justice. Preston notes that 'Humans are not the only victims of

environmental crime' [26, p11]. Preston's model also recognises as victims: members of the community, including community natural resources, public property, heritage, future generations, the environment and environment other than humans (the biosphere and non-human biota). In Preston's restorative justice, the harm caused by a crime may be 'assessed from an ecological perspective; it need not be anthropocentric' [26, p12], a theme also raised in Preston's later paper "*Internalising Ecocentrism in environmental law'* [27]. Foreshadowing any concerns regarding the representation of non-human victims and future generations, Preston gives examples of alternative surrogate victims, citing precedent from the Supreme Court of Philippines and cases from public trust doctrine, concluding that 'In practice, natural objects, such as rivers and trees, have been represented successfully by a surrogate victim in restorative justice conferences' [26, p15].

That 'the environment' is a victim is apparent from observations in these courts, where the focus in Class 5 cases is on the harm caused to the environment. Expert witnesses are used to give evidence regarding the extent of environmental harm and, often. on the possibility of reparation for the harm caused. In cases observed by the authors, expert witnesses were called to assess the harm to rivers and streams, soil, trees and habitat of endangered species. Attempts at reparation of harms on which the courts ruled include restoration projects which offenders are required to undertake, such as regeneration of plantings, or biobanking, a market based scheme which attempts 'to help address the loss of biodiversity values, including threatened species' [21, p1].

A brief insight into recent criminal cases identifies the ways in which the LEC now defines and administers environmental justice. In the case of *Chief Executive of the Office of Environment and Heritage v Rinaldo (Nino) Lani [2012] NSWLEC 115 (18 May 2012),* the defendants were both the company, Bombala Investments Pty Ltd (Bombala) and its director, Mr Rinaldo Lani, and both were found to be guilty of an offence of damaging a threatened species habitat when clearing land they knew was a squirrel glider habitat. Both the company and Mr Lani were convicted and ordered to pay $23,000 into the National Parks and Wildlife Funds, specifically for the mapping and study of squirrel glider populations in the local National Park. They also had to undertake the preparation of a remediation plan and carry out remediation works to mitigate the harm caused by the offences. In addition a publication order was made, in which a notice was to be placed in the local paper regarding the matter.

These are clearly attempts at reparation, and reflect restorative justice practices. Today restorative justice is evident in sentencing in the NSW LEC with restoration projects, naming and shaming in the press, and economic penalties being prominent while incarceration is rarely considered.

Such an approach to restorative justice in the LEC produces an environmental justice of a different type, unlike any notions of environmental justice we have previously considered. In cases where the concept of environmental justice has been used previously, it has more often referred to instances of environmental racism or a victimology in which distribution of rights or harms is clearly unequal, for example in the pioneering work of Bullard [8, 9] and others. Other notions of environmental justice are also linked to social justice, for example in fair and just access to courts, to participation and to hearings [28]. The growth of regulation and legislation has brought with it awareness of different victims of environmental crimes, such as trees

and endangered species, and new forms of environmental justice, such as that attempted in the LEC. For some commentators the NSW LEC has provided a means of delivering 'environmental justice' [2].

Conclusion

For some, the expectations and performance of the NSW LEC are both diverse and ambiguous. Its history is one of 'hope and false expectation' and notions of justice subsequently take on new meanings or are 'weakened' when the Court 'functions in a politically or socially contentious area' [32, p313]. In this research the authors found a decisive shift from the 1980s focus on prosecution and coercive criminal sanctions to approaches more linked to civil regulatory responses, evident in the growing use of conciliation and arbitration, case work and innovative sentencing, which preferences restorative approaches above criminal penalty.

We found the NSW LEC unique in many ways; some argue that the court processes appear less formal, yet formal dress and lengthy consideration of scientific evidence remains. The uniqueness is more evident in the processes and the justice discourses of the court, and the extent to which all classes, including criminal cases, are now arbitrated in some way before coming to the court. It is clear that criminal cases, less patently perhaps, are also negotiated; a not guilty plea is rare. The earlier an offender admits guilt, the more likely is a reduction in sentence and the more an offender assists the court, the lighter the penalty. Remorse and a willingness to make amends considerably lighten any possible penalty and the court is transparent in sentencing decisions, thanks particularly to a unique sentencing database which publishes the decisions of the Court. More importantly, there is a shift in the understandings of environmental harm, environmental crime and green justice. Finally, there is much to be gained from open and accessible court proceedings. Moreover, this court provides an outstanding example of the ways in which experienced and dedicated environmentally focussed judicial members can provide legal leadership and environmental education.

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