Indigenous Communities, Environmental Protection and Restorative Justice

Rob White
School of Social Sciences
University of Tasmania, Australia
Acknowledgement of Country

In recognition of the deep history and culture of this island I wish to acknowledge the Mouheneenner (pronounced Moo-he-ne-ne-nah) People, the traditional owners and custodians of the land upon which we presently meet. I acknowledge the contemporary Tasmanian Aboriginal community, who have survived invasion and dispossession, and continue to maintain their identity, culture and Indigenous rights.
Most discussions of restorative justice and Indigenous people tend to focus on either the discriminatory access of Indigenous youth to juvenile conferencing forums 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. Importantly, in most instances at the centre of such discussions is the status the Indigenous person as offender.
Indigenous People as Victims

In contrast, the following descriptions and analysis start with the notion that it is Indigenous communities that 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 matches the specific requirements of the case.
Nonhuman Environmental Subjects

- **Natural Objects**
  - Forests, trees
  - Rivers, streams
  - Eco-systems
  - Mountains
  - Plants

- **Animals**
  - Wildlife
  - Domesticated
Eco-Justice and Victims/Subjects

- **Environment justice** – environmental rights are seen as an extension of human or social rights so as to enhance the quality of human life, now and into the future: the victim is human

- **Ecological justice** – human beings are merely one component of complex ecosystems that should be preserved for their own sake: the victim is specific environments

- **Species justice** – animals have an intrinsic right to not suffer abuse, and plants the degradation of habitat to the extent that threatens biodiversity loss: the victim is animals and plants
Garrett v Williams
New South Wales
Land and Environment Court

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 interest is to repair environmental harm where possible and feasible.
Functions of NSW LEC

- 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.
RJ and Environment in New Zealand

Wide variety of offences:
- Pollution, both air and water;
- Breach of conditions of development consent; and
- Destruction of trees.

Wide variety of victims:
- Individuals;
- Communities; and
- The environment

Wide variety of outcomes:
- Defendant willing to offer:
  - An apology;
  - Payment of costs (both facilitators and prosecutors);
  - Tree planting;
  - Undertaking of steps to prevent further occurrence of the offence;
  - Donation to community associations, local schools and resident associations;
  - Landscaping; and even
  - The installation of fly screens.
Restoration & Reparation in Oz

Victorian Environmental Protection Agency, NSW LEC & others

- orders for restoration and prevention
- orders for payment of costs, expenses and compensation
- orders to pay investigation costs
- monetary benefits penalty orders
- publication orders
- environmental service orders
- environmental audit orders
- payment into environmental trust or for other purposes
- order to attend training
- order to establish training course
- order to provide financial assurance
Offences under NPW Act 1974

The reported judgement in 2007 involving 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 (Williams) involved two offences stemming from the construction of a private rail siding during which a number of artifacts 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 the Aboriginal place.
Aboriginal Heritage

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).
Aboriginal Place

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 to the Aboriginal people was recognised in 1996 by a declaration that the Pinnacles to be an **Aboriginal place protected** under the NPW Act 1974 (NSW). A place cannot be declared under s 84 of the NPW Act as an Aboriginal place unless the place is considered in the opinion of the Minister is or was of special significance with respect to Aboriginal culture.
Conferencing Criteria

- 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.
- 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.
- 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.
- There was a reasonable prospect that the **defendant would wish to participate** in a restorative process.
What was Done

“What was done:

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…”

The Court subsequently handed down a total penalty of $1400 plus payment of prosecutor’s costs.
“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.”
"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’."
Remorse

“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”.

Land and People – People and Land
Destruction of Aboriginal sites

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.
We are the Environment

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 realize that we are the environment.

(Suzuki, 2010: 71)
Aboriginal Domain

Von Sturmer (1984) 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.

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.
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.

‘Lifestyle choices’

PM Tony Abbott said on 10 March 2015, while backing a plan in Western Australia to close more than 100 remote communities and move more than 1,000 people, ‘what we can’t do is endlessly subsidise lifestyle choices’. The response from Indigenous people was illuminating:
The Response

‘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

‘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

‘We’re not funding lifestyle choices, we’re funding lives, in fact. I would argue against that it’s a “choice” that people have got deep-rooted connections to their country, it’s a “choice” that they’ve lived there for generations and generations’.

Joe Morrison, NT Northern Land Council Chief Executive
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’.

(Morris & Ruru, 2010: 49)
Case Features & Implications for RJ
Precisely because the case involved an Indigenous community, there was an apparent unity of the human and the nonhuman 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’).
The 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, air and mountains) 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**.
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 LEC 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 NPW 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, 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.
Willingness of the Parties to Proceed and 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 mean that people do matter and 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 RJ process. Reputation, status and social capital matter in such circumstances.
The RJ process itself was marked by remorse on the part of the offender, and moreover an openness to listening to what the other side had to convey. The ‘affective’ is inherently personal and human. It was a ‘person’ rather than ‘CEO’ who was most affected and who learned most from the RJ 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 contact or business.
Legal standing and who is affected

Personalising the nature of the offence – the offender, the harm, and the victim – is vital to the RJ process. If and where the nonhuman is granted potential legal status (e.g., the ‘wild rivers’ legislation in Queensland), there is some movement toward recognition of Earth rights and the rights of the ‘natural object’. 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 RJ being used as part of 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. For example, a ‘river’ may be seen as being constituted by its channel banks and channel bed according to geomorphology and conceptualised as inclusive of riparian zones from an ecological perspective. 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.
Limitations of the sharing and caring ethos

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 nonhuman corporate entity (which nonetheless may have legal status as a ‘person’), and the victim is nonhuman such as a river or a tree (which nonetheless 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. Here the emphasis, rightly, ought to be on dealing with chronic recidivism, and on ‘making things right’ through reparative action.
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. 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.
Conclusion
Widening the scope of ‘victim’

Writing in relation to the clearing of native vegetation and threatened species, Hamilton 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?’… 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.

Such inclusions 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 ‘gives the offender the chance to learn something – the imparting of knowledge’. Indeed, he argues that restorative justice could be usefully and productively be applied as a means to share viewpoints, impart knowledge and provide an apology, across many instances of environmental victimisation.
Indigeneity

New ways of seeing, being and acting:
‘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…’ (Green et al., 2007: 409).

- Paradoxes for RJ involving nonhuman as well as human victims: the personal is political
- Implications for RJ and reparative justice: dialogue, awareness, collective action
Whose Voice, Under What Circumstances?

- Indigenous identification with nature is provided in the legislation itself (i.e., protection of Aboriginal heritage); and in court processes which privilege their voice.
- 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.
Identity and Expertise

• Unity of ‘natural object’ and Indigenous people
  =
• Unity of ‘victim’ and ‘expert’ in the same community/natural object
  **But**
• Separation of ‘nature-as-victim’ from local group
  =
• Less personalised, more technocratic and more contested forms of justice reliant upon external expertise/different voices regarding the nature of the victimisation and harm