Environmental Crime and Specialist Courts: The Case for a 'One-Stop (Judicial) Shop' in Queensland

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Abstract

The increasing international political, public and scientific engagement in matters of environmental sustainability and development has produced a rapidly expanding body of environmental law and policy. The advent of international protocols, directives, and multilateral agreements has occurred concomitantly with the harmonisation of widespread environmental regimes of governance and enforcement within numerous domestic settings. This has created an unprecedented need for environmental legal apparatuses to manage, regulate and adjudicate legislation seeking to protect, sustain and develop global natural habitats. The evolving literature in green criminology continues to explore these developments within discourses of power, harm and justice. Such critiques have emphasised the role of dedicated environmental courts to address environmental crimes and injustices. In this article, we examine the important role of specialist courts in responding to environmental crime, with specific reference to the State of Queensland. We offer a critique of existing processes and practices for the adjudication of environmental crime and propose new jurisdictional and procedural approaches for enhancing justice. We conclude that specialist environmental courts endowed with broad civil and criminal jurisdiction are an integral part of an effective response to environmental crime.

Keywords: green criminology – environmental offences – specialist courts – reparative justice – Queensland

Introduction

It is widely recognised that the protection, preservation and sustainable development of our environment is one of the most demanding and challenging global issues facing the

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international community in the 21st century (UNEP Year Book 2012). The last two decades have seen the creation of new and rapidly developing environmental knowledge economies across multiple disciplines. It is now common practice that governments, corporations and non-governmental organisations adopt, plan and prepare a range of environmental initiatives, policies and practices. The scientific, political and public engagement with environmental debates has also sponsored emerging markets in environmental economics, technologies, renewable energies, and agriculture. Such developments have necessitated an emergence and growth of policy, legal and regulatory arrangements. The expansion of international environmental law and policy has also witnessed an increase in national processes to mitigate and adjudicate cases of environmental concern. The recognition of anthropocentric environmental damage and the need for ecological sustainability has ensured that discourses of risks, rights, harm, responsibility and liability have become part of environmental debates and developments.

As a part of this recognition, there has been a steady growth in both developed and developing countries of specialist environmental frameworks which often include specialist environmental courts or tribunals ('ECTs'). It is reported that 350 ECTs operate across 41 countries, facilitating various forms of environmental due process and justice (Pring and Pring 2009; White 2013; Walters and Westerhuis 2013). The growth of ECTs can be attributed to 'continual [pressure] worldwide for effective resolution of environmental conflicts and/or expanding recognition of the need for procedural and substantive justice vis-à-vis environmental matters' (White 2013:268). These burgeoning fora for settling environmental disputes have the ability to resolve a wide variety of claims from administrative matters, such as planning permits, to serious prosecutions involving environmental contamination. The diversity and complexity of environmental cases increasingly requires innovative approaches based on 'problem-solving' before judicial officers with specialised knowledge (White 2013). As the case study at the end of this article reveals, legal systems with a distinct separation between criminal and civil jurisdictions can provide a roadblock to the effective administration and understanding of environmental issues.

Recent years have seen an expansion of various types of specialist courts across different justice issues, including mental health, drugs, racial abuse, domestic violence, anti-social behaviour and youth (Freiberg 2005:196). The emergence of specialist courts has been attributed to a variety of factors, including a push towards delivering 'a particular type of judicial expertise or a particular process of judicial adjudication' (Moore 2001:[2]). Several of these specialist settings have resulted in positive outcomes by embedding specific problem-solving jurisdictions with increased judicial specialism (Donoghue 2014).

The adjudication of environmental issues seems to be particularly well suited to a specialist court model. Courts adjudicating on environmental issues are often confronted with challenging issues, such as the unique methodologies of environmental decision-making and the 'layered' subject matter of internationally recognised concepts like ecologically sustainable development (Fisher 2014:292). Moreover, the legal processes of environmental legislation and the principles that guide them are notoriously complex, requiring a high level of technical insight (White 2013; Uhlmann 2009:1231–5). The evolving literature has emphasised the role that dedicated environmental courts play in addressing some of these issues. It is our claim in this article that specialist environmental courts, endowed with broad civil and criminal jurisdiction, are an integral part of an effective response to environmental crime. We start by exploring some of the key features of successful ECTs, focusing on the need for a comprehensive civil and criminal jurisdiction.

Key features of successful ECTs

The more successful ECTs have been characterised by certain processes and practices. In their wide-ranging and comprehensive report on ECTs, Pring and Pring (2009:20–87) identified '12 building blocks' or 'design decisions' to consider when establishing an ECT. For example, one building block is that governments should carefully consider the geographical reach of the court (municipal, regional, state, provincial, national etc) and the extent to which it has the resources to devote to a comprehensive jurisdiction (Pring and Pring 2009:30–1). Another is the consideration of standing permitted for members of the public to file a complaint or bring an enforcement action. Wide-standing rights for the public to pursue environmental wrongs can contribute significantly to public trust and accountability in policy settings and also to further issues relating to law reform (Figg 2014; McGrath 2008).

The ambit or reach of the ECT's jurisdiction can also be a significant factor in its success or failure. Research suggests that the more successful ECTs 'enjoy a more comprehensive jurisdiction', including both civil and criminal matters (Preston 2013:3). Examples include the Environment Court of New Zealand and the New South Wales Land and Environment Court ('NSW LEC)'. Both courts hear a wide variety of appeals, reviews, prosecutions and applications relating to environmental matters (Preston 2013:3). There are several advantages that flow from adopting a 'one-stop shop' for civil and criminal matters relating to the environment (Preston 2013:17). First, an expansive jurisdictional ambit can be seen as a strong 'public pronouncement' of how important the court's role is (Preston 2013:5). For example, ECTs in Sweden appear to be 'fully accepted' by industry, communities and non-government organisations, which often use the law for conservation and environmental protection (Preston 2013:6).

Second, a comprehensive jurisdiction attracts high-calibre appointments that are 'environmentally literate' and have substantial expertise in investigating human activities that impact on the natural world (Preston 2013:5). Environmentally literate judges add a necessary level of sophistication and ecological insight to the court's decision. They give the adjudication of environmental issues a level of academic credibility. They also serve to improve consistency in judicial decision-making in all matters relating to the environment. The 'art of judging environmental disputes' as Preston (2009:27) calls it, still involves the same kinds of judicial techniques, reasoning and logic as many other areas of law. However, with specialist judicial officers in a designated court, the proceedings commence from a position of higher ecological insight.

Third, ECTs with a broad jurisdiction can level the playing field between the judiciary, the parties and their legal representation by allowing for matters to be heard in a space where all stakeholders understand the basic regulatory structures and processes. Judicial officers are placed in a very difficult position when asked to rule upon a matter in instances where they do not understand the full legal duties in place and the full implications that could arise from their decisions.

Fourth, a comprehensive civil and criminal jurisdiction can provide the foundations for a 'holistic' contribution to environmental governance and policy. Environmental courts and tribunals with only limited jurisdiction — for instance, those with the ability to hear civil planning appeals — can be prevented from joining the discourse surrounding other areas of environmental law, such as illegal development, vegetation clearing, pollution, biodiversity theft and so on. Examples of separated forums include the Planning Appeals Board in Ireland and the National Environmental Tribunal of Kenya. Preston (2013:15) highlights the issues with these two forums:

> [Those two ECTs] respectively only deal with land use (not environmental) laws and EIA appeals. By limiting jurisdiction in this way, the Irish and Kenyan governments have curtailed the ability of these ECTs to make a holistic contribution to environmental governance in these jurisdictions.

Finally, the centralisation of environmental issues can also help to ensure there is a 'critical mass' of cases coming before the court (Preston 2013:17). This is ultimately important for the efficient administration of the court because it can result in economies of scale that are often not achieved through 'dissipation of environmental matters throughout different courts and tribunals' (Preston 2013:17). Centralisation also improves data flows and transparency in environmental decision-making. It allows the court to be both the collector and disseminator of judicial information, rather than a government agency, which is often a party to the court proceedings and in a somewhat conflicted position.

In the next section, we examine the benefits that ECTs can provide to the adjudication of environmental crime.

Appreciating the seriousness of environmental crime

The specialisation of ECTs can help to appreciate the seriousness of crimes against the environment. The de-emphasising of harm to the environment is evident in general courts and stems from the relatively long history of criminal law in common law systems. In environmental matters, however, 'the moral content of the proscribed conduct [for environmental crime] is not as well established as it is for common law crime' (Ulhman 2009:1228). This can lead to a misunderstanding of the importance of environmental crime when viewed against other types of crimes heard by the same court. In the United States, there is evidence to suggest the problem goes a step further than merely undervaluing the criminal nature of environmental crime; in fact, it is possible that 'judges today are more likely to harbor heightened scepticism toward, rather than solicitude for, environmental law' (Lazarus 2004–05:202).

Similar sentiments have been reported in an Australian context. Compared with more traditional crimes in Australia, such as assaults and thefts, environmental crime has taken much longer to be accepted 'as a genuine category of crime' (Bricknell 2010:ix). This may result from a reluctance of generalist courts to appreciate the serious nature of environmental offending. Under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act'), for instance — the main Commonwealth law that protects national environmental issues (World Heritage areas, migratory species, internationally renowned wetlands etc) — there have been no reported custodial sentences despite over a dozen serious infractions of the Act (DoE 2015). Prosecutions under the EPBC Act are brought by the Commonwealth Environment Department in the Federal Court, a generalist court, which very rarely hears serious criminal matters and thus may underappreciate the significance of the conduct. In 2004, for example, one of the world's largest private wheat farmers was fined $450 000 for deliberately clearing part of the internationally renowned Gwydir Ramsar Wetlands in inland New South Wales. The clearing had a significant impact on the ecological character of the wetland. In imposing the fine, Sackville J in the Federal Court commented that the defendant knew that the ecological character of the wetland would be significantly damaged if the clearing took place. Nevertheless, despite the seriousness and malice behind the offence, no custodial sentence was considered. Likewise, Queensland's District Court has been reluctant to impose custodial sentences for instances of serious and intentional clearing of vegetation in World Heritage areas (Environmental Law Australia 2015).

One possible explanation for the 'heightened scepticism' some might hold for environmental crime is that while criminal law is reserved for punishing what would otherwise be considered as 'socially unacceptable behaviour', environmental harm is considered to be on something of a sliding scale of moral acceptability (White 2013:268). Society seems to legitimise pollution under the licensing or 'authorisation' model because it represents 'an inherent consequence of many industrial activities which provide significant benefits' (White 2013:268).

One major difference, between traditional notions of crime and environmental crime is that pollution is not prohibited; it is *regulated*. Whereas criminal law demands the 'violation of clear legal duties', environmental law offers 'dense regulatory requirements' (Uhlmann 2009:1232). The foundations of environmental law have thus been framed very differently from criminal law on the assumption that most 'pollution' activities are allowed provided they are licensed or otherwise approved by the state.

We suggest the distinction between environmental crime and other forms of crime is best appreciated and applied by expert judges in specialist ECTs. At the very least, it is almost certainly best applied in forums that do not harbour 'scepticism' for the inherent value of environmental law. Appreciating the nature of environmental crime and environmental law can help to deliver consistency in sentencing and a fairer result for all involved — most importantly, for the ecosystem which has been damaged by the conduct. In fact, it has been demonstrated empirically that when ECTs hear matters relating to environmental crime, 'there is greater likelihood of both prosecution of offenders and greater use of appropriate sanctions' (White 2013:269).

Understanding environmental harm and the rights of future generations

Chief Judge of the highly successful NSW LEC, Justice Brian Preston, recently shared his own key characteristics of what a successful ECT should look like (Preston 2013). His Honour emphasised the need for environmentally literate and specialist judicial officers to constitute the ECT (Preston 2013:6–7). Judges adjudicating on environmental issues need to be able to understand technical scientific evidence and have an appreciation for the complex interconnectedness of human impacts on our natural world, including impacts on future generations. As White (2008:1) reminds us, adjudicating environmental crime requires a court to make difficult but important value judgments which more traditional crimes do not: '[H]ow do we deal with harms that we cannot see or smell, as with some forms of toxic pollution and courts will also often find themselves asking "[w]ho or what is the victim?"'

Further, the complex nature of ecological 'cause and effect' may mean that the effects of environmental harm may not be fully realised until years, or even generations, later. It has long been understood that environmental offences are unique in that they may 'directly affect our health today or the health of untold generations to come' (Starr 1986:394). For example, the pollution of an estuary may kill a species of amphibian — a keystone species — which may slowly disrupt an entire ecosystem, including the surrounding marine life or wetlands downstream that are habitats for migratory birds and so forth. The ultimate harm may not materialise until 30, 40 or a 100 years later. As Lazarus (2004–05:206) writes: '[A]ctions taken today can have environmental impacts that last for centuries and, in some instances, do not even have any perceptible impact for decades. The upshot is both tremendous scientific uncertainty in both cause and effect.'

In international environmental law, the principle that recognises the relationship *between* generations (including those yet to be born) is known as the 'principle of inter-generational equity'. The principle requires that the present generation act as a trustee of the planet with rights to benefit from its resources, but also with responsibilities to ensure that future generations share in its wealth (Weiss 1990). In the domestic sphere, the principle of intergenerational equity is often allied to the concept of 'sustainable development' (Weiss 1992). In Australia, although there are slightly different conceptions, ecologically sustainable development ('ESD') is generally defined as development that uses, conserves and enhances 'the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased' (Australian Government 1992:pt 1). Thus, the rights of future generations are ingrained within today's environmental decision-making. Both state and federal Governments in Australia have incorporated the principles of ESD into legislation (EPBC Act s 3A; *Environmental Protection Act 1994* (Qld) s 3). The principles of ESD have been subjected to a long line of academic and judicial attention in Australia (Bates 2014; Fisher 2014). Judicial officers with the relevant expertise and insight to understand and apply principles of ESD are far better placed than those without to appreciate the full ramifications that their decisions might have on future generations.

Theory into practice: Applying notions of restorative/reparative justice

Expertise in ECTs can contribute to innovative approaches to environmental issues. For example, the Environmental Court of New Zealand, a specialist ECT, is innovatively attempting to translate theoretical notions of 'restorative justice' into practical environmental outcomes (Pepper 2012; Pring and Pring 2010:64). As restorative justice is something of an 'umbrella-like concept' it can be difficult to define (Latimer et al 2005:128). Nevertheless, a definition put forward by Marshall (1996) seems to be generally accepted in the literature (Latimer et al 2005:128): 'Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future' (Marshall 1996:17).

Restorative justice has historically been utilised in traditional criminal law settings such as victim-offender mediation and community service, but its utility in resolving and responding to environmental criminal matters is increasingly being recognised (Boyd 2008). The approach of most environmental and land courts in Australia could be more accurately be defined as 'reparative justice'. This form of justice has subtle forms of difference from the broader concept of restorative justice by focusing on repairing harm in the context of a problem-solving model of adjudication. Common problem-solving processes and remedies to repair environmental harm include:

- orders for restoration and prevention;
- orders for payments of costs, expenses and compensation;
- orders to pay investigation costs;
- monetary benefits penalty orders;
- publication orders;
- environmental service orders

- environmental audit orders;
- payments into environmental trust or for other purposes;
- orders to attend training;
- orders to establish training course; and
- orders to provide financial assurance (Preston 2007; White 2010).

While restorative justice focuses on repairing the relationship between offender and victim, reparative justice is not primarily concerned with maintaining or improving relationships between offenders and victims. Thus reparative justice focuses on repair to the environment, while restorative justice has traditionally focused on repair to the relationship between the parties. The NSW LEC focuses on repairing environmental harm, and carrying out repair will sometimes need to be imposed by the court as opposed to negotiated between the parties (this is particularly the case in the instance of corporate offenders). As such, the relationship between the parties after the court hearing may not necessarily be improved. Relationships involved in environmental crime are less clear cut than in more traditional notions of crime. Reparative justice perspectives in environmental law require that we work to better understand those relationships and the differing notions of harm that come with them. Only by understanding relationships between humans, the environment and other species can we effectively respond to environmental issues (White and Heckenberg 2014:45).

Of course, not every innovative attempt by an ECT at bridging theory and practice has worked out. The Environment Court of New Zealand suggests that restorative justice approaches were not appropriate for all environmental offences: '[the Court] carefully evaluates each case to determine its suitability for this community healing process as an alternative to standard penalties' (Pring and Pring 2009:64). One of the biggest difficulties in implementing reparative justice can be in identifying the victim of the harm. Victims can include indigenous people, persons whose life, health or property are affected, other species, and future generations (Preston 2011:140–3). There are also other challenges, such as the reluctance of the offender to appreciate the damage, and even galvanising the interests of a transient community about a harm that might not eventuate for a number of years. As Preston (2011:153) reminds us, it is unrealistic to expect that reparative justice 'will be used fully in all, or even many, cases of green crime'.

The implementation of reparative justice ideals requires the expertise of specifically trained judges to facilitate the processes of restoration between damaged relationships (Boyd 2008:512). In New Zealand, courts have recently been experimenting with restorative justice concepts (Pring and Pring 2009:64). Under New Zealand law, the presiding judge hearing an environmental prosecution must, as far as practical, also be appointed a Judge of the Environment Court (Palmer 2010:74). This enables the judiciary to acquire specialised knowledge and ensures that only judges with appropriate expertise adjudicate on environmental crimes.

The NSW LEC is also working hard to give practical effect to 'abstract and theoretical notions' such as restorative/reparative justice (Preston 2013:8). Preston suggests that restorative justice can be transformative for all involved: the victim, the offender, the community, the environment and even the justice system (2011:136). Restorative justice allows a community affected by a harm to 'regain some control over the process of resolving the conflict and healing the harm' (Preston 2011:151). In the greater context of the conduct, it is equally, if not more, important that the 'community make[s] the offender aware of the

collective consequences of the offender's acts as it is for individual victims to make the offender aware of the individual consequences' (Preston 2011:151).

The NSW LEC's unique focus on 'environmental harms, scientific evidence to assess such harms, and attempts at reparation' is ultimately what 'sets [it] apart from other criminal courts' (Walters and Westerhuis 2013:285). It is the NSW LEC's comprehensive criminal and civil jurisdiction and expertise in the area that provides the platform for innovative contributions to environmental governance (like reparative justice). Even though reparative justice is not specifically referred to in any of the laws conferring criminal jurisdiction on the NSW LEC, 'it is [still] seen as one way of achieving the objectives of the legislation' (Hamilton 2008:271).

In addition to reparative justice, the NSW LEC has been instrumental in facilitating other theoretical notions of justice, including: substantive justice; procedural justice; distributive justice; and therapeutic justice (White 2013:275). These innovative approaches appear to stem from the '[i]nstitutionalisation of specialist expertise' within the ECT, which White (2013:276) suggests 'reinforces and embellishes the further development of innovative practice and practical implementation of the law in relation to what have often been, formerly, simply abstract declarations of principle and emergent rights with little applied substance.'

While perhaps not under the official banner of 'restorative justice', other ECTs are using innovative approaches to address the complex ecological problems presented by environmental crimes. *Greening Justice* reported that in the State of Amazonas Environmental Court in Manaus, Brazil, one judge — Adalberto Carim Antonio — gives those convicted of environmental crime a choice between regular penalties (such as a fine or imprisonment) or participation in an alternative arrangement designed 'specifically to address the violation' (Pring and Pring 2009:85). Other examples of the Court's innovative orders include:

- ordering the payment of advertisements (billboards) popularising environmental laws;
- ordering the defendant to pay for publications of environmental law handbooks, and other environmental education initiatives;
- ordering the defendant to pay for the rehabilitation of a degraded inner city areas; and
- ordering the defendant to work as volunteer on environmental projects (Pring and Pring 2009:86).

Although it is still relatively early days, specialist ECTs appear to be making valuable contributions to environmental governance by giving practical effect to abstract theoretical concepts such as reparative justice. Until recently, such concepts have been largely the sole domain of academic discourse. These types of initiatives assist in sending a strong message about the importance of complying with environmental laws and processes, while also increasing literacy in environmental obligations across the wider community.

The reported innovations in ECT processes and practices of justice are explored further in the case study that follows.

Case study: Judicial responses to environmental crime in Queensland

This case study explores the adjudication of environmental crime in Queensland. Significant efforts have been made over the last few years to streamline regulation and remove 'green

tape' from Queensland's environmental laws. The government has emphasised its achievements in 'de-cluttering' environmental law by removing duplication and supposedly arduous standards, cutting back on paperwork and taking a 'risk-based' approach to environmental management.

During the reform period, the government did have the opportunity to reform its judicial approach to environmental crime. While it flagged the issue in public consultation, it eventually chose to leave the current distinction between civil and criminal jurisdiction untouched (Planning and Development (Planning Court) Bill 2015 (Qld): Explanatory Notes, 12). Our case study examines the Queensland Government's current framework for the judicial response to environmental crime, focusing on the drawbacks of such a system. We conclude that further reform is necessary to ensure the full appreciation of all the benefits ECTs can bring, including: consistency and transparency in sentencing; the application of theoretical models of restorative justice to environmental crime; and contributing a holistic approach to the administration of environmental governance in Queensland.

Main environmental offences in Queensland

Most of Queensland's major environmental crime provisions are contained in a handful of key statutes. Queensland's premier environmental statute, the *Environmental Protection Act 1994* (Qld) ('EP Act'), prohibits unauthorised environmental harm (that is, 'pollution') in all its forms, including contamination of air, water, land and to ecosystems more generally. While the EP Act would arguably be broad enough to cover the clearing of vegetation as 'environmental harm', illegal clearing has traditionally been seen as a *planning* offence, exercisable under s 578 of the *Sustainable Planning Act 2009* (Qld) ('*Sustainable Planning Act*'), strangely, in the same category of offences as unauthorised development of a heritage-listed building. The taking of water without a licence or unauthorised interference with the natural flow of water is prosecuted pursuant to the *Water Act 2000* (Qld). Disturbance of Indigenous cultural heritage is prosecuted under the *Aboriginal Cultural Heritage Act 2003* (Qld) or the *Torres Strait Islander Cultural Heritage Act 2003* (Qld). Damage to non-Indigenous cultural heritage is, however, included in the *Sustainable Planning Act*. There is also a wide variety of offences contained within the *Nature Conservation Act 1992* (Qld) with respect to 'protected areas' such as national parks, and also the theft, killing or interference with native wildlife (both flora and fauna, which restricts dealings with protected animals).

Prosecuting environmental crime in Queensland

Although a small number of environmental offences under the EP Act are devolved to local government, the Queensland Department of Environment and Heritage Protection ('EHP') is responsible for enforcing most serious offences. The Department of Environment and Heritage Protection is a state government administrative department, rather than a separate statutory authority, unlike, for instance, the Western Australian Environmental Protection Authority. The Department reports to the Minister for Environment and Heritage Protection although a variety of decisions under the EP Act can be made by the Chief Executive of the Department. For 'natural resource' offences, such as theft or unauthorised interference of water (*Water Act 2000* (Qld) ss 808, 812) or the illegal clearing of native vegetation (*Sustainable Planning Act* s 578), prosecutions are initiated by the Department of Natural Resources and Mines. Offences concerning protected areas such as national parks and native wildlife are the domain of the Department of National Parks, Sport and Racing. Compliance and enforcement of the Commonwealth's EPBC Act provisions, including: World Heritage Areas; migratory birds; nationally listed species; and internationally renowned wetlands, are the responsibility of the Commonwealth Department of Environment. Commonwealth

environmental prosecutions, though rare, are brought in the Federal Court and are outside the scope of this case study.

Regardless of which law contains the underlying offence, prosecutions are almost always brought summarily in a Magistrates Court in or near where the offence occurred (Fantin and Macnaughton 2011). On rare occasions, cases may be brought on indictment (EP Act s 495) and may be heard in the District Court. Although publicly available enforcement data is limited, it appears that a large number of instances of non-compliance with environmental laws do not go to court and are resolved through the use of administrative fines, called Penalty Infringement Notices, as well as a wide variety of other 'non-prosecutorial' tools open to EHP, such as Environmental Protection Orders ('EPOs'), Temporary Emissions Licences ('TELs') and clean-up notices (EP Act ss 357AAA–357G, 358, 363H).

The Department of Environment and Heritage Protection has published Enforcement Guidelines (2014a) to inform industry and the public of the circumstances under which it will take action and the forms of action available. Earlier versions of the enforcement guidelines recognised prosecution as an important part of the enforcement process. When discretion to prosecute existed, the dominant factor that the government considered was whether bring the prosecution was in the 'public interest'. The new Enforcement Guidelines no longer place emphasis on prosecution, and explicitly state that enforcement will be used with restraint (EHP 2014a:pt 2). The guidelines state a preference for exhausting other enforcement actions (such as EPOs) before court action is commenced.

Queensland's specialist ECT: Planning and Environment Court

The Planning and Environment Court ('PEC'),[1] Queensland's specialist ECT, adjudicates on civil environmental matters, largely planning disputes. The PEC, which is now part of the District Court, was first constituted in 1965 as the Local Government Court (Rackemann 2010:2). As its original name implied, the Court's origins were grounded not in environmental protection, but in planning and land use considerations. Current PEC Judge Rackemann (2010:2) recently noted: '[The Court's] primary function, at the outset, was to hear appeals from those dissatisfied with decisions on applications for rezoning, land subdivision or land use.' This initial role of the PEC therefore reflected traditional anthropocentric notions of 'owning' or 'using' the natural world, as opposed to protection, maintenance or conservation of the environment.

In the 1970s and 1980s, environmentalism and wider concern for the natural world flourished. Australia's state and federal Governments responded by introducing (or consolidating) a number of key environmental laws aimed at protection and conservation of the environment. Much of the early legislation and policies in Australia were aimed at controlling a range of polluting activities (Fisher 2014:18). This rise of environmental law and policy also saw a rise in 'the development of political, legal and administrative apparatuses that [were needed to] service the evolving environmental regimes' (Walters and Westerhuis 2013:280).

In New South Wales, one of the most important of these apparatuses was the establishment of the Land and Environment Court, first constituted in 1979 (*Land And Environment Court*

[1] At the time of writing, the Queensland Government was considering changing the name of the Planning and Environment Court to the 'Planning and Development Court'. Because the *Sustainable Planning Act 2009* (Qld) is being repealed, it is also proposed to constitute the new court through a separate 'stand-alone' statute. The proposed court's jurisdiction appears largely unaltered. It is expected a bill will be passed in October 2015.

Act 1979 (NSW) s 5). In the 1980s, the Queensland Government attempted to follow suit by giving the Local Government Court a new function and a new name: the Planning and Environment Court. The change to the Court's name 'was apt', as the Court's decision-making had now 'come to embrace environmental, as well as more traditional, land use considerations' (Rackemann 2010:2).

Notwithstanding the change of name and the perceived willingness to embrace environmental considerations, the bulk of the PEC's jurisdiction today is currently conferred by way of Queensland's premier piece of planning legislation, the *Sustainable Planning Act 2009* (Qld) Ch 7 pt 1. As a result, the majority of the PEC's current workload involves hearing appeals from decisions of State Government agencies and local governments relating to development applications (Rackemann (2010:2). The PEC prepares written judgments for many of its substantive decisions on planning issues. Decisions are published on the Court's website and are freely available for download. Except for the power to punish for contempt of Court or to issue an enforcement order to remedy or restrain an offence against the EP Act s 505 or the *Sustainable Planning Act* ss 603–606, the PEC has no substantive criminal jurisdiction to hear environmental offences. As mentioned, most crimes are heard summarily in the Magistrate's Court.

Inadequate data on environmental prosecutions

Accurate data on finalised environmental prosecutions is not widely available largely because no written judgment is recorded in the Magistrates Court (Fantin and Macnaughton 2011:14). Depending on the location of the court, most magistrates in Queensland hear many matters in a day, ranging from small civil disputes to drink driving offences to more serious assaults. The busiest courts, such as in central Brisbane, often have long lines of people and large piles of files waiting for the magistrate at the start of each day. Decisions often must be made quickly and on the available resources and evidence. There appears to be a large emphasis on practicalities of dispensing justice, rather than applying abstract theories (such as restorative justice). There is therefore seldom time to research or write detailed decisions. On rare occasions when decisions are made by a District Court, they may be reported, but may not always be readily available online. It is therefore left to the prosecuting agencies (mainly EHP) to accumulate and disseminate data on environmental crime.

Implications for procedural justice

The dearth of published judgments has serious implications for the proper administration of justice and the fair adjudication of environmental crime in Queensland. Defendants' lawyers are placed at a distinct disadvantage by not being able to fully advise their clients on the likelihood of guilt or innocence or being fully appraised of 'like cases' in sentencing considerations (Simmonds 2011:204; Fantin and Macnaughton 2011:14). It is reported that advocates often have to rely on 'informal networks' to obtain suitable sentencing comparatives for their cases (Fantin and Macnaughton 2011:14). Parallels here can be drawn with the work of Marc Galanter, who depicts litigation as a game dominated by 'repeat players' (for example, prosecutors) who enjoy advanced intelligence and economies of scale over 'one-shotters' like criminal defendants (Galanter 1974). The implications for procedural justice are made distinctly worse where an accused is self-represented and unprepared for the complex and intimidating processes of the courtroom (Nicholson 2001). Moreover, uninformed self-represented litigants, without access to the proper information, can create considerable stress on the court system, causing undue delay and further costs to society (Greacen 2014; Nicholson 2001).

Unpublished judgments for environmental crimes can also have significant implications for transparency and deterrence. Achieving consistency and transparency in sentencing for environmental offences is vital for the administration of justice (Preston et al 2008). Publishing court decisions enhances transparency and public confidence in judicial reasoning and decision-making processes. It also furthers the aim of general deterrence in sentencing offenders. Current judge of the PEC, Justice Rackemann, agrees. Speaking extra-judicially, his Honour observed that:

> the principal roles of the criminal jurisdiction in this area include both bringing offenders to justice and creating a deterrent to offences by others. Each of those roles is furthered by appropriate, consistent and well known decisions on penalties imposed on those convicted. The current position in Queensland however is not entirely satisfactory from this perspective (Rackemann 2011:[45]).

Implications for understanding environmental crime

With the exception of perhaps vegetation clearing (McGrath 2007; Rolfe 2002; McAlpine et al 2002), no extensive analysis appears to have been completed of the relationship between environmental offences and the harm they cause to Queensland. The theft of water in Australia is particularly difficult to study due to the limitations of available data (Bricknell 2010:112). A lack of publicly available data, including written judgments from the courts, makes it difficult for researchers to construct a picture of how much environmental crime is actually occurring. The lack of enforcement data available has the effect of restricting 'comment being made regarding trends or hotspots of illegal activity' (Bricknell 2010:115). In 2011, for example, a research brief into environmental crime prepared by Queensland's Parliamentary Library could only be achieved by reviewing mainstream media such as *The Courier Mail*, *The Townsville Courier* and *The Brisbane Times* (Dixon 2011), reporters from which were likely to have been present at the court for sentencing.

Limited data can also interfere with the role of state regulators. A recent audit into the monitoring and enforcement activities of EHP revealed lack of information to be a key problem in EHP's operations in combatting environmental offences: 'Poor data and inadequate systems continue to hinder EHP's planning and risk assessments. As a result, EHP cannot target its monitoring and enforcement efforts to where they are most needed' (Queensland Audit Office 2014:1). The problem in assessing risk is further exacerbated by not sharing information between departments (Queensland Audit Office 2014:1). Apparently, this problem has been 'known for years' without being adequately addressed (Queensland Audit Office 2014:1).

Attempts to address the data shortfall

The Department of Environment and Heritage Protection is attempting to address the shortage of publicly available prosecutorial information. Since 2011, the Department has published 'Prosecution Bulletins', which are essentially short summaries of successful prosecutions (EHP 2014b). However, as the bulletins include disclaimers regarding the use of their information, they contain little precedent value. The bulletins omit key details like commentary from the court on the meaning of legislative provisions and the aggravating or mitigating factors taken into account in sentencing. The names and backgrounds of defendants have also been removed in most instances, negating any real precedent value to researchers or the profession. While the bulletins may serve as basic information to industry and the general public, they are ultimately the prosecuting agency's interpretation of the case.

More recently, the Department has promised to 'improve community access to data including compliance and enforcement information' (EHP 2013:24). The Department's latest *Regulatory Strategy* vowed to increase the public dissemination of 'compliance alerts, prosecution bulletins and other information to clients, industry associations, peak bodies and the community' (EHP 2014c:6). It has also started implementing an 'open data policy' policy, with more than 50 datasets available for download, including information on infringement notices issued for vehicle-related littering and illegal dumping (Queensland Government 2015). At this stage, there are no datasets available on court prosecutions.

Despite the best intentions of the regulator, we suggest a far more effective and transparent solution would be to 'outsource' the availability of all prosecutorial data to the court. In addition to reducing holding costs for the department, it would increase transparency and public trust in the regulator such that the public could follow the processes involved with prosecuting environmental crime. A specialist court database open to the public would provide a 'living record of how judges and magistrates are treating different environmental offences in the courts' (White and Heckenberg 2014:265).

Low, inconsistent or inappropriate penalties

In Australia, it is reported that environmental crime has been assigned a relatively 'low value' of importance by magistrates and judges (White and Heckenberg 2014:261). Bricknell (2010:xi) reports that:

> the trying of cases in Magistrates' courts has been proposed as contributing to the generally low penalties handed down for environmental offences. It is suggested that this is due to a combination of factors including intermittent exposure to such cases, a lack of judicial training in dealing with environmental matters and (it has been argued) a 'lack of understanding' about this type of offending and the consequences of the harm produced.

Justice Pepper (2012:17) suggests that low penalties for environmental crimes in Australia appear to be the norm simply because 'the court has neither routine exposure to such offences nor the necessary expertise and training in environmental crime'. Similar views have been advanced by other authors (Hain and Cocklin 2001; Hartley 2004; Fantin and Macnaughton 2011).

Sentencing for environmental offences, like many other offences, lies 'very much within the discretion of the Court' (Fisher 2014: 621). It is a discretion that necessitates an in-depth understanding of several factors including the nature of the offence, the circumstances of the offence, its relative seriousness, and the personal circumstances of the offender (Preston 2007). In Queensland, in the limited time allowed and the pressing urgency of other traditional crimes (assaults, thefts, drink driving etc) Magistrate's Courts are likely to be incapable of dedicating time and court resources to thoroughly explore the complexity of all the issues the long and technical processes of environmental law create. Similarly, the lack of access to comparative decisions (discussed above) may mean magistrates are 'inherently cautious' in sentencing offenders (Fantin and Macnaughton 2011:14). Lower or inconsistent penalties may be the end result.

What does the existing sentencing data reveal?

The limited information on prosecutions published by EHP presents something of a conflicted and inconsistent picture in sentencing for environmental crimes in Queensland. Firm conclusions are difficult to draw without first-hand contextual information from the court. Nevertheless, some very preliminary observations can be made. According to the EHP's annual report, the total amount of fines recovered through prosecutions during 2013–14

totaled $1 088 600 (EHP 2014d:82). Fines ranged from $150 for a general littering offence to $150 000 imposed on a mining operator that had spilled 300 000 litres of contaminated water into the environment (EHP 2014d:27). The types of environmental prosecutions include offences such as littering ($150; $250; $300), release of animals into the wild ($6500), taking or interfering with native animals ($7000) contravening an environmental approval ($120 000), contravening a development approval ($45 000), and several other offences (EHP 2014d:81–2).

In the previous financial year, 2012–13, a total of 11 prosecutions were finalised by EHP with total fines tallying $837 000 (EHP 2013:25–6). Sentences included fines ranging from $2000 to $432 000 as well as two custodial sentences (EHP 2013:25–6). The presence of the custodial sentences appears to be unusual in the makeup of Australian environmental crime (Bricknell 2010:18, 20, 63). Moreover, the high fine of $432 000 (albeit for multiple offences) suggests magistrates in Queensland are starting to take environmental crime more seriously. The relative closeness of small fines for littering during the 2013–14 financial year does suggest some consistency at the lower end of offending; however, questions arise as to the consistency of fines for the more serious offences such as breaching a condition of an 'environmental authority' or 'development approval'. The maximum fine for a wilful contravention of an environmental authority under the EP Act (EP Act s 430) was recently increased to 6250 penalty units ($711 563) or five years imprisonment, indicating the extremely serious nature of the offence. Previously the maximum sentence for the same offence was $220 000 or two years imprisonment. However, without the proper sentencing data available, particularly detailed factual circumstances and the sentencing remarks of the court, it is impossible to analyse in any depth whether fines in the ranges provided during 2012–14 ($15 000–$432 000) are appropriate and consistent with the nature of the offending.

The 'stifling' of reparative justice techniques

In almost all court prosecutions for environmental crime in Queensland a fine appears to be the end result (EHP 2014d:80–2, 2013:25–6). The readiness to use fines may be attributable to the familiarity with this type of penalty in Magistrates Courts. In any event, purely pecuniary remedies such as fines are unlikely to fully address the damage done to an ecosystem by major environmental crimes. 'It is quite often hard,' says Lazarus (1995–96:866) 'If not impossible, to put the pieces of an ecological puzzle back together again in the aftermath of serious environmental degradation.'

Notably, Queensland's EP Act was amended in 2010 to include several options for alternative sentences (other than fines), including 'public benefit orders', 'education orders' and 'rehabilitations orders' (EP Act s 502). The new orders, which reflect reparative justice approaches, were introduced to provide more 'flexible and proportionate sentencing' responses, which were meant to be 'commensurate with the risk and circumstances of individual cases' (Environmental Protection and Other Legislation Amendment Bill 2010 (Qld):Explanatory Notes, 57). While there is an indication that magistrates are starting to use problem-solving processes and remedies in sentencing offenders (EHP 2014b: Bulletins 4/2012, 2/2014, 4/2014), there is no elaboration of the circumstances in which they are being used. Questions arise such as: why has a particular 'public benefit project' been selected? Why is a certain rehabilitation program seen as appropriate? Is the program backed by the best available independent science or was it suggested by the regulator or 'agreed to' by the parties involved? What are the conditions of the rehabilitation program? Will they be made public? These are all questions which go to the transparency and public interest in the sentencing of the offender.

The deployment of reparative justice techniques in Queensland is to be applauded; however, the current sentencing process lacks transparency, accountability and (possibly) consistency. In the end, the use of restorative approaches in sentencing, as is the case in the NSW LEC, is best left to specialised judges in established ECTs with the capacity to publish detailed written reasons.

Capacity of the PEC to absorb criminal work

There is unlikely to be high administrative burden on the PEC if it were to subsume criminal jurisdiction. Leaving aside complexity, prosecution numbers do not appear to be exceptionally high, with only a few dozen prosecutions commenced each year in Magistrates Courts (EHP 2014d:82; EHP 2013:25–6). Further, the PEC has a proven track record of speedily resolving civil disputes with 'exceptional clearance rates' and a high proportion of matters resolved 'without the need for a contested hearing' (Rackemann 2012). The PEC itself has even expressed an interest in widening its jurisdictional ambit to possibly include criminal work (Rackemann 2012). In any event, any additional administrative burden is likely to be far outweighed by the benefits of transparency, deterrence and precedent that a centralised forum with criminal and civil jurisdiction would provide.

Conclusion

In this article we have raised the question of whether the adjudication of environmental crime is perhaps best left to specialist environment courts, rather than the general criminal legal system. Identifying the victim, conceptualising the harm to the environment and delivering reparative outcomes in sentencing are complex interconnected tasks best left to a specialist forum with specialist adjudicators. The evidence also suggests that specialist environment courts function more efficiently and offer a more substantial (holistic) contribution to environmental governance when they are granted a wide and comprehensive civil and criminal jurisdiction.

In Queensland, the PEC has been hailed as a leading example of a highly specialised forum for resolving environmental disputes (Pring and Pring 2009). It is true, the court is ground breaking, not the least for its wide geographical coverage and its extensive civil jurisdiction. However, it currently lacks jurisdiction to hear environmental prosecutions. The majority of offences in Queensland are heard alongside other traditional crimes in the Magistrates Court where decisions are rarely written or published. This makes independent commentary and sentencing data difficult to come by for policymakers, defendants and academic researchers. In order to better understand the nature of Queensland's environmental crime, and to ultimately improve our regulatory response to it, we suggest that Queensland requires a highly specialised forum to adjudicate environmental disputes. This could be achieved either by expanding the jurisdiction of the PEC to encompass environmental crime or, better yet, establishing an entirely new forum, one with a superior status equivalent to the Supreme Court, capable of hearing all environmental issues, from serious pollution to technical planning matters and everything in between. Only then will the benefits to Queensland's environmental governance framework be fully realised.

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