INDIGENOUS COMMUNITIES, ENVIRONMENTAL PROTECTION AND RESTORATIVE JUSTICE

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I Introduction

The aim of this article is to discuss the application of restorative justice in the NSW Land and Environment Court ['Land and Environment Court'] in a case dealing with environmental harm that affected a specific Indigenous community. This case is important for several reasons, not the least of which because it remains the only instance in which the Land and Environment Court has utilised restorative justice as part of its proceedings. Of particular interest, as well, is that the case brings to attention several issues pertaining to the status of the non-human victim as well as the human in instances involving environmental harm. These are explored in the latter part of this paper.

Most discussions of restorative justice and Indigenous people tend to focus on either the discriminatory access of Indigenous youth to juvenile conferencing forums,[1] or to the establishment and use of specific Indigenous sentencing courts or tribunals in which Aboriginal elders and members of the Aboriginal community are involved in the sentencing of Aboriginal offenders.[2] Importantly, in most instances at the centre of such discussions is the status of the Indigenous person as *offender*.

In contrast, the following descriptions and analysis start with the notion that it is Indigenous communities who are the *victims* of certain offences, and that it is the role of a different kind of specialist court – this time, an environment rather than Indigenous court – to interpret and apply appropriate sentencing criteria (as dictated by relevant sentencing law) that best match the requirements of the case. However, the constitution of victimhood in regards to environmental harm also embodies certain nature-human relationships that are unique to Indigenous people and that therefore delineate such cases from routine court matters. The concern of the present paper therefore also includes consideration of the way in which non-human environmental interests are incorporated into conceptualisations of Indigenous communal life.

II Restorative Justice and Environmental Crimes

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.[3] In New Zealand, for example, relevant sections of both the *Sentencing Act 2002* (NZ) and the *Victims' Rights Act 2002* (NZ) both contemplate restorative justice intervention,[4] and restorative justice processes have long been utilised by the New Zealand Environment Court.[5] According to Hamilton, as illustrated by the New Zealand cases, restorative justice conferences can be utilised across a wide variety of offences (such as pollution, both air and water; breach of conditions of development consent; and destruction of trees); a wide variety of victims (including individuals, communities, and the environment); and a wide variety of outcomes (for example a defendant apology; payment of costs; tree planting).[6] 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 (eg, on the importance of listening to the voices of nature) and extra-judicial comment (eg, on taking into account non-human interests in court deliberations), rather than case law *per se*.[7]

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.[8] 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).

The complexities of environmental harm in terms of spatial and temporal dimensions, divergent opinions about how to conceptualise injustice in regards to the human and the non-human, and difficulties associated with measuring the extent, seriousness and scale of wrongdoing dictate that justice needs to be a free-flowing but grounded process.[9] Something needs to be done in the here and now, but very often the 'what is to be done' requires a blend of expertise and ideas from many different quarters (including experts, traditional users of land, social and environmental movements, and laypeople, among others). This also means inclusion of advocates who can speak on behalf of those who cannot – such as trees, soils, bees, and orchids. This, in turn, requires active listening, by humans, to the non-verbal communication from nature, for example the signals emanating from the natural world and its inhabitants that denote things such as the impacts of climate change (eg, oceans warming, insect eggs hatching earlier).[10] There is much to learn by bringing the non-human into the dialogue about ecological health and wellbeing that affects all.

A creative interpretation and implementation of restorative justice principles allows for recognition of particular categories of victims of environmental harm that may not normally be considered. For example, in the context of an environmental court Preston describes how future generations and non-human biota may be considered victims:

> Environmental harm may require remediation over generations and hence the burden and the cost of remediation [are] transferred to future generations. Remediation of contaminated land and restoration of habitat of species, populations and ecological communities are examples of intergenerational burdens passed from the present generation to future generations. Where intergenerational inequity is caused by the commission of an environmental offence, the victims include future generations … The biosphere and non-human biota have intrinsic value independent of their utilitarian or instrumental value for humans. When harmed by environmental crime, the biosphere and non-human biota also are victims. The harm is able to be assessed from an ecological perspective; it need not be anthropocentric.[11]

Identification of victims is only part of the restorative process however. The voice of the victim needs to be heard as well as be part of restorative justice proceedings. Yet, who speaks for whom is nevertheless still controversial; especially when it comes to natural objects such as trees, rivers and specific bio-spheres.[12]

The law does allow for a modicum of protection for the non-human as well as the human. This is reflected in legislation pertaining to endangered species (eg, particular animals such as tigers) and to conservation more generally (eg, in the form of national parks). Harm is central to these forms of social regulation as well; however, whether 'harm to the environment' is of consequence *unless* it is measured with reference to human values (such as economic, aesthetic, cultural) is of ongoing concern in regards to legal decision-making.[13] In essence, natural objects (such as trees and forests) lack legal rights (and agency or volition) and so must rely upon humans to bring actions to protect them. Some argue that the inherent interests of 'natural objects' ought to be protected through legal actions by the objects themselves, with humans serving as their guardians or trustees.[14]

This raises important and fascinating issues regarding the criteria by which judgements around restoration are to be made, and the kind of expertise required to adequately speak for the non-human. It is notable in this regard that in New Zealand a river was represented at a restorative justice conference by the chairperson of the Waikato River Enhancement Society,[15] and the Whanganui River became a legal entity in 2012, with a legal voice that involves local Maori people.[16] For the purpose of the restorative process, 'surrogate victims' are being recognised as representing the affected community, including harms to particular biotic groups and abiotic environs. More generally, public trust and public interest law have been used to establish future generations as victims of environmental crime including humans as well as the environment and non-human biota, where surrogates (such as parents or NGOs) have provided representation.[17]

The question of expert evidence and who should speak for whom (or what) is particularly important in defining the 'subject' of the law and thus identifying the nature of 'victimisation,' and hence the scope of what needs to be done to 'repair the harm.' For example, a 'river' may be defined in spiritual and cultural terms by an Indigenous community,[18] be viewed primarily in terms of water flow according to the more narrow Eurocentric conceptions common in Australian courts,[19] be seen as being constituted by its channel banks and channel bed according to the science of geomorphology,[20] and be conceptualised as inclusive of riparian zones which relate to the observed influence of the river on the biota within and adjacent to the river from an ecological perspective.[21] Thus there are quite different associations with and interpretations of what 'a river' actually means.

The problem of expertise raises questions around how evidence is assessed and responded to in court. They include matters such as:

- Defining the 'victim' and implications of this for assessing perpetrators, harms and remedies;
- Acknowledging that defining an 'entity' via legal means implies the need for expertise, but that this expertise also varies (for example, geomorphology versus ecological science); and
- Determining which particular speakers are most suitable in terms of standing, legitimacy and specific types of knowledge.

Inevitably the court will have to weigh up and deal with substantive contests over knowledge, evidence, thresholds, and concepts of harm. The problem of expertise is basically one of how and to whom does non-human nature communicate its 'needs,' and how the court is to make resolutions when knowledge and expertise is partial, skewed and/or ideological.[22]

The NSW Land and Environment Court has from inception 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 interest is to repair environmental harm where possible and feasible. The Court has three broad functions:

- First, it acts as an administrative tribunal, determining planning and building appeals on their merits.
- Second, it 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.

Within the context of the criminal law and particular mandate of the NSW Land and Environment Court, there is no specific or explicit reference to 'restorative justice' *per se* as a method or remedy.[23] Nonetheless, adoption of a restorative justice conference does appear to be one way in which to 'recognise the harm done to the victim of the crime and the community,' which is an express purpose of sentencing under s 3A(g) of the *Crimes (Sentencing Procedure) Act*,[24] and to dovetail with several other purposes as well.[25] Recent statements in the NSW Legislative Assembly by the Minister for the Environment do provide support for alternative approaches to sentencing:

> Restorative justice actions can benefit the environment and the victims of environmental incidents. These reforms will allow communities whose health or livelihood has been impacted by an environmental incident to participate in the sentencing response to that incident, including in the formation of a remedy appropriate for the harm caused.[26]

Although the NSW Land and Environment Court has had a number of opportunities to use restorative justice throughout its history, it has in fact done so on only one occasion.[27] It is to this case that we now turn.

III Indigenous Communities, Restorative Practices and Environmental Protection

The 2007 case of *Garrett v Williams*[28] involved the defendant Craig Williams, of Pinnacle Mines Pty Ltd, who was charged with several offences under the *National Parks and Wildlife Act 1974* (NSW). The case involved two offences stemming from the construction of a private rail siding during which a number of artefacts were destroyed, and one offence stemming from excavation of a costean (an open trench excavated across a known or expected strike of rock formations to expose fresh rock for inspection, logging rock types, measuring strike and dip directions for the rock, and for sampling of mineralised zones) during which damage was caused to a protected Aboriginal place.

The offences are described in the 1974 Act, under the section relevant to protection of Aboriginal heritage. Specifically, s 90(1) of the Act at the time stated:

> A person who, without first obtaining the consent of the Director-General, knowingly destroys, defaces or damages, or knowingly causes or permits the destruction or defacement of or damage to, an Aboriginal object or Aboriginal place is guilty of an offence against this Act.
>
> Maximum penalty: 50 penalty units or imprisonment for 6 months, or both (or 200 penalty units in the case of a corporation).[29]

The NSW Land and Environment Court acknowledged the historical connection between the local Aboriginal people and the Pinnacles, noting that Aboriginal people have inhabited the country around Broken Hill for tens of thousands of years. The importance of the area to Aboriginal people was recognised in 1996 by a declaration that the Pinnacles are an Aboriginal place protected under s 84 of the Act. A place cannot be declared a protected place under the Act unless it is considered, in the opinion of the Minister, of special significance with respect to Aboriginal culture.[30] What is protected is a 'place,' rather than specific biota such as flora and fauna. The 'victim' is, in this sense, abiotic and thus considered 'non-living' (like a river or mountain). Nonetheless, the bank and creek areas are considered 'cultural sites' as is the place along the hill where the costean offence occurred.

The harm was to the 'place' as well as to those who identify with the 'place.' Namely, the victims included the non-human as well as the human, although the Court only explicitly recognised the humans when it came to restorative justice proceedings. The Court determined that, based on evidence at the sentence hearing, the four critical ingredients for a fully restorative process appeared to be satisfied:

(a) The offences in this case involved identifiable victims, being the Aboriginal people of the Broken Hill area for whom the Aboriginal place of the Pinnacles and the Aboriginal objects held special significance. The evidence adduced at the sentence hearing revealed the emotional harm that the commission of the offences caused to the victims. Yet, they were alienated from the traditional criminal justice process.

(b) There was reasonable prospect that the victims would want to participate in a restorative process, to have an opportunity to express their needs and to participate in determining the best way for the offender to make reparation.

(c) The evidence of the defendant revealed that he accepted responsibility for his criminal actions, showed remorse, had been alienated from the community by adverse media and for other reasons, and had a desire for re-integration into the community and with the Aboriginal people of the area.

(d) There was a reasonable prospect that the defendant would wish to participate in a restorative process.[31]

Under the direction of an experienced restorative justice facilitator, John McDonald, the conference took place on 10 November 2006 in Broken Hill, and lasted just over six hours. The conference was designed to hear from the defendant what had taken place, from the victims how they were affected, and to determine what could be done to repair any harm and prevent future offences. As noted by the Court, an extensive range of persons were consulted by John McDonald during preparations for the conference, including, for example, representatives of the Broken Hill Local Aboriginal Land Council, archaeologists, representatives from the Attorney-General's Department, the Department of Environment and Department of Primary Industries, and representatives of Pinnacle Mines.[32] The conference was marked by cooperation and respectfulness among all parties. It was reported that during the conference, talk 'ranged over subjects as diverse as the connection of the traditional owners to the land, the history of the mine, methods and people used to survey the Aboriginal place for artefacts, family connections, shared acquaintances, children and plans for future opportunities.'[33]

At the conference, the defendant Craig Williams apologised personally and on behalf of Pinnacle Mines, of which he was sole director and secretary, for the offences committed under s 90(1) of the Act to Maureen O'Donnell, representing the Broken Hill Local Aboriginal Land Council. At the later sentence hearing, the Court noted a report from the restorative justice consultant that said among other things that:

1. Maureen O'Donnell has visited the mine site in consultation with Craig Williams.
2. Maureen O'Donnell and Craig Williams have met

> since the site visit to discuss moving forward in a cooperative manner, including:
> (a) fostering Indigenous employment opportunities;
> (b) establishing a Wilykali Pinnacles Heritage Trust to which Mr Williams would donate (i) a four wheel drive truck type of vehicle to the value of $20,000; (ii) a trailer to the value of $3,000; (iii) a quad bike to the value of $8,000; and (iv) provide a fuel card to the value of $100 per month or $1,200 per annum…[34]

The Court subsequently handed down a total penalty of $1400 plus payment of prosecutor's costs.

The destruction of Aboriginal artefacts was described by Maureen O'Donnell in the following terms: 'I believe that moving Aboriginal artefacts destroys them by taking them away from their resting place. We are taught not to take artefacts away from their original place.'[35] She also told of the significance of the Pinnacles, in evidence that was deemed by the Court as the most authentic (that is, over and above that provided by the archaeologists):

> I have knowledge of the Pinnacles Aboriginal Place near Broken Hill. My knowledge of the Pinnacles came from my teaching by my family and Aboriginal elders. The Pinnacles is tied to the Marnbi Bronze Winged Pigeon story. I was told that the pigeon flew to the Pinnacles from South Australia where it was wounded, dropping its blood and feathers indicating that there is gold and silver in the area. The Pinnacles area was a large gathering place for Aboriginal people from the Broken Hill and surrounding area, including South Australia. Aboriginal people used to camp along the surrounding creeks, trade and dance and feed together at the Pinnacles. The Pinnacles and the whole area surrounding the Pinnacles is a spiritual ground. There is still evidence of Aboriginal use of the Pinnacles, including stone tools and camp ovens. The Pinnacles area is very significant to the Wilykali and other Aboriginal people. It is also very significant to the Ancestors before us who have gone to their resting place. I do not know when the Pinnacles was last used by Aboriginal people but the story lives on today.[36]

In describing the damage caused by the excavation associated with the costean ('drains'), Maureen O'Donnell commented:

> I was very upset with what I saw because the drains had been dug at a sacred place. I believe that the drains had damaged the Pinnacles sacred area because they would have disturbed the Aboriginal spirits and the story line of our teaching. I believe that the Aboriginal spirits would be very unhappy. I felt like the spirits were angry because the weather was awful that day. It was very cold and windy. The Pinnacles were serene and a place of beauty until the drains were dug. I remember saying to Steve Millington words like 'Look at this Steve, isn't it terrible that they put in these drains. Feels like they put a big hole in my body.'[37]

Craig Williams, the defendant, was to later express his contrition and remorse as follows:

> I regret that I committed the offences and I am sorry for the harm it has caused. I realise that it was foolish not to be vigilant and more respectful about the Aboriginal objects and the Aboriginal place. During the course of these proceedings I have learnt a significant amount about Aboriginal archaeology and the importance of the Aboriginal place. I have also realised how both Aboriginal objects and the Aboriginal place are more important to Aboriginal people than I had previously appreciated. I am seriously remorseful about what has occurred.[38]

From the point of view of the 'usual practice' of restorative justice conferences, the case so far appears to resemble a typical case. It ticks all the boxes in terms of victim-offender engagement, expressions of hurt and remorse, as well as efforts made to repair the harm. However, there are other aspects of the case that warrant further attention as well. To put these into context, it is first necessary to consider the relationship between Indigenous people and nature.

IV Indigeneity, Epistemology and Ontology

The specific material and cultural positioning of Indigenous people within certain landscapes is vital to understanding the nature of environmental victimisation in cases such as *Williams*. In *Ausgrid* (2013),[39] for example, a contractor to Ausgrid committed an offence against the *National Parks and Wildlife Act* when they damaged an Aboriginal rock engraving while undertaking excavation works for a new electrical substation. In the course of proceedings, an affidavit tendered by Ms Turner said that:

> The proper protection of Aboriginal culture and heritage is of deep importance to the NSW Aboriginal Land Council and Aboriginal communities in NSW. In this case, the harm that

> has occurred due to the engraving being sliced in half means that the engraving can never be replaced. The destruction of Aboriginal sites, such as has occurred in this instance impacts on the ability of Aboriginal peoples to connect with a living culture of the past. These sites tell important stories for Aboriginal communities and must be protected to provide Aboriginal people with opportunities to strengthen and maintain culture now and in the future .[40]

The phrase 'connect with a living culture of the past' is particularly important here. This type of acknowledgement connotes a dynamic and continuously vibrant relationship between local Indigenous communities, and the land upon and within which they live. As Hamilton points out, the Aboriginal connection to the land is powerful and it is 'at this junction where potential for conflict and disconnect between non-Aboriginal and Aboriginal people exists.'[41] To interpret the importance of this observation, it is necessary to also acknowledge the wider social context of 'whiteness.'[42], and the common sense experience of white cultural practices as normative, natural and universal.[43]

The reason why, as Hamilton alludes to above, there is a disconnect between Indigenous and non-Indigenous people about 'land' is that Indigenous people define 'country' in very particular culturally understood ways. The special relationship between Indigenous communities and nature finds expression in a number of different places and ways, a point made by Suzuki when he observes:

> Whether it's in the Amazon, the Serengeti, or the Australian outback, Aboriginal people speak of Earth as their mother and tell us we are created by the four sacred elements: Earth, Air, Fire, and Water. I realized that we had defined the problem incorrectly. I had pressed for laws and institutions to regulate our interaction with the environment when, in fact, there is no environment 'out there', separate from us; I came to realise that we *are* the environment.[44]

The task, therefore, is not only to articulate this, but to do so in ways that break through taken-for-granted 'white' understandings of nature and the nature-human relationship.

In order for this to occur, it is also imperative to locate Indigenous Australians historically and in social context: Australia's Indigenous people can be seen as 'a colonised people, with a profound pre-existing attachment to, and lawful claim on, the Australian continent.'[45] Von Sturmer uses the notion of Aboriginal domain to describe instances where:

> The dominant social life and culture are Aboriginal, where the major language or languages are Aboriginal, where the system of knowledge is Aboriginal; in short where the resident Aboriginal population constitutes the public.[46]

Forms of domain exist and co-exist throughout the Australian urban, rural and remote areas. It is not fixed geographically. Fundamentally, acknowledgement of distinctive spheres of thought, attitudes, social relations and styles of behaviour means that taken-for-granted assumptions regarding Indigenous people's lived experiences, from a 'whiteness' perspective, need to be challenged.[47]

Central to this is the idea of 'land' or 'country.'[48] And this, in turn, is illustrated via the comments of Indigenous people directly. Thus, for example, Dodson comments that:

> Everything about Aboriginal society is inextricably interwoven with, and connected to, the land. Culture is the land, the land and spirituality of Aboriginal people, our cultural beliefs or reason for existence is the land. You take that away and you take away our reason for existence. We have grown the land up. We are dancing, singing and painting for the land. We are celebrating the land. Removed from our lands, we are literally removed from ourselves.[49]

As Connell further comments: 'The land is *part of* the social order.'[50] That is, it is not a question of humans owning the land, or the land owning humans – it is far deeper than this.

On 10 March 2015, Australian Prime Minister Tony Abbott, while backing a plan in Western Australia to close more than 100 remote communities and move more than 1,000 people, said, 'What we can't do is endlessly subsidise lifestyle choices.'[51] The response from Indigenous people was, for present purposes, illuminating:

> These people are actually living on their homelands and it affects a lot of things, it affects their cultural activities, it affects their native title, it affects a number of areas. It's not as simple as … if someone from Sydney decides to have a treechange and go and live in the bush. It's about their life, it's about their very essence, it's about their very culture.
> *Warren Mundine, Chair of the Prime Minister's Indigenous Advisory Council*

> Who will the shutting down of communities benefit? Not the people living there. It will rip families to shreds, tear their souls apart and their connection to Country. It will lead to homelessness and despair.
> *Tauto Sansbury, Chair of the Narrungga Peoples*
>
> We are obliged to look after our country and that's why a lot of us are out here on country.
> *Brian Lee, Chairman of WA's Kimberley Community of Djarindjin*
>
> Being on country is more than a lifestyle choice. It is the essence of life itself.
>
> Culture, land, community and identity are intrinsically linked.
> *The Lowitja Institute*[52]

Meanwhile, in New Zealand, similar sorts of assertions are also made in regards to Maori relationships with nature:

> Indigenous peoples throughout the world have strong connections to the flowing freshwater of rivers. For instance, Maori – the Indigenous peoples of Aotearoa New Zealand – view many rivers as tupuna (ancestors) and invoke the name of a river to assert their identity. There is a deep belief that humans and water are intertwined as is encapsulated in common tribal sayings such as 'I am the river and the river is me' and 'the river belongs to us just as we belong to the river.'[53]

In solidarity with the Indigenous people of Australia about the Prime Minister's comments, the New Zealand Maori Party stated that:

> The right of indigenous people to live on their traditional land and to live as a community is not a lifestyle choice, it is an integral part of our identity. The Maori Party shares the pain of Australia's First Peoples who face losing their connection to their ancestral land and the destruction of their communities as a result of Government actions.[54]

These expressions of connection and interrelationship have profound implications for understanding and responding to desecration of Indigenous lands. These are explored in the next section.

V Case Features and Implications for Restorative Justice

Close analysis of proceedings indicates facets of *Williams* that are worthy of note in addition to the fact that it is the first and only use of restorative justice in the NSW Land and Environment Court.

A The Unity of the Human and the Non-human

Precisely because the case involved an Indigenous community, there was an apparent unity of the human and the non-human in any consideration of 'harm' and in the notion of transgression itself. This is because of the intrinsic identification of land with local Indigenous inhabitants. This historically and culturally constructed one-to-one identification makes them inseparable at both the level of ontology ('ways of being') and epistemology ('ways of knowing').

Any particular ecosystem is made up of both abiotic components (air, water, soil, atoms and molecules) and biotic components (plants, animals, bacteria and fungi). The present case is also significant insofar as the unity of 'people' and 'country' also means that attention is given to the abiotic (the 'non-living,' which generally includes rivers, mountains and the earth itself) as well as the biotic (such as flora and fauna). The latter are acknowledged in law and in legal discourses as 'victims' (see for example, *Native Vegetation Act 2003 NSW*, and proceedings of the NSW Land and Environment Court around illegal land clearing and illegal picking of plants); the former less so, although recent decisions in New Zealand are breaking new ground in regards to the legal status of rivers.[55] With regard to this, it has been observed that:

> The legal personality concept aligns with the Maori legal concept of a personified natural world. By regarding the river as having its own standing, the mana (authority) and mauri (life force) of the river would be recognised, and importantly, that river would be more likely to be regarded as a holistic being rather than a fragmented entity of flowing water, river bed and river bank.[56]

B The Privileging of the Indigenous Voice

In the context of colonialism, legal redress for past wrongs can include acknowledging land rights and protecting rights pertaining to Aboriginal culture and heritage. Together,

these establish a framework within which contemporary harm is constructed in legal terms. The NSW Land and Environment Court made an explicit point of privileging the Indigenous voice and granting it 'extra' legitimacy over and above other kinds of evidence, including 'expert' evidence. This is significant in legal terms, insofar as the Indigenous warrant to suffer harm was (in)directly granted via relevant sections of the *National Parks and Wildlife Act 1974* (NSW), dealing with protection of Aboriginal heritage. The injury suffered was thus previously legislatively constructed to be of significance via the Act.

In the context of 'whiteness', which includes instances in which white 'experts' provide expert testimony and interpretation of Indigenous communities to non-Indigenous forums,[57] who talks and who listens, in practice, is also significant. The Court in this instance also privileged the Indigenous voice directly in that the judgement gave prominence to the comments and observations of Indigenous leaders. They spoke for themselves. The Court assessed their stories carefully and considerately, and critically, in the light of the parameters of the legal and substantive harms before it. This did not mean total agreement or acceptance of everything said. But it did involve accepting the prima facie 'truth' of what was being said.

C The Willingness of the Parties to Proceed and to Exchange

It is notable that the company involved in the transgression was a small mining company headed by a CEO who lived and worked in the local area. This meant that the offence and the offender were positioned within the community in a very personal sort of way. Such personal community connections means that people do matter and that what a person does has personal consequences. Mr Williams was embedded in a web of close personal relationships that had been built over time, and this was important to his willingness to engage in the restorative justice process. Reputation, status and social capital matter in such circumstances.

The process itself was marked by remorse on the part of the offender, and moreover openness to listen what the other side had to convey. The 'affective,' or emotional engagement, is inherently personal and human. It was a 'person' rather than 'CEO' who was most affected and who learned most from the restorative justice exchanges. The personalisation of the process also flowed into the personalisation of the outcomes, including the forging of new relationships directly with Indigenous people with whom Mr Williams had had no prior intimate contact or business.

D The Legal Standing of the Affected Areas

Personalising the nature of the offence – the offender, the harm, and the victim – is vital to the restorative justice process. If and where the non-human is granted potential legal status, there is some movement toward recognition of Earth rights and the rights of the 'natural object.'[58] An example of this was the 'wild rivers' legislation in Queensland: the purpose of the *Wild Rivers Act 2005 (Qld)* was to (a) preserve the natural values of rivers that have all, or almost all, of their natural values intact; and (b) provide for the preservation of the natural values of rivers in the Lake Eyre Basin. It was repealed in November 2014. *Wild Rivers* was supported by the Labor Party, scientists and environmentalist groups such as the Wilderness Society, but heavily contested by some local Indigenous leaders and communities who argued that it deprived Indigenous people of economic opportunities. As Noel Pearson stated: 'Traditional owners should decide whether they want conservation or a mixture of both. We don't want this unilaterally imposed on them by political deals in Brisbane.'[59] Similarly, in New Zealand it has been observed that, 'the point of recognising the legal standing of a river is to give that river a voice. The health and wellbeing of the river must factor into all decision making concerning the use of a river.'[60]

However, the severing of connection between 'land' and 'people' in a way that disconnects the prior one-to-one identity also undermines the experience of transgression as 'personal.' In other words, legal acknowledgement of the intrinsic rights of nature outside of specific social and cultural contexts goes against the suitability of restorative justice being used as part of a conflict resolution method.

To put it differently, Mr Williams was sensitised to the nature of the damage caused by his actions by the personal stories of anguish by local Indigenous community members. They did not only speak 'on behalf' of the land – they spoke *with* the land. It is the unity of land and spirit, of people and river, of living and ancestor, which makes such transgression so powerful and personal.

Where there is not this one-to-one identity, then harm to a river or a mountain-top or a bird or a flower is much more

de-personalised, including where legislation is introduced that includes the legal concept of a personified natural world. Harm then becomes a matter of expert testimony and debate over scope and scale. As noted earlier for example, a 'river' may be seen as being constituted by its channel banks and channel bed according to the science of geomorphology,[61] and conceptualised as inclusive of consideration of riparian zones from an ecological perspective.[62] The interpretation of harm in any specific case will be dictated by the particular empirical 'facts of the case,' and these in turn will shape which expert testimony will be of greatest relevance and value. Justice becomes more technical rather than personalised in such scenarios.

E The Limitations of a Sharing and Caring Ethos

There are many ways to seek redress over environmental crimes, including several different ways in which to conceptualise repairing harm. Restorative justice involves certain key elements, such as mutual membership of community (however constituted), exercising agency on each side, and processes of giving and forgiving (again, a reciprocal process). On the other hand, where the perpetrator is disembodied, as in the case of the non-human corporate entity (which nonetheless may have legal status as a 'person'), and the victim is non-human such as a river or a tree (which nonetheless also may have the legal status as a 'person'), it is much harder to build into the justice process the needed humanity that will make it a personal process involving mutual exchanges.[63] Here the emphasis, rightly, ought to be on dealing with chronic recidivism, and on 'making things right' through *reparative* action. In other words, reparative justice is and should be the main instrument or tool used by relevant justice forums. Interestingly, this is precisely the trend within the NSW Land and Environment Court, which has many sanctions at its disposal and which is oriented toward problem-solving.[64]

While it makes sense to deal with individual offenders and small firms via restorative justice processes – since there is greater scope for offender change of conscience and understanding, as well as behaviour – this is less relevant in respect to large companies.[65] Here, reparative justice, with an emphasis on repairing harm within a generally more punitive context, is more appropriate and effective. 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. Again, this provides further support for the idea of specialist environmental courts with well-developed problem-solving skills and capacities.

VI A Distinctive Identity

When it comes to environmental harm, Hamilton raises several questions that aim to broaden the scope of 'victim' in ways that allow other voices and other agendas into the restorative justice process. Writing in relation to the clearing of native vegetation and threatened species, he asks:

> The environment, consisting of the endangered plant, is obviously the victim but can this be extended to conservation groups who seek to protect the environment, or even those who enjoy looking at the plant species in the natural environment? If the circumstances were appropriate, with a willing and acceptable offender, would a restorative justice conference with such conservation groups and plant enthusiasts be one way of imparting knowledge and understanding to the offender?
>
> Maybe the net should be cast wider to include National Parks and Wildlife Rangers in the conference, as they are indirect victims of the aforementioned offence because they have had their good work in protecting the environment undermined by the commission of the offence.[66]

According to Hamilton, such inclusions could enhance the opportunity for victims to express how they have been violated and what they feel, and for the sharing of viewpoints between victim and offender. This, he argues, 'gives the offender the chance to learn something – the imparting of knowledge.'[67] Indeed, Hamilton states that restorative justice could be usefully and productively applied as a means to share viewpoints, impart knowledge and provide an apology, across many instances of environmental victimisation.[68]

Yet, there seems to be a significant difference between Indigenous and non-Indigenous relationships to 'land' / 'country'. As demonstrated above, these differences imply quite different understandings of restorative justice, and of the meaning that it holds for Indigenous communities relative to non-Indigenous stakeholders. This is because putting oneself into the perspective of Indigenous communities involves new ways of seeing, being and acting

that run counter to a 'whiteness' perspective. Indeed, 'the articulation of Indigenous knowledges is part of the project of decolonisation, or retelling stories from the vantage point of disenfranchised communities, and offering new ways of seeing and being in the world.'[69] This pertains to narratives offered in legal proceedings as it does in other social settings.

Importantly, the distinctiveness of Indigenous ways of being and ways of knowing is reinforced in law. Thus, for example, Indigenous identification with nature is provided in the legislation itself (ie protection of Aboriginal heritage) and in court processes which privilege their voice. By contrast, discourses on non-Indigenous relationships with nature are not seen in 'identity' terms, but in regards to instrumental use (riparian rights), expertise (science, elder knowledge) and generalist spiritual beliefs ('Gaia') not founded in traditional, historical and specific connections to the land. There is no assumed one-to-one identity.

VII Conclusion

In summary, it can be said that the unity of the 'natural object' (nature / land / country) and Indigenous people simultaneously means that there is a unity of 'victim' and 'expert' in regards to that specific community / natural object. They are one and the same. However, where there is separation of 'nature-as-victim' from the local group (as in the case of non-Indigenous communities and individuals, and 'wild rivers' legislation), there is less prospect for true restorative justice to occur, particularly that which is inclusive of the non-human as victim as well as the human. On the contrary, it is much more likely that the process will involve less personalised, more technocratic and more contested forms of justice reliant upon external expertise and different voices contesting the nature of the victimisation and harm. Under such circumstances there will also be more resistance to the use of restorative justice forums insofar as powerful vested interests are more likely to veto such initiatives and rely upon formal court processes (and the advantages offered by the hiring of professional legal counsel).

The bottom line is that restorative justice in aid of protecting the environmental interests of Indigenous people not only requires special circumstances (relating to general use of restorative justice forums, such as willingness of victims and offenders to participate), but it embodies principles and perspectives unique to the Indigenous experience. While non-Indigenous communities may well benefit from restorative justice processes where environmental harm directly affects their health and wellbeing (as in, for example, neighbourhood pollution cases), the use of restorative justice methods is less certain in cases in which the non-human environmental victim features. This is because, unlike *Williams* in which nature and community were fused, who speaks on behalf of nature will inevitably be subject to contestation, thus reinforcing the role of the Court in weighing up whose viewpoints matter most, and when.

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1 Chris Cunneen and Rob White, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 2011); Harry Blagg, *Restorative Visions: Crime, Aboriginality and the Decolonisation of Justice* (Hawkins Press, 2008).

2 See for example Elena Marchetti, 'Australian Indigenous Sentencing Courts: Restoring Culture in the Sentencing Court Process' in Jane Bolitho, Jasmine Bruce and Gail Mason (eds) *Restorative Justice: Adults and Emerging Practice* (Sydney Institute of Criminology Press, 2012).

3 Brian Preston, (2011) 'The use of restorative justice for environmental crime', *Criminal Law Journal*, 35: 136-145.

4 Mark Hamilton, 'Restorative justice intervention in an environmental law context: Garrett v Williams, prosecutions under the Resource Management Act 1991 (NZ), and beyond' (2008) 25 *EPLJ* 263.

5 Fred McElrea, '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.

6 Hamilton, above n 4, 269.

7 See for example Fred Besthorn, 'Restorative Justice in Environmental Restoration - The Twin Pillars of a Just Global Environmental Policy: Hearing the Voice of the Victim' (2004) 3(2) *Journal of Societal and Social Policy* 33; Fred Besthorn, 'Speaking Earth: Environmental Restoration and Restorative Justice' in Katherine Wormer and Lorenn Walker (eds), *Restorative Justice Today: Practical Applications* (Sage, 2012); and Preston, above n 3.

8 Rob White, Fiona Haines and Nicole Asquith, *Crime and Criminology* (Oxford University Press, 2012); Michael King et al, *Non-Adversarial Justice* (The Federation Press, 2009).

9 See Rob White, *Environmental Harm: An Eco-Justice Perspective* (Policy Press, 2013).

10 David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford University Press, 2007); and Besthorn (2004), above n 7.

11 Preston, above n 3, 143.

12 Besthom (2004) and Besthorn (2012), above n 7.

13 See Albert Lin, 'The Unifying Role of Harm in Environmental Law' (2006) 3 *Wisconsin Law Review* 898.

14 Christopher Stone, 'Should trees have standing?: Toward legal rights for natural objects' (1972) 45 *Southern California Law Review* 450; and Lin, above n 13.

15 See Preston, above n 3; and see also James Morris and Jacinta Ruru, 'Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water?' (2010) 14(2) *Australian Indigenous Law Review* 49. The importance of this is that it formally acknowledges 'agency' on the part of the river in and during the proceedings.

16 Kate Shuttleworth, 'Agreement entitles Whanguanui River to legal identity', *The New Zealand Herald* (online), 30 August 2012 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10830586>; Christopher Findlayson, *Whanganui River Agreement signed* (30 August 2012) beehive.govt.nz: The official website of the New Zealand Government < http://www.beehive.govt.nz/release/whanganui-river-agreement-signed>.

17 Preston, above n 3; Mahesh Chandra Mehta, *In the Public Interest: Landmark Judgement & Orders of the Supreme Court of India on Environment & Human Rights*, *Vols1-3* (Prakriti Publications, 2009).

18 Morris & Ruru, above n 15.

19 Peter Davies et al, 'Urban rivers and riparian systems – directions and recommendations for legislators, policy makers, developers and community users' (2011) 28 *Environmental Planning and Law Journal* 313; Mark Taylor and Robert Stokes, 'When is a River not a River? Consideration of the legal definition of a river for geomorphologists practising in New South Wales, Australia' (2005) 36(2) *Australian Geographer* 183.

20 Taylor & Stokes, above n 19.

21 Davies et al, above n 19.

22 See Rob White and Diane Heckenberg, *Green Criminology: An Introduction to the Study of Environmental Harm* (Routledge, 2014).

23 The *Protection of the Environmental Operations Act 1997* (NSW) s 250 does make reference to an additional order, under (1)(c), that the offender carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit; and subsection (1A) 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.

24 *Crimes (Sentencing Procedure) Act 1999* (NSW).

25 See Hamilton, above n 4.

26 New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 May 2014, 29310 (Robert Stokes, Minister for the Environment).

27 Mark Hamilton, 'Restorative justice intervention in an Aboriginal cultural heritage protection context: Conspicuous absences?' (2014) 31 *Environmental and Planning Law Journal* 352.

28 *Garrett v Williams* [2007] NSWLEC 96.

29 *National Parks and Wildlife Act 1974* (NSW) s 90(1). The Act has since been amended, and the offence formerly under s 90(1) has been incorporated with different wording into s 86.

30 See *Garrett v Williams* [2007] NSWLEC 96, [74].

31 Ibid, [47].

32 Ibid, [56].

33 John McDonald, 'Restorative Justice Process in Case Law' (2008) 33(1) *Alternative Law Journal* 41, 43.

34 *Garrett v Williams* [2007] NSWLEC 96, [63].

35 Ibid, [73].

36 Ibid, [75].

37 Ibid, [76]..

38 Ibid, [110]

39 *Chief Executive, Office of Environment and Heritage v Ausgrid* [2013] NSWLEC 51.

40 Ibid, [55].

41 Hamilton, above n 4, 341.

42 See for example Aileen Moreton-Robinson, *Talkin' Up to the White Woman: Indigenous Women and Feminism* (University of Queensland Press, 2000).

43 See Meredith Green, Christopher Sonn and Jabulane Matsebula, 'Reviewing whiteness: Theory, research and possibilities' (2007) 37(3) *South African Journal of Psychology* 389.

44 David Suzuki, *The Legacy: An Elder's Vision for our Sustainable Future* (Allen & Unwin, 2010) 71.

45 Harry Blagg, 'Journeys outside the comfort zone: Doing research in the Aboriginal domain' in Lorana Bartels and Kelly Richards (eds) *Qualitative Criminology: Stories from the Field* (Hawkins Press, 2011) 144.

46 Cited in ibid, 145.

47 Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015).

48 Mary Graham, 'Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews' (2008) 45 *Australian Humanities Review* 181.

49 Mick Dodson (1977) quoted in Raewyn Connell, *Southern Theory: The global dynamics of knowledge in social science* (Allen & Unwin, 2007) 195.

50 Ibid, 200.

51 Emma Griffiths, 'Indigenous advisors slam Tony Abbott's 'lifestyle choice' comments as 'hopeless, disrespectful'', *ABC News* (online), 11 March 2015 <http://www.abc.net.au/news/2015-03-11/abbott-defends-indigenous-communities-lifestyle-choice/6300218>.

52 Ibid. See also The Lowitja Institute, *Proposed closure of Western Australian remote communities Statement by the Lowitja Institute* (11 March 2015) <http://thelowitjainstitute.cmail1.com/t/ViewEmail/j/C5E11931C50B57F8/EC330118E5BD929C6A4D01E12DB8921D>; Gerry Georgatos, 'Premier Barnett, How Dare You? "Appalling Mistreatment of Children"', *The Stringer* (online), 7 March 2015 <http://thestringer.com.au/premier-barnett-how-dare-you-appalling-mistreatment-of-children-9832#.Vm5xfFV96Uk>.

53 Morris & Ruru, above n 15, 49.

54 Mark Mitchell, 'NZ Maori Party Issues Scathing Letter to Tony Abbott', *Fraser Coast Chronicle* (online), 20th Apr 2015 <http://www.frasercoastchronicle.com.au/news/nz-maori-party-issues-scathing-letter-tony-abbott/2611909/>.

55 Shuttleworth, above n 16; Findlayson, above n 16.

56 Morris & Ruru, above n 15, 50.

57 Green, Sonn & Matsebula, above n 43.

58 Stone, above n 14.

59 See Andrew Fraser, 'Cape York's Wild Rivers victory', *The Australian* (online), 18 June 2014 <http://www.theaustralian.com.au/national-affairs/state-politics/cape-yorks-wild-rivers-victory/story-e6frgczx-1226958084736>; Louisa Rebgetz, Chrissy Arthur and Kym Agius, 'Wild Rivers legislation repealed in Queensland as new planning laws introduced to protect rivers,' *ABC News* (online), 19 November 2014 <http://www.abc.net.au/news/2014-08-06/queensland-wild-rivers-legislation-repealed/5651624>.

60 Morris & Ruru, above n 15, 57.

61 Taylor & Stokes, above n 19.

62 Davies et al, above n 19.

63 There are 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 does have a place in dealing with corporate wrongdoing (see John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002)). 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 (Michael Levi, 'Suite Justice or Sweet Charity? Some Explorations of Shaming and Incapacitating Business Fraudsters' in Eugene McLaughlin et al (eds) *Restorative Justice: Critical Issues* (Sage, 2003)). 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 (Steve Tombs and David Whyte, *The Corporate Criminal: Why corporations must be abolished* (Routledge, 2015)).

64 Rob White, 'Environmental Crime and Problem-Solving Courts' (2013) 59(3) *Crime, Law and Social Change* 267.

65 This is highlighted for example in controversies surrounding the decision in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48. In this case, the Land and Environment Court refused an application to expand an open cut coal mine. This was appealed by Warkworth Mining Ltd (owned by Rio Tinto) and the NSW government. In April 2014, the NSW Court of Appeal ruled in favour of the residents by upholding the refusal of the mine extension. Over the course of the proceedings, fierce criticism, including personal attacks on the judiciary, were spearheaded by the mining industry and popular media, supported by government ministers. Large companies can marshal huge resources in support of their specific interests and can be antagonistic and aggressive in doing so. In November 2014, the New South Wales Department of Planning recommended the approval of the Warkworth coal mine expansion by Rio Tinto, despite two court decisions against the project (Environmental Defenders Office New South Wales, *Court victory again for Bulga residents over coal mine expansion* (19 November 2014) <http://www.edonsw.org.au/court_victory_again_for_bulga_residents_over_coal_mine_expansion>).

66 Hamilton, above n 4, 270.

67 Ibid, 271.

68 Hamilton, above n 27.

69 Green, Sonn & Matsebula, above n 43, 409.