



# The role of restorative justice approaches in environmental enforcement



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Deborah Hollingworth | September 2022



# Context and Acknowledgments

**“Because environmental crime hurts, justice should heal”**

Adjunct Professor John Braithwaite



# Antipodean case studies – environmental restorative justice



## New Zealand

- Restorative justice conferencing embedded in general criminal law – Maori culture
- Some interesting examples in environment enforcement / case law
- Canterbury Council – alternative environmental justice

## New South Wales

- Land & Environment Court adjourns pre-sentencing for restorative justice conference – two seminal cases
- Destruction of Aboriginal / First Nations cultural heritage
- No provision in Protection Environment Operations Act

## Victoria

- Restorative justice projects
- Recognition of Traditional Owners
- New environment protection laws
- New option for an adjournment to convene a restorative process, which can be taken into account in sentencing
- Enhanced option to make Restorative Project Orders <sup>3</sup>

# Restorative justice can help redress environmental injustices

- The emerging practices of restorative justice provide
  - new models that have the potential to address some of the multiple impacts of environmental harms and wrongs.
  - provides a way in which victims and other stakeholders with an interest in better environmental outcomes can be involved in the identification of the environmental solutions.
  - a process which is inclusive and collaborative carry the potential of identifying the 'root causes' of a harm, wrong or injustice – in a way that traditional sanctions do not given its emphasis on punitive solutions.
- The available evidence (in other criminal law contexts) has shown that restorative justice has the potential of 'breaking the cycle' of crime and achieving behavior change that in turn is preventative of re-offending.

# EPA, Victoria

## New paradigm

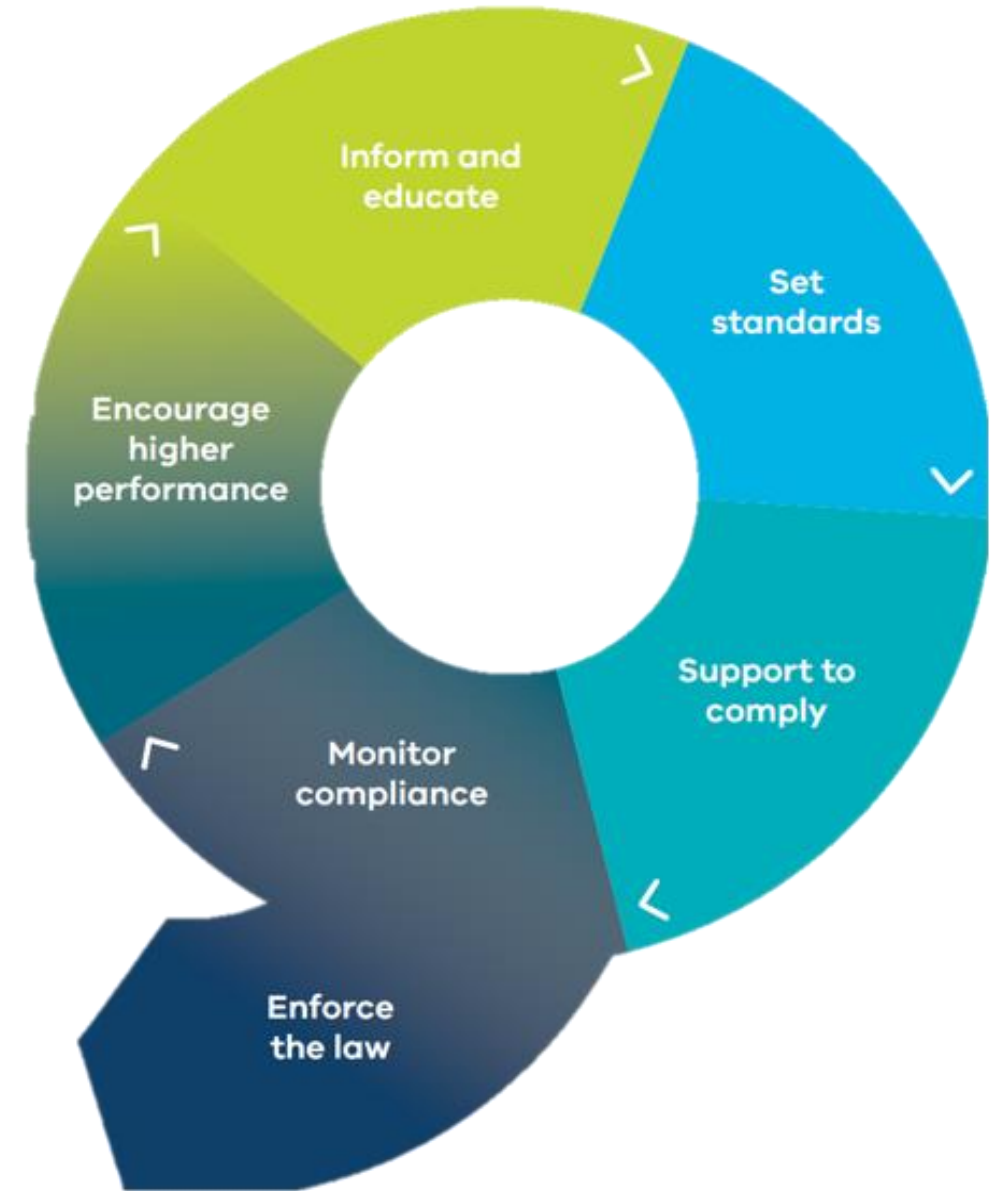
Environment Protection Authority Victoria (EPA) is Victoria's environmental regulator.

Statutory role is to protect human health & environment from the harmful impacts of pollution and waste

Powers and functions under the Environment Protection Act 2017, commenced 2017.

New preventative paradigm for protection – legally enforceable general environmental duty – emphasis on risk identification / elimination.

New laws – new powers – including raft of new enforcement measures.



# Strengthened Restorative justice provisions

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## **Enforceable undertaking process**

includes a participatory process to inform ways of ensuring the community and those impacted by an offence or contravention are involved in the enforceable undertakings brought about to address the issues in question (s 300 EP Act)

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## **The hearing of an impact statement**

from a person, organisation or community that is affected by the contravention or offence (s 335)

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## **A court-ordered restorative justice project**

as part of the outcome of civil or criminal proceedings the court orders an environmental or public project (s 332)

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## **Restorative justice process**

in which court proceedings are **adjourned** to facilitate affected parties to seek to resolve the matters arising from the alleged contravention and by agreeing on an outcome that recognises the harm caused to the community or the environment (s 336).

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# Court Orders – Civil & Criminal Proceedings

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Court may in sentencing / remedy

- Monetary benefit order
- Adverse publicity order
- General restoration and prevention order
- Restorative project order
- Consider impact statement
- Adjourn for restorative justice conference

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## Deterrent, Punitive, Restorative



## Examples of how a restorative justice process might work under the EP Act

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### **Office of Environment and Heritage v Clarence Valley Council** (2018) 236 LGERA 291

destruction of a sacred scarred tree  
in the centre of town, by council  
workers.

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### **Garrett v Whitlam** (2007) 151 LGERA 92

destruction by Pinnacle Mines (near  
Broken Hill) of a landscape of  
sacred cultural significance to its  
Traditional Owners.

- Court convened a restorative conference
- all those involved (both council or company executives, the people involved directly in the carrying out of cultural heritage destruction, members of the Traditional Owner groups)
- all attended a long, carefully prepared interactive facilitated conference
- a watershed for participants in both cases.
- Traditional Owners received a deep and genuine apology by those involved in the destruction of cultural heritage
- Agreement on the requirement of initiatives to help heal the harm and prevent a future occurrence.
- perpetrators gained new insights into the impact of their actions.
- The final court orders, in both instances included requirements to undertake organisational cultural heritage training and system improvements to prevent a recurrence in the future, along with other penalties



# Court ordered Restorative Justice Projects

## Supporting Traditional Owners to heal Country



- Central Victoria
- Country of First Peoples, Dja Dja Wurrung
- Goldfields, mining Country 'upside down country'
- Recognition Settlement Agreement

### Water Corporation Prosecution Pollution to water

Pollution to the Campaspe River

Traditional Owners for Waterway assessment

Traditional cultural mapping – used by water authorities and catchment planning and management

### Water Corporation Prosecution Sewer spill

Significant sewer spill

Traditional Owners received funds for rehabilitation of mining degraded waterway and wetlands

Return of indigenous species, Frog ponds, Traditional meeting place

# Court ordered Restorative Justice Projects

## Supporting Traditional Owners to heal Country



- Wurundjeri Woi Wurrung
- Traditional Owners of the area now known as Melbourne
- Yarra River, Birrarung significant waterway

**Porsche Ltd  
prosecuted for  
pollution to the Yarra  
River (Birrarung)**



Restorative project involving traditional re-vegetation of the banks;  
re-introduction of native shellfish;  
improved water quality and education opportunities.

# Enforceable Undertaking - Restorative Justice Conference

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## Situation

- Landfill in south eastern Melbourne
- Residential area
- Ongoing leachate odour
- 2013 Rain
- Community pollution complaints
- EPA investigated licence breaches and pollution offences



## Regulatory response

- could prosecute but needs a longer-term solution and one that addressed the ongoing and multiple impacts experienced the surrounding community
- Enforceable Undertaking as an alternative to prosecution
- Included a restorative justice conference to ensure that the local community would have their say as part of the EU process.

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## Outcomes

- 30 reps from the community, local government and LF operator
- 5 hour conference - cathartic
- resulted in EU conditions
- infrared drone monitoring of odour hot spots
- A community benefit (tree planting project)
- Health study
- Improve ongoing engagement with the community around Hallam Rd through a Community Reference Group

# Court ordered Restorative Projects

- Scheme administered by EPA, not by offender
- Projects delivered by third party
- Provisions in new and previous Act, since 2000
- Compliance & Enforcement Policy
- Preferred outcome where appropriate – approx. 40% prosecutions result in RPO

## EPA Guidelines

- benefit the affected environment in a significant and lasting way, beyond the life of the project;
- enable affected residents to have a greater connection to their local environment and build their capacity;
- benefit the affected local residents and directly engage with them at all stages of the project using local relationships and networks;
- have outcomes with a clear connection to the prosecuted offence



## Alternative Environment Justice (AEJ)

- Purpose – Compliance with Resource Management Act while ensuring that the consequences of offending are accepted by the community and stakeholders.
- prosecution is commenced, then adjourned for a conference with representatives of the local community to discuss how the offending has impacted them and to be a part of seeking solutions.

### Situation

Small owner/operator business of a resource recovery business

- Important resource recovery / recycling of solvents involves burning
- located in residential area
- acridid chemical smell
- impacted community and concerns about the nature of the chemicals / their impact on the environment and human health.
- Long-standing consent (licence) which is not reviewable
- Multiple complaints

### Outcomes

- The prosecution was adjourned for AEJ process
- In the RJ conference business and community came up with solutions.
- Community saw that the owner was genuine.
- Operator saw that community was finding impacts of his recycling hard to bear. Identified need for systems for dealing with these issues including technological solutions

## Environment Protection Authority Victoria

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