

**Operating an environment court: the experience of the
Land and Environment Court of New South Wales**

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Introduction

Environmental problems are polycentric and multidisciplinary. The first law of ecology is that everything is connected to everything else.¹ The scale of environmental problems is such as to require a holistic solution. Environmental problems can have wide, even transboundary, impacts. Examples are climate change, forest fires and hazardous waste.

Tackling environmental problems involves implementing ecologically sustainable development. The original concept of sustainable development articulated in *Our Common Future* (the *Brundtland Report*) is of “development that meets the needs of the present without compromising the ability of the future generations to meet their own needs”². In Australia, the adjective “sustainable” is qualified by “ecologically” to emphasise the necessary integration of economy and environment.³ Ecologically sustainable development involves a cluster of elements or principles, including the principle of sustainable use; the principle of integration (of economic and environmental considerations in decision making); the precautionary principle; principles of equity, both intergenerational equity and intragenerational equity; the principle that the conservation of biological diversity and ecological integrity should be a fundamental consideration; and the principle of the internalisation of the environmental costs (in decision-making).⁴

The achievement of ecologically sustainable development depends on the commitment and involvement of all branches of government – the legislature, executive and judiciary – as well as other stakeholders. Klaus Toepfer, the then Executive Director of the United Nations Environment Program (UNEP), stated in his message to the UNEP Global Judges Program:

“Success in tackling environmental degradation relies on the full participation of everyone in society. It is essential, therefore, to forge a global partnership among all relevant stakeholders for the protection of the environment based on the affirmation of the human values set out in the United Nations *Millennium Declaration*: freedom, equality, solidarity, tolerance, respect for nature and shared responsibility. The judiciary plays a key role in weaving these values into the fabric of our societies.

The judiciary is also a crucial partner in promoting environmental governance, upholding the rule of law and in ensuring a fair balance between environmental, social and developmental consideration through its judgements and declarations”⁵.

The judiciary has a role to play in the interpretation, explanation and enforcement of laws and regulations. As Kaniaru, Kurukulasuriya and Okidi state:

“The judiciary plays a critical role in the enhancement and interpretation of environmental law and the vindication of the public interest in a healthy and secure environment. Judiciaries have, and will most certainly continue to play, a pivotal role both in the development and implementation of legislative and institutional regimes for sustainable development. A judiciary, well informed on the contemporary developments in the field of international and national imperatives of environmentally friendly development, will be a major force in strengthening national efforts to realise

¹ Commoner B, “The Closing Circle: Confronting the Environmental Crisis”, Jonathan Cape, London, 1972, p 33.

² World Commission on Environment and Development (WCED), *Our Common Future* (United Nations, 1987), p 44.

³ Bates G, “Environmental Law in Australia” (6th edition LexusNexus Butterworths, 2006) p 124 at [5.15].

⁴ See Preston B J, “The Role of the Judiciary in Promoting Sustainable Development: the Experience of Asia and the Pacific” (2005) 9 (2&3) *Asia Pacific Journal of Environmental Law* 109 and Preston B J, “Ecologically Sustainable Development in the context of Contaminated Land” (2008) 25 *Environmental Planning Law Journal* 164.

⁵ United Nations Environment Programme, *UNEP Global Judges Programme*, 2005, p v.

the goals of environmentally-friendly development and, in particular, in vindicating the rights of individuals substantively and in accessing the judicial process”.⁶

Increasingly, it is being recognised that a court with special expertise in environmental matters is best placed to play this role in the achievement of ecologically sustainable development. Amongst the advantages of a specialist environment court are:

1. Having a comprehensive integrated jurisdiction to deal with environmental matters, frequently providing a “one stop shop” for merit appeals, judicial review and criminal and civil enforcement;
2. Bringing together in the one court, officers (both judges and non-lawyer specialists) with knowledge and expertise in environmental law. This creates a centre of excellence, a think tank on environmental law. Bringing experts together creates a synergy. It facilitates free and beneficial exchange of ideas and information;
3. Where the design enables the appointment of multidisciplinary officers (both judges and non-lawyer specialists), being able to construct panels of officers with expertise relevant to the issues in the matter so as to facilitate interdisciplinary decision-making;
4. Facilitating lawyers who bring environmental matters and officers who hear these matters continuing to develop a specialised knowledge of environmental law and issues;
5. Adopting a holistic approach to the resolution of environmental matters, both by reason of the comprehensive jurisdiction and of interdisciplinary decision-making;
6. Developing innovative practice and procedure so as to facilitate access to justice, including public interest litigation;
7. Being better positioned to develop innovative remedies and solutions to environmental problems;
8. Being better positioned and having more opportunity to develop a coherent and consistent body of precedent and environmental jurisprudence;
9. Being better positioned to move more quickly through complex environmental cases, achieving efficiencies and reducing the overall cost of litigation; and
10. Relieving backlog in other courts by separating from the body of pending cases and then resolving more efficiently matters involving environmental issues.⁷

The Land and Environment Court of New South Wales is an example of a specialist environment court. It was the first specialist environment court established as a superior court of record in the world. It provides an instructive case study.

⁶ Kaniaru D, Kurukulasuriya L and Okidi C, “UNEP Judicial Symposium on the Role of the Judiciary in Promoting Sustainable Development”, a paper presented to the Fifth International Conference on Environmental Compliance and Enforcement, Monterey, California, USA, November 1998, p 22 of conference proceedings.

⁷ See generally *UNEP Judicial Training Modules on Environmental Law, Application of Environmental Law by National Courts and Tribunals*, UNEP, 2007, pp 179-180.

Land and Environment Court: Outline and History

The Land and Environment Court was established on 1 September 1980 by the *Land and Environment Court Act 1979* (NSW) as a superior court of record. It is a specialist court that enjoys the benefit of a combined jurisdiction within a single court. The Court has a merits review function, reviewing decisions of government bodies and officials in a wide range of planning, building, environmental and other matters. In exercising its merits review function, the Court operates as a form of administrative tribunal. The Court also exercises judicial functions, as a superior court of record. Judicial functions include civil enforcement, judicial review and summary criminal enforcement of a wide range of environmental laws, compensation for compulsory land acquisition and Aboriginal land claims. The Court also has appellate functions. It hears appeals against conviction or sentence for environmental offences from the Local Court of New South Wales and appeals (on questions of law) from decisions of the non-legal members of the Court in merits review proceedings.

The Court was established with two principal objectives in mind: rationalisation and specialisation⁸. In relation to rationalisation, there was a desire for a “one stop shop” for environmental, planning and land matters. Prior to the establishment of the Land and Environment Court, the judicial system was irrational and inefficient. Planning and land matters were dealt with by an “uncoordinated miscellany” of tribunals and courts.⁹ There was no environmental law as we now know it. Valuation, compulsory acquisition and land matters were dealt with by a Land and Valuation Court, Valuation Boards of Review and the Supreme Court (for title issues). Building, subdivision and development matters were dealt with by the Local Government Appeals Tribunal. Civil (equitable) enforcement and judicial review of both government and tribunal decisions were undertaken by the Supreme Court of New South Wales. Criminal enforcement was undertaken in the Local Court and the District Court of New South Wales. Parliament ensured rationalisation by vesting the Land and Environment Court with jurisdiction to deal with all of the matters formerly dealt by these courts and tribunals.

In relation to specialisation, the Court was given a wide jurisdiction in relation to environmental planning and land matters. The jurisdiction was made exclusive; no other court or tribunal could exercise the jurisdiction given to the Land and Environment Court¹⁰. Facilities were made for transfer of proceedings wrongly commenced in other courts to the Land and Environment Court.¹¹ Specialisation was also to be promoted by appointment of appropriate personnel. The judges are to be judges of a superior court of record or lawyers of at least seven years standing¹², preferably with knowledge and expertise in matters within the jurisdiction of the Court or otherwise who would develop such knowledge and expertise. In addition, there are to be technical and conciliation assessors (later termed Commissioners), being persons with special knowledge and expertise in areas such as local government administration, town planning, environmental science, land valuation, architecture, engineering, surveying, building construction, natural resources management, urban design, heritage, and land rights for Aborigines or disputes involving Aborigines.¹³

Specialisation was not seen to be an end, but rather a means to an end. It was envisaged that a specialist court could more ably deliver consistency in decision-making, decrease

⁸ See Preston B J and Smith J, “Legislation Needed for an Effective Court” in *Promise, Perception, Problems and Remedies: The Land and Environment Court and Environmental Law 1979-1999*, Nature Conservation Council of New South Wales, 1999, pp 104-107.

⁹ McClelland J, paper presented to an engineering conference, Hobart, 24 January 1982, p 7.

¹⁰ ss 16 and 71 of the *Land and Environment Court Act 1979*.

¹¹ s 72 of the *Land and Environment Court Act 1979* and now also s 149B of the *Civil Procedure Act 2005*.

¹² s 8(2) of the *Land and Environment Court Act 1979*.

¹³ s 12(2) of the *Land and Environment Court Act 1979*.

delays (through its understanding of the characteristics of environmental disputes) and facilitate the development of environmental laws, policies and principles.

Jurisdiction of Land and Environment Court

As noted, the Court's jurisdiction falls into three categories: merits review, enforcement (both civil and criminal) and appellate.

Merits review is undertaken in three classes of the Court's jurisdiction: Class 1 involving environmental, planning and protection appeals¹⁴; Class 2 involving local government, trees and miscellaneous appeals¹⁵; and Class 3 involving land tenure, valuation, rating and compensation matters, as well as Aboriginal land claims¹⁶.

Merits review involves the re-exercise by the Court of the administrative power previously exercised by the original decision maker. The Court has the same functions and discretions as the original decision maker¹⁷. The appeal is by way of rehearing and fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the original decision may be given on the appeal¹⁸. In determining the appeal, the Court is obliged to have regard to, amongst other matters, the circumstances of the case and the public interest¹⁹. The decision is deemed to be the final decision of the original decision maker and is to be given effect accordingly²⁰.

Merits review has numerous benefits including: providing a forum for full and open consideration of issues of importance; increasing accountability of decision makers; clarifying meaning of legislation; ensuring adherence to legislative principles and objects; focussing attention on the accuracy and quality of policy documents, guidelines and planning instruments; and highlighting problems that should be addressed by law reform.

Merits review in the Court is conducted with little formality and technicality²¹. The Court uses informal dispute resolution processes such as conciliation conferences and on-site hearings²². The Court can inform itself and use its specialist expertise in determining the appeal²³.

The Court can enforce environmental laws, both civilly and criminally. Proceedings in Class 4 of the Court's jurisdiction can be of two types: civil enforcement, usually by government authorities, of planning or environmental laws to remedy or restrain breaches of those laws and judicial review of administrative decisions and action under planning or environmental laws²⁴. Proceedings in Class 5 involve summary criminal enforcement proceedings, usually by government authorities prosecuting for offences under planning or environmental laws²⁵. Planning or environmental laws include legislation such as the *Environmental Planning and Assessment Act 1979*, *Protection of the Environment Operations Act 1997*, *Contaminated Land Management Act 1997*, *Heritage Act 1977*, *Threatened Species Conservation Act 1995* and *National Parks and Wildlife Act 1974*.

¹⁴ s 17 of the *Land and Environment Court Act 1979*.

¹⁵ s 18 of the *Land and Environment Court Act 1979*.

¹⁶ s 19 of the *Land and Environment Court Act 1979*.

¹⁷ s 39(2) of the *Land and Environment Court Act 1979*.

¹⁸ s 39(3) of the *Land and Environment Court Act 1979*.

¹⁹ s 39(4) of the *Land and Environment Court Act 1979*.

²⁰ s 39(5) of the *Land and Environment Court Act 1979*.

²¹ s 38(1) of the *Land and Environment Court Act 1979*.

²² s 34 and s 34B of the *Land and Environment Court Act 1979*.

²³ s 38(2) of the *Land and Environment Court Act 1979*.

²⁴ s 20(1) and (2) of the *Land and Environment Court Act 1979*.

²⁵ s 21 of the *Land and Environment Court Act 1979*.

A key feature of the Court and the legislation it administers is the ability of the public to participate and have access to justice. Many of the planning or environmental laws contain open standing provisions which enable any person to bring proceedings to remedy or restrain breaches of the laws. Public interest litigation has been a feature throughout the Court's history. The Court's decisions have been instrumental in the development of public interest litigation, both procedurally and substantively²⁶. Non-governmental organisations have been key players in public interest litigation.

The Court's role in criminal enforcement has also been of importance. The Court's decisions have developed a jurisprudence in relation to environmental crime²⁷. This is particularly so in relation to sentencing. Environmental crimes have their own unique characteristics which demand special consideration. As a specialist environment court, the Land and Environment Court is better able to achieve principled sentencing for environmental offences. The Court, through its sentencing decisions, strives to achieve consistency and transparency in sentencing for environmental offences.²⁸ It has been instrumental in establishing the world's first sentencing database for environmental offences.²⁹

Caseload

As a consequence of its wide jurisdiction, the Court has a sizeable caseload. In 2007, the Court's finalised caseload was 1717 cases. This was distributed amongst the Classes of the Court's jurisdiction as follows: 992 (Class 1); 159 (Class 2); 168 (Class 3); 308 (Class 4); 75 (Class 5) and 15 (Classes 6 and 7).

Court personnel

Court personnel comprise the Judges, the Commissioners, the Registrars and the Registry staff. The Judges comprise the Chief Judge and five puisne Judges. The Judges are all lawyers, four of whom were previously barristers (three being Queens Counsel or Senior Counsel) and two were previously solicitors. They have the same rank, title and status as judges of the Supreme Court of New South Wales³⁰. They have tenure of office until the statutory retirement age of 72.

The Commissioners comprise a Senior Commissioner, eight other full-time Commissioners and 15 acting, part-time Commissioners who are called upon on a causal basis to exercise

²⁶ See Preston B J, "Public Enforcement of Environmental Laws in Australia" (1991) 6 *Journal of Environmental Law and Litigation* 39; Preston B J, "Judicial Review in Environmental Cases" (1992) 1 *Asia Pacific Law Review* 39 and (1993) 10 *Australian Bar Review* 147; Stein P L, "A Specialist Environmental Court: An Australian Experience" in Robinson D and Dunkley J (eds), *Public Interest Perspectives in Environmental Law*, Wiley Chancery, 1995, p 255; Stein P L, "The Role of the Land and Environment Court in the Emergence of Public Interest Law" (1998) 13 *Environmental and Planning Law Journal* 179; Stein P L, "New directions in the prevention and resolution of environmental disputes – specialist environmental courts" a paper presented to The South-East Asian Regional Symposium on the Judiciary and The Law of Sustainable Development, Manila, 6 March 1999; and Preston B J, "The role of public interest environmental litigation" (2006) 23 *Environmental and Planning Law Journal* 337.

²⁷ See Preston B J, "Environmental Crime" in *Environmental Responsibilities Law New South Wales*, Thomson LawBook Co, Vol 3, pp 3-501 to 3-589.

²⁸ See Preston B J, "Sentencing for environmental crime", (2006) 18(6) *Judicial Officers' Bulletin* 41; Preston B J "Principled sentencing for environmental offences – Part 1: purposes of sentencing" (2007) 31 *Criminal Law Journal* 91 and Preston B J "Principled sentencing for environmental offences – Part 2: sentencing considerations and options" (2007) 31 *Criminal Law Journal* 142.

²⁹ See Preston B J and Donnelly H, "Achieving consistency and transparency in sentencing for environmental offence, Judicial Commission of NSW – Monograph 32, June 2008" and Preston B J and Donnelly H "Environmental crime sentencing database is a world first" (2008) 20(4) *Judicial Officers' Bulletin* 27.

³⁰ s 9(2) of the *Land and Environment Court Act 1979*.

the functions of a Commissioner as the need arises. Commissioners of the Court must have qualifications and experience as specified in s 12(2) of the *Land and Environment Court Act 1979*. Full-time Commissioners are appointed for a term of 7 years and are eligible for reappointment for further terms³¹. Persons appointed as an acting Commissioner are appointed for a term of up to 12 months and are eligible for reappointment for further terms³².

The Court Registrar has the overall administrative responsibility of the Court, as well as exercising judicial powers, such as conducting directions hearings. The Chief Judge directs the Registrar on the day to day running of the Court. There is currently a Registrar (who is a solicitor) and an Assistant Registrar (who is not legally trained). The Registrar is an accredited mediator.

The Court Registry comprises four sections: Client Services; Listings; Information and Research; and Commissioner Support. The Client Services section is the initial contact for Court users and provides services such as procedural assistance, filing and issuing of court process, maintaining of records and exhibits, as well as having responsibilities under the *Public Finance and Audit Act 1983*. It also provides administrative assistance for the Court's eCourt system. The Listings section provides listing services, including preparation of the Court's daily and weekly program and publishes the daily Court list on the internet. The Information and Research section provides statistical analysis and research to the Registrar and the Chief Judge. It also supports the administration of the Court's website and the CaseLaw judgment database. The Commissioner Support section provides word processing and administrative support in the preparation of Commissioners' judgments and orders.

An essential part of ensuring that the Court achieves its potential is to not only appoint persons with appropriate knowledge and expertise, but to maintain and enhance such knowledge and expertise by training. The Court encourages continuing education and professional development. For Judges and Commissioners, the Court, together with the Judicial Commission of New South Wales, arranges a two day annual conference. In addition, specialist training programs are held from time to time. For example, in 2007 a three day training course on conciliation was organised for all of the Commissioners (both full-time and part-time) and Registrars. The Court also encourages Judges and Commissioners to attend conferences to further their education and development.³³

Registry staff are also required to undertake regular programs of training and development.

Exercise of jurisdiction

Judges constitute the Court³⁴ and may exercise all classes of jurisdiction³⁵. However, usually they will exercise the jurisdiction of the Court in Classes 3-7 inclusive and in Classes 1 and 2 when legal issues or large or controversial issues are involved. Commissioners exercise functions in the Classes 1-3 only³⁶. Jurisdiction is delegated to them by the Chief Judge to act as the adjudicator³⁷, conciliator³⁸, mediator³⁹ or neutral evaluator⁴⁰. In determining the Commissioner who is to exercise any function, the Chief Judge has regard to the knowledge,

³¹ s 12(4) and Sch 1 of the *Land and Environment Court Act 1979*.

³² s 13 of the *Land and Environment Court Act 1979*.

³³ The judicial education and professional development of Judges and Commissioners are summarised each year in the Court's Annual Review: see, for example, the Annual Review 2007, Chapter 6.

³⁴ s 7 of the *Land and Environment Court Act 1979*.

³⁵ s 33(1), (2) and (3) of the *Land and Environment Court Act 1979*.

³⁶ s 33(1) of the *Land and Environment Court Act 1979*.

³⁷ s 30(1) of the *Land and Environment Court Act 1979*.

³⁸ s 34(2) of the *Land and Environment Court Act 1979*.

³⁹ s 26 of the *Civil Procedure Act 2005*.

⁴⁰ Pt 3 r 3.8 of the *Land and Environment Court Rules 2007*.

experience and qualifications of the Commissioners and to the nature of the matters involved⁴¹. The Registrars are responsible for case management of matters in Classes 1 and 2 and also act as conciliator⁴² or mediator⁴³ in appropriate matters.

Multi-door courthouse

Increasingly, the Court is operating as a form of multi-door courthouse. The concept of multi-door courthouse is that of a dispute resolution centre offering intake services together with an array of dispute resolution processes under one roof. The idea is to match the appropriate dispute resolution process to the particular dispute.⁴⁴

Dispute resolution processes available

The Land and Environment Court offers a variety of dispute resolution processes, both “in house” and externally. The “in house” dispute resolution processes offered are:

- (a) adjudication in all Classes of jurisdiction (by Judges or Commissioners);
- (b) conciliation in Classes 1-3 (by Commissioners or Registrars)⁴⁵;
- (c) mediation in Classes 1-4 (by trained mediators, either the Registrar or some Commissioners)⁴⁶; and
- (d) neutral evaluation in Classes 1-3 (by Commissioners)⁴⁷.

The Court also facilitates external dispute resolution processes of:

- (a) mediation by accredited mediators (in proceedings in Classes 1-4)⁴⁸;
- (b) neutral evaluation by neutral evaluators (such as a retired judge)⁴⁹; and
- (c) reference of the whole or part of a matter in Classes 1-4 to an external Referee with special knowledge or expertise for enquiry and report to the Court⁵⁰.

The alternative dispute resolution processes of conciliation, mediation and neutral evaluation offered by the Court warrant some elaboration.

Conciliation is a process in which the parties to a dispute, with the assistance of an impartial conciliator, identify the issues in dispute, develop options, consider alternatives and endeavour to reach agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may

⁴¹ s 30(2) of the *Land and Environment Court Act 1979*.

⁴² s 34(14) of the *Land and Environment Court Act 1979*.

⁴³ s 26 of the *Civil Procedure Act 2005*.

⁴⁴ See Preston B J, “The Land and Environment Court of New South Wales: Moving towards a Multi-Door Courthouse – Part 1” (2008) 19 *Australasian Dispute Resolution Journal* 72 and “The Land and Environment Court of New South Wales: Moving towards a Multi-Door Courthouse – Part 2” (2008) 19 *Australasian Dispute Resolution Journal* [new page?].

⁴⁵ s 34 of the *Land and Environment Court Act 1979*.

⁴⁶ s 26 of the *Civil Procedure Act 2005*.

⁴⁷ Pt 3 r 3.8 of the *Land and Environment Court Rules 2007*.

⁴⁸ s 26 of *Civil Procedure Act 2005*.

⁴⁹ Pt 3 r 3.8 of the *Land and Environment Court Rules 2007*.

⁵⁰ Pt 20 r 20.14 of the *Uniform Civil Procedure Act 2005*.

advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the parties to reach agreement⁵¹.

Conciliation in the Court is undertaken pursuant to s 34 of the *Land and Environment Court Act 1979*. This provides for a combined or hybrid dispute resolution process involving first, conciliation and then, if the parties agree, adjudication⁵².

The conciliation involves a Commissioner with technical expertise on issues relevant to the case acting as a conciliator in a conference between the parties. The conciliator facilitates negotiation between the parties with a view to their achieving agreement as to the resolution of the dispute.

If the parties are able to reach agreement, the conciliator, being a Commissioner of the Court, is able to dispose of the proceedings in accordance with the parties' agreement⁵³. Alternatively, even if the parties are not able to decide the substantive outcome of the dispute, they can nevertheless agree to the Commissioner adjudicating and disposing of the proceedings⁵⁴.

If the parties are not able to agree either about the substantive outcome or that the Commissioner should dispose of the proceedings, the conciliation conference is terminated and the proceedings are referred back to the Court for the purpose of being fixed for a hearing before another Commissioner. In that event, the conciliation Commissioner makes a written report to the Court setting out that no agreement has been reached and that the conciliation conference has been terminated as well as stating what in the Commissioner's views are the issues in dispute between the parties to the proceedings⁵⁵. This is still a useful outcome, as it scopes the issues and often will result in the proceedings being able to be heard and determined expeditiously, in less time and with less cost.

Mediation is a process in which the parties to a dispute, with the assistance of an impartial mediator, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted⁵⁶.

The Court may, at the request of the parties or of its own volition, refer proceedings in Classes 1, 2, 3 and 4 to mediation⁵⁷. The Court provides a mediation service at no cost to the parties by referral to Court personnel who are trained in mediation. The Court will also refer proceedings for mediation to an external mediator not associated with the Court and agreed to by the parties.

Neutral evaluation is a process of evaluation of a dispute in which an impartial evaluator seeks to identify and reduce the issues of fact and law in dispute. The evaluator's role includes assessing the relative strengths and weaknesses of each party's case and offering an opinion as to the likely outcome of the proceedings, including any likely findings of liability or the award of damages⁵⁸.

⁵¹ National Alternative Dispute Resolution Advisory Council (NADRAC), *Dispute Resolution Terms* (2003), p 5.

⁵² See Preston B J "Conciliation in the Land and Environment Court of New South Wales; History, nature and benefits" (2007) 13 *Local Government Law Journal* 110 at 123-126.

⁵³ s 34(3) of the *Land and Environment Court Act 1979*.

⁵⁴ s 34(4)(b) of the *Land and Environment Court Act 1979*.

⁵⁵ s 34(4)(a) of the *Land and Environment Court Act 1979*.

⁵⁶ National Alternative Dispute Resolution Advisory Council (NADRAC), *Dispute Resolution Terms* (2003), p 9.

⁵⁷ s 26(1) of the *Civil Procedure Act 2005*.

⁵⁸ Pt 3 r 3.8(1) of the *Land and Environment Court Rules 2007*.

The Court may refer proceedings in Classes 1, 2, 3 and 4 to neutral evaluation with or without the consent of the parties⁵⁹. The Court has referred matters to neutral evaluation by a Commissioner or an external person agreed to by the parties.

Intake screening, diagnosis and referral

Intake screening, diagnosis and referral to the appropriate dispute resolution process occurs in a staged process: at the Registry counter, at the first return before the Court of any application commencing proceedings in the Court and at any case management or dispute resolution orientation session that might be directed by the Court. Collectively, these occasions and the persons who preside constitute the intake screening, diagnosis and referral unit of the Court.

The screening, diagnosis and referral process in the Court is assisted by certain presumptions and protocols. The Court's Practice Notes, issued in 2007, create a presumption in favour of referring matters in Classes 1-3 to conciliation, unless the parties demonstrate a reason to the contrary. The Court's Practice Note Class 3 Valuation Objections contains a pre-action protocol. The parties are required to engage in mediation before commencing proceedings. Compliance is verified at the first directions hearing before the Court. The Court's practice notes for all Class 1-3 matters contained post-action protocols. Parties are required to consider and report to the Court at the first subsequent directions hearing the appropriateness of using the alternative dispute resolution processes of conciliation and mediation.

The Court screens, diagnoses and refers matters to the appropriate dispute resolution process, both in consultation with the parties but also by its own motion. For matters in Classes 1 and 2 involving environmental, planning and local government appeals, the Registrar at the directions hearings performs this function. In Class 2 tree disputes between neighbours, the list Commissioner performs this function at the directions hearings. In Classes 3-7, which are managed by a List Judge, the task is performed by the List Judge at the directions hearings. Parties can select what they consider to be the appropriate dispute resolution process and may, subsequently, change their selection. This will involve referral back to the Court for re-referral to a different dispute resolution process.⁶⁰

Case management

Duty to facilitate just, quick and cheap resolution

The Court is under a duty to give effect to the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings.⁶¹ The attainment of the overriding purpose necessitates active case management.⁶²

In order to further the overriding purpose, proceedings are to be managed by the Court having regard to the following objects:

- “(a) the just determination of the proceedings,

⁵⁹ Pt 3 r 3.8(2) of the *Land and Environment Court Rules 2007*.

⁶⁰ Preston B J, “The Land and Environment Court of New South Wales: Moving towards a Multi-Door Courthouse – Part 2” (2008) 19 *Australasian Dispute Resolution Journal* [new page?].

⁶¹ s 56(1) and (2) of the *Civil Procedure Act 2005*.

⁶² s 57(1) and (2) of the *Civil Procedure Act 2005*.

- (b) the efficient disposal of the business of the court,
- (c) the efficient use of available judicial and administrative resources,
- (d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.⁶³

There is a degree of interrelationship between the goals of the “just”, “quick” and “cheap” resolution of issues in proceedings.

Just resolution

Acting in accordance with the dictates of justice includes dealing with cases in a manner that is expeditious and timely, proportionate to their importance and complexity, and cost efficient to both private parties and public resources.

Section 58 of the *Civil Procedure Act 2005* provides that in determining what are the dictates of justice in a particular case the Court:

- (a) must have regard to the provisions of s 56 (the overriding purpose is to facilitate the just, quick and cheap resolution of the real issues in the proceedings) and s 57 (the objects of case management is to further the overriding purpose); and
- (b) may have regard to a number of other matters to the extent that the Court considers them relevant being:
 - “(i) the degree of difficulty or complexity to which the issues of the proceedings give rise;
 - (ii) the degree of expedition with which the respective parties have approached the proceedings, including the degree to which they have been timely in their interlocutory activities;
 - (iii) the degree to which any lack of expedition in approaching the proceedings has arisen from circumstances beyond the control of the parties;
 - (iv) the degree to which the respective parties have fulfilled their duties under Section 56(3) [being to assist the court to further the overriding purpose in s 56 to facilitate the just, quick and cheap resolution of the real issues of the proceedings];
 - (v) the use that any party has made or could have made, of any opportunity that has been available to the parties in the course of the proceedings whether under rules of Court, the practice of the Court or any direction of a procedural nature given in the proceedings;
 - (vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction;
 - (vii) such other matters that the court considers relevant in the circumstances of the case⁶⁴.

⁶³ s 57(1) of the *Civil Procedure Act 2005*.

These mandatory and discretionary considerations underscore the interrelationship between the concept of justice and those of timeliness and efficiency.

Quick resolution

The goal of ensuring the “quick” resolution of the real issues in proceedings involves eliminating delay. “The delay of justice is a denial of justice” pronounced Lord Denning MR⁶⁵. Lord Denning continued:

“All through the years men have protested at the law’s delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time [Hamlet Act III, sc 1]. Dickens tells how it exhausts finances, patience, courage, hope [Bleak House, ch 1].”⁶⁶

Delay is interrelated with cost. The longer the period between lodgment and finalisation of proceedings, the greater the cost. This is a result of many factors but the increased number of attendances and adjournments are critical causes. As the Chief Justice of NSW has noted, litigation is a field in which Parkinson’s law operates: “work expands to fill the time set aside for it.”⁶⁷ Case management must attempt to minimise the number of attendances in court and restrict adjournments⁶⁸.

The increased cost is both to the parties and to public resources in the administration of the judicial system. Court resources, both in terms of time and facilities are scarce and shrinking. Allocation of court resources to one case precludes allocation to another case. The consequence is that other cases are delayed.

The Court has an obligation to monitor and ensure that public resources are applied in the best and most efficient means possible⁶⁹.

Cheap resolution

The goal of the “cheap” resolution of the real issues in the proceedings involves the concept of proportionality of costs. The cases need to be managed and resolved in such a way that the cost to the parties is proportionate to the importance and complexity of the subject matter in dispute⁷⁰. The criteria of proportionality include the amount in issue in the proceedings and relative importance of the subject matter of the proceedings (to be determined having regard to such factors such as the status of the parties and the nature of the proceedings).

⁶⁴ s 58(2) of the *Civil Procedure Act 2005*.

⁶⁵ In *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] QB 229 at 245.

⁶⁶ [1968] 2 QB 229 at 245.

⁶⁷ The Hon. JJ Spigelman, “Just, Quick and Cheap – A Standard for Civil Justice”, Address to the Opening of Law Term, 31 January 2000, p. 2.

⁶⁸ The Hon. JJ Spigelman, “Case Management in New South Wales”, an address to the Malaysian Annual Judges Conference, Kuala Lumpur, 22 August 2006, p. 4.

⁶⁹ *Christmas Island Resort v Geraldton Building Co Pty Ltd* (No 5) (1997) 18 AWAR 334 at 345; 140 FLR 452 at 462.

⁷⁰ s 60 of the *Civil Procedure Act 2005*.

Means to achieve just, quick and cheap resolution

In order to serve the overriding purpose, the Court is given a comprehensive range of powers. These are in the *Civil Procedure Act 2005* and *Uniform Civil Procedure Rules 2005*, *Land and Environment Court Act 1979* and *Land and Environment Court Rules 2007*. The exercise of these powers are guided by the Court's practice notes.

To achieve the overriding purpose, the Court has power:

- (a) to direct parties to take specified steps and to comply with timetables and otherwise to conduct proceedings as directed;⁷¹
- (b) to regulate the conduct of the hearing including limiting the time that may be taken in cross-examination, limiting the number of witnesses, limiting the number of documents that may be tendered, and limiting the time that may be taken by a party in presenting its case or in making submissions;⁷²
- (c) to take into account in deciding whether to make a direction as to the conduct of the hearing, not only the requirements of procedural fairness but also a range of relevant matters including the subject matter, complexity or simplicity of the case, the efficient administration of court lists, the interests of parties to other proceedings before the Court and the costs of the proceedings;⁷³ and
- (d) to direct at any time a solicitor or barrister for a party to provide to his or her client a memorandum stating the estimated length of the hearing and estimated costs of legal representation including costs payable to the other party if the client was unsuccessful.⁷⁴

The concern to achieve the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings is reflected in the Court's practice notes. The Court uses differential case management in recognition not only of the different classes of jurisdiction, but also the different nature of matters within a class. Practice notes group practice and procedure according to the types of proceedings. The Court has Practice Notes for Class 1 Development Appeals; Classes 1, 2 and 3 Miscellaneous Appeals; Class 3 Compensation Claims; Class 3 Valuation Objections; and Class 4 Applications. The Court has special information sheets and applications for Class 2 Tree Disputes. The Court will, in the next few months, adopt a Class 2 Tree Disputes Practice Note which will consolidate and revise the practice and procedure for Class 2 Tree Disputes.

The Practice Notes and Information Sheets provide template litigation plans. A litigation plan sets procedural steps with deadlines for the case to move through pre-trial procedures to summary disposition or trial. Parties and the Court may select or adapt the template to suit the particular circumstances of the case. This involves the appropriate litigation steps, types of evidence and type of hearing. The emphasis is on ensuring proportionality to the importance of the case and the costs of litigation.

Pre-hearing attendance options

The Court offers three types of pre-hearing attendances:

⁷¹ s 61(1) and (2) of *Civil Procedure Act 2005*.

⁷² s 62(3) of the *Civil Procedure Act 2005*.

⁷³ s 62(4) and (5) of the *Civil Procedure Act 2005*.

⁷⁴ s 62(6) of the *Civil Procedure Act 2005*.

- (a) Actual callover: representatives of the parties attend before the Judge, Commissioner or Registrar;
- (b) Telephone callover: representatives of the parties talk with the Judge, Commissioner or Registrar in a telephone conference call; and
- (c) eCourt callover: representatives of the parties communicate with the Registrar and each other electronically using the Court's internet service, eCourt.

Hearing options

The Court offers a variety of options for the final hearing:

- (a) Court hearing: available for all matters in all Classes;
- (b) On-site hearing: available for matters in Classes 1 and 2. An on-site hearing is the final determination of the matter conducted at the site the subject of the appeal. Apart from the judgment, an on-site hearing is not recorded.
- (c) Partial on-site hearing: available for matters in Classes 1 to 3, usually by commencing on-site, taking evidence of lay witnesses such as resident objectors on site, and undertaking a view of the site and surrounds in the presence of the parties. The hearing resumes in Court as usual.
- (d) Video-conferencing: available in all matters for taking evidence of remote witnesses.

Measuring Court performance

In order to determine whether the various measures of practice and procedure adopted by the Court are effective in facilitating the just, quick and cheap resolution of the real issues in the proceedings in the Court, the Court needs to monitor and measure performance.

The Court has developed a suite of performance indicators for the administration of the Court. Many of these are instructive in determining whether the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings is being achieved.

The Productivity Commission in its *Report on Government Services 2008* suggests the following objectives for court administration:

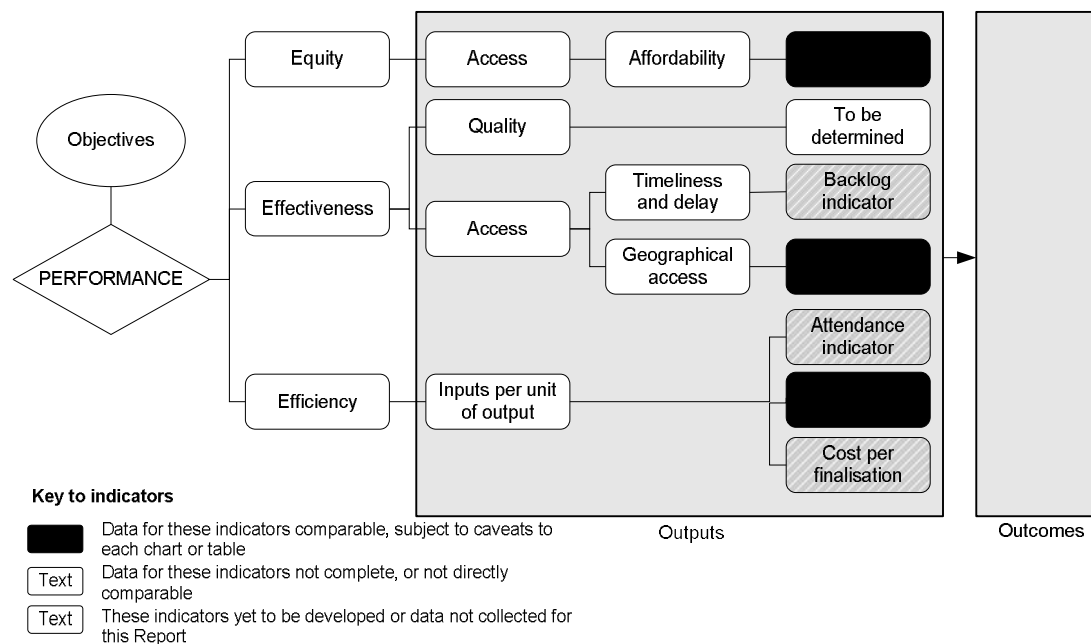
- to be open and accessible;
- to process matters in an expeditious and timely manner;
- to provide due process and equal protection before the law;
- to be independent yet publicly accountable for performance; and
- to provide court administration services in an efficient manner.⁷⁵

⁷⁵ Australian Government Productivity Commission, *Report on Government Services 2008*, p 7.20, Box 7.5.

Performance indicators

The Productivity Commission suggests a performance indicator framework for court administration as follows⁷⁶:

Figure 7.3 Performance indicator framework for court administration



The objectives of court administration are equity, effectiveness and efficiency. The performance of a court in achieving these objectives may be evaluated by reference to output and outcome indicators. Outputs are the actual services delivered. Outcomes are the impacts of these services on the status of an individual or group.

Of relevance to the goal of facilitating the “quick” resolution of the real issues in proceedings are the backlog indicator, clearance indicator and attendance indicator. Of relevance to the goal of facilitating the “cheap” resolution of the real issues in proceedings are these three indicators (because delay increases costs) as well as the cost per finalisation. Each of these indicators are output indicators.

The goal of facilitating the “just” resolution of the real issues and proceedings is more difficult to measure. Lord Woolf identified a number of principles which a civil justice system should meet in order to ensure access to justice. The system should aspire to:

- “(a) be *just* in the results it delivers;
- (b) be *fair* in the way it treats litigants;
- (c) offer appropriate procedures at a reasonable cost;
- (d) deal with cases with reasonable *speed*;

⁷⁶ Australian Government Productivity Commission, *Report on Government Services* 2008, Figure 7.3, p 7.21

- (e) be *understandable* to those who use it;
- (f) be *responsive* to the needs of those who use it;
- (g) provide as much *certainty* as the nature of particular cases allows; and
- (h) be *effective*: adequately resourced and organised".⁷⁷

Some of these principles are outcomes of the justice system, notably ensuring a just result and by fair means. They contribute to the achievement of the objective of equity. Other principles are outputs of the justice system including the cost and speed of litigation, and the resources and organisation of the court. These contribute to the achievement of the objectives of effectiveness and efficiency.

Measuring the performance of the Court in delivering access to justice is more difficult for outcomes than for outputs of the system.

Quality of outcomes

Ensuring the just resolution of proceedings involves examining the quality of outcome of a case, whether the result is a fair outcome and reached by fair means⁷⁸. However, there are no accepted outcome indicators for measuring the quality of court administration⁷⁹. Indeed, there are serious reservations about the appropriateness of measuring the quality of judicial decisions⁸⁰.

Measuring the number of appeals from a court's decision and their success is not an appropriate or useful quality indicator⁸¹.

The Chief Justice of Canada has suggested that quality is more likely to result if the Court, and its judges and officers, retain certain virtues. They must be knowledgeable, independent, impartial, connected to society, possess absolute integrity, be more diverse reflecting our society, more efficient, better at communicating with the public, better educated and possess conscience and courage⁸². The Land and Environment Court continues to strive to uphold these virtues.

Output indicators of access to justice

The objectives of equity and effectiveness involve ensuring access to justice. Access to justice can be evaluated by reference to various outputs. These evaluate the accessibility of the Court, by reference to various criteria, both quantitative and qualitative. These include affordability, accessibility, responsiveness to the needs of users, and timeliness and delay measured by a backlog indicator and compliance with time standards. The objective of efficiency can be evaluated by output indicators including an attendance indicator and a clearance rate indicator.

⁷⁷ Lord Woolf, *Access to Justice: Final Report*, HMSO, 1996, p 2.

⁷⁸ Gleeson M, "Judicial Accountability" (1995) 2 *The Judicial Review* 117 at 120; Spigelman J J, "Seen to be done: The principle of open justice – Part 1" (2000) 74 *Australian Law Journal* 290 at 292.

⁷⁹ Australian Government Productivity Commission, *Report on Government Services* 2008, p 7.21 and 7.24.

⁸⁰ See the Hon J J Spigelman, "The 'New Public Management' and the Courts", (2001) 75 ALJ 748 at 753 and the Hon J J Spigelman, "Measuring Court Performance", an address to the Annual Conference of the Australian Institute of Judicial Administration, Adelaide, 16 September 2006.

⁸¹ The Hon J J Spigelman, "Measuring Court Performance", an address to the Annual Conference of the Australian Institute of Judicial Administration, Adelaide, 16 September 2006, p 9.

⁸² The Right Hon B McLachlin P C, "The 21st Century Courts: Old Challenges and New", the 14th AIJA Oration in Judicial Administration, Melbourne, 28 April 2006, p 14 (summarising discussion at pp 6-13).

Affordability

Access to justice is facilitated by ensuring affordability of litigation in the Court. One indicator of affordability is the fees paid by applicants. Lower court fees help keep courts accessible to those with less financial means. However, ensuring a high standard of court administration service quality (so as to achieve the objective of effectiveness) requires financial resources. These days, a primary source of revenue to fund court administration is court fees. The Land and Environment Court is no exception. The Court endeavours to ensure that its court fees meet criteria of equity.

First, the court fees differentiate having regard to the nature of applicants and their inherent likely ability to pay. Individuals are likely to have less financial resources than corporations and hence the court fees for individuals are about half of those for corporations.

Secondly, the court fees vary depending on the nature of the proceedings. For example, the court fees for proceedings concerning a dispute over trees under the *Trees (Disputes Between Neighbours) Act 2006* have been set low, equivalent to Local Court fees, reflecting the fact that these proceedings are likely to be between individual neighbours.

Thirdly, in development appeals in Class 1, the quantum of court fees increases in steps with increases in the value of the development (and the likely profit to the developer). Similarly, in compensation claims in Class 3, the court fees increase in steps with the increased amount of compensation claimed.

Fourthly, the increased court fees bring about parity with the court fees for equivalent proceedings in other courts. The court fees for tree disputes are equivalent to Local Court fees reflecting the fact that the nature of the dispute is one that the Local Court might entertain. Similarly, proceedings in Class 4 for civil enforcement and judicial review are of the nature of proceedings in, and indeed before the establishment of the Land and Environment Court were conducted in, the Supreme Court. The court fees for these proceedings are comparable to those charged by the Supreme Court.

Finally, the Registrar retains a discretion to waive or vary the court fees in cases of hardship or in the interests of justice.

It is also important to note that court fees are only part of the costs faced by litigants. Legal fees and experts' fees are far more significant costs of litigation. The Court continues to improve its practice and procedure with the intention of reducing these significant costs and hence improving the affordability of litigation in the Court.

Accessibility

The Court has adopted a number of measures to ensure accessibility including geographical accessibility, access for people with disabilities, access to help and information, access for unrepresented litigants, access to alternative dispute resolution mechanisms and facilitating public participation.

Geographical accessibility

Geographical accessibility concerns ensuring parties and their representatives and witnesses are able to access the Court in geographical terms. New South Wales is a large

state⁸³. The Land and Environment Court is located in Sydney which is a considerable distance from much of the population. To overcome geographical accessibility problems, the Court has adopted a number of measures.

First, the Court regularly holds hearings in country locations throughout New South Wales. These are conducted in Local Courts proximate to the land the subject of the appeal (for court hearings) or on-site (for on-site hearings).

Secondly, for attendances before hearings, the Court has established the facility of a telephone callover. This type of callover takes place in a court equipped with conference call equipment where the parties or their representatives can participate in the court attendance whilst remaining in their distant geographical location.

Thirdly, the Court pioneered the use of eCourt callovers. This involves the parties or their representatives posting electronic requests to the Registrar using an internet accessible and secure system, eCourt, and the Registrar responding in the same way. This also mitigates the tyranny of distance.

Fourthly, conduct of the whole or part of a hearing on the site of the dispute also means that the Court comes to the litigants. An official on-site hearing involves conducting the whole hearing on-site. This type of hearing is required where there has been a direction that an appeal be conducted as an on-site hearing⁸⁴. The hearing is conducted as a conference presided over by a Commissioner on the site of the development.

However, even for other hearings which may be conducted as a court hearing, it is the Court's standard practice that the hearing commence at 9.30am on site. This enables not only a view of the site and surrounds but also the taking of evidence from residents and other persons on the site. This facilitates participation in the proceedings by witnesses and avoids the necessity for their attendance in the Court in Sydney.

Access for persons with disabilities

The Court has a disability strategic plan that aims to ensure that all members of the community have equal access to the Court's services and programs. The Court is able to make special arrangements for witnesses with special needs. The Court can be accessed by persons with a disability. The Land and Environment Court website contains a special page outlining the disability services provided by the Court.

Access to help and information

The Court facilitates access to help and provides information to parties about the Court and its organisation, resources and services, the Court's practices and procedures, its forms and fees, court lists and judgments, publications, speeches and media releases, and self-help information, amongst other information. Primarily it does this by its website. However, the Court also has guides on the Court and other information available at the counter. Registry staff assist parties and practitioners, answer questions and provide information.

⁸³ New South Wales has a land area of 800,642 sq kilometres.

⁸⁴ For appeals under ss 96, 96AA, 97, 121ZK or s 149F of the *Environmental Planning and Assessment Act 1979* or s 7 of the *Trees (Disputes Between Neighbours) Act 2006*.

The Local Courts throughout New South Wales also have information on the Land and Environment Court and documents are able to be filed in those Courts, which are passed on to the Land and Environment Court.

The provision of such help and information facilitates access to justice and allows the people who use the judicial system to understand it.

Access for unrepresented litigants

The Court also makes special efforts to assist unrepresented litigants, through its website and its published information and fact sheets, and by the Registry staff. The Court has a special fact sheet for “Litigants in Person in the Land and Environment Court of New South Wales”. The fact sheet contains information on:

- The Court's jurisdiction;
- Legal advice and assistance;
- The Court's schedule of fees;
- How to request a waiver, postponement or remission of fees;
- The availability of interpreters;
- Disability access information;
- User feedback – Land and Environment Court services;
- Information about the Court's website; and
- Land and Environment Court contact information.

The Court's website also has a special page on “self-help”. That page provides links to other web pages and to external links dealing with:

- Information sheets on each of the types of proceedings in the Court;
- Contacts in the Court;
- Frequently asked questions;
- A guide to the Court;
- Interpreters and their availability;
- Judgments of the Court;
- The jurisdiction of the Court;
- Languages and translation services;
- Legal advice and assistance;
- Legal research links;
- Litigants in person in Court;
- Mediation;
- Planning principles; and
- Tree dispute applications.

Access to alternative dispute resolution

The Court has been a pioneer in providing alternative dispute resolution services. The availability of alternative dispute resolution mechanisms allows the tailoring of mechanisms to the needs of disputants and the nature of the evidence.

When the Land and Environment Court was established in 1980 there was the facility for conciliation conferences under s 34 of the Court Act. These were curtailed in 2002 when on-site hearings were provided for but in 2006 the facility of conciliation conferences was extended to all matters in Classes 1, 2 and 3.

The Court provides mediation services. Currently, the Registrar of the Court is an accredited mediator and can provide in-house mediation for parties. A number of Acting Commissioners are also accredited mediators. In addition, the Court encourages and will make appropriate arrangements for mediation by external mediators. Informal mechanisms such as case management conferences also encourage negotiation and settlement of matters.

The Court's website contains a page explaining the alternative dispute resolution mechanisms and providing links to other sites explaining ADR methods including mediation.

Facilitating public participation

Access to justice can also be facilitated by the Court ensuring that its practice and procedure promotes and does not impede access by all. This involves careful identification and removal of barriers to participation, including by the public. Procedural law dealing with standing to sue, interlocutory injunctions (particularly undertaking for damages), security for costs, laches and costs of proceedings, to give some examples, can either impede or facilitate public access to justice. The Court's decisions in these matters have generally been to facilitate public access to the courts⁸⁵. The Court's Rules also expressly acknowledge that the fact that the proceedings have been brought in the public interest is relevant to the exercise of the Court's discretions in relation to costs, security for costs and undertaking for damages.⁸⁶

Responsiveness to the needs of users

Access to justice can also be facilitated by the Court taking a more user orientated approach. The justice system should be more responsive to the needs and expectations of people who come into contact with the system. The principle of user orientation implies that special steps should be taken to ensure that the Court takes specific measures both to assist people to understand the way the institution works and to improve the facilities and services available to members of the public. These steps require sensitivity to the needs of particular groups.

⁸⁵ See Preston B J "Judicial Review in Environmental Cases" (1992) 1 *Asia Pacific Law Review* 39 at 55-61 and (1993) 10 *Australian Bar Review* 147 at 165-174, Stein P L, "A Specialist Environmental Court: An Australian Experience" in Robinson D and Dunkley J (eds), *Public Interest Perspectives in Environmental Law* Wiley Chancery, 1995, pp 260-262; Stein P L, "The Role of the Land and Environment Court in the Emergence of Public Interest Law" (1996) 13 *Environmental Planning Law Journal* 179 at 179-183; Stein P L, "New directions in the prevention and resolution of environmental disputes – specialist environmental courts", a paper presented to The South-East Asian Regional Symposium on the Judiciary and The Law of Sustainable Development, Manila, 6 March 1999 at paragraphs 28-52 and Preston B J, "The role of public interest environmental litigation" (2006) 23 *Environmental Planning Law Journal* 337.

⁸⁶ Pt 4 r 4.2 of the *Land and Environment Court Rules 2007*.

The measures adopted by the Court for ensuring accessibility (discussed above) also make the Court more responsive to the needs and expectations of people who come into contact with the Court. The Court also consults with court users and the community to assist the Court to be responsive to the needs of users.

The Court has a Court Users Group to maintain communication with and receive feedback from Court users as to the practice and procedure and the administration of the Court. Membership of the Court Users Group includes representatives of legal professional bodies (such as New South Wales Bar Association, Law Society of New South Wales, Environmental and Planning Law Association and Local Government Lawyers Group), non-legal professional bodies (such as Planning Institute of Australia, Royal Australian Institute of Architects, Australian Institute of Landscape Architects, Engineers Australia and Institute of Arbitrators and Mediators), State government (such as Department of Planning, Department of Environment and Climate Change and Department of Water and Energy), local government (such as Local Government Association of New South Wales, Shires Association of New South Wales and local government representatives), development interests (such as Property Council of Australia, Urban Development Institute of Australia, New South Wales Urban Taskforce and Housing Industry Association) and conservation interests (such as Environmental Defenders' Office and Nature Conservation Council of New South Wales). The Court Users Group assists the Court to be responsive to the needs of those who use it.

The Chief Judge holds informal gatherings with practitioners and experts who use the Court and has delivered numerous speeches where the Court's practices and procedures have been discussed. The Judges, Commissioners and the Registrar have participated in numerous conferences and seminars to enhance awareness of recent developments in the Court relating to both procedural and substantive law.

Output indicators of effectiveness and efficiency

The effectiveness and efficiency of the Court is able to be measured by reference to the output indicators of backlog indicator, time standards for delivery of judgments, clearance rate and attendance indicator.

Backlog indicator

The backlog indicator is an output indicator of case processing timeliness. It is derived by comparing the age (in elapsed time from lodgment) of the Court's caseload against time standards.

The Court adopted its own standards for the different classes of its jurisdiction in 1996. These are:

- Classes 1, 2 and 3: 95% of applications should be disposed of within 6 months of filing.
- Classes 4, 5, 6 and 7: 95% of applications to be disposed of within 8 months of filing.

These standards are far stricter than the national standards used by the Productivity Commission in its annual Report on Government Services. The national standards are:

- No more than 10% of lodgments pending completion are to be more than 12 months old (i.e. 90% disposed of within 12 months)
- No lodgments pending completion are to be more than 24 months old (i.e. 100% disposed of within 24 months)

Performance relative to the timeliness standards indicates effective management of caseloads and court accessibility.

Time taken to process cases is not necessarily due to court administration delay. Some delays are caused by factors other than those related to the workload of the Court. These include delay by parties, unavailability of a witness, other litigation taking precedence, and appeals against interim rulings.

The Court's performance in 2007 was the best in the last five years, reducing the backlog indicator (LEC time standards) to its lowest level for merits review cases (Classes 1-3) and judicial cases (Classes 4-7).⁸⁷ The Court's performance in Classes 1, 2 and 6 bettered the national backlog indicator standard and in Classes 4 and 5 was comparable to the national standard.⁸⁸

Delivery of reserved judgments

The Court may dispose of proceedings by judgment delivered at the conclusion of the hearing (ex tempore judgment) or at a later date when judgment is reserved by the Court (reserved judgment). An appreciable number of judgments are delivered ex tempore, thereby minimising delay. To minimise delay for reserved judgments the Court has adopted time standards.

The Court's time standard for delivery of reserved judgments is determined from the date of the last day of hearing to the delivery date of the judgment. The current time standards for reserved judgments are as follows:

- 50% of reserved judgments in all classes are to be delivered within 14 days of hearing;
- 75% are to be delivered within 30 days of hearing;
- 100% are to be delivered within 90 days of hearing.

These are strict standards compared to other courts. In 2007, the Court's performance improved, increasing the percentage of reserved judgments delivered for each of the 14, 30 and 90 day standards. The number of judgments delivered within 90 days was 90%.⁸⁹

Clearance rate

The clearance rate is an output indicator of efficiency. It shows whether the volume of finalisations match the value of lodgments in the same reporting period. It indicates whether the Court's pending caseload has increased or decreased over that period. The clearance rate is derived by dividing the number of finalisations in the reporting period, by the number

⁸⁷ Annual Review 2007, p 34.

⁸⁸ Annual Review 2007, p 36.

⁸⁹ Annual Review 2007, p 37.

of lodgments in the same period. The result is multiplied by 100 to convert it to a percentage.

A figure of 100% indicates that during the reporting period the Court finalised as many cases as were lodged and the pending caseload is the same as what it was 12 months earlier. A figure of greater than 100% indicates that, during the reporting period, the Court finalised more cases than were lodged, and the pending caseload has decreased. A figure less than 100% indicates that during the reporting period, the Court finalised fewer cases than were lodged, and the pending caseload has increased. The clearance rate should be interpreted alongside finalisation data and the backlog indicator. Clearance over time should also be considered.

The clearance rate can be affected by external factors (such as those causing changes in lodgment rates) as well as by changes in the Court's case management practices.

In 2007, the Court achieved a clearance rate for both merits review cases (Classes 1-3) and judicial cases (classes 4-7) greater than 100%.⁹⁰

Attendance indicator

The attendance indicator is an output indicator of efficiency where court attendances act as a proxy for input costs. The more attendances, the greater the costs both to the parties and to public resources. The number of attendances is the number of times that parties or their representatives are required to be present in Court to be heard by a judicial officer or mediator (including appointments that are adjourned or rescheduled).

The attendance indicator is presented as the median number of attendances required to reach finalisation for all cases finalised during the year, no matter when the attendance occurred.

Fewer attendances may suggest a more efficient process. However, intensive case management can increase the number of attendances although there may be countervailing benefits. Intensive case management may maximise the prospects of settlement (and thereby reduce the parties' costs, for the number of cases queuing for hearing and the flow of work to appellate courts) or may narrow the issues for hearing (thus shortening hearing time and also reducing costs and queuing time for other cases waiting for hearing). In the Land and Environment Court, increased use of the facilities of conciliation conferences and case management conferences may be means to achieve these benefits.

In 2007, the number of pre-hearing attendances decreased for all classes, other than class 3, evidencing the success of the Court's revised practice and procedure and Practice Notes.⁹¹

Accountability and transparency

The administration of justice and public confidence in the courts depend on the courts being accountable and transparent.

The principle of open justice requires that justice not only be done but be seen to be done. The principle of open justice "ensures that the public administration of justice will be subject

⁹⁰ Annual Review 2007, p 38.

⁹¹ Annual Review 2007, p 39.

to public scrutiny”.⁹² Spigelman posits that the principle of open justice is reflected in a number of rules including that:

- (a) judicial proceedings be conducted in an open court, to which the public and the press have access;
- (b) the court publish reasons for its decision, not merely provide reasons to the parties;
- (c) the judicial officer be unbiased, determined by a test of what fair minded people – not just the parties, but the public – might reasonably apprehend or suspect;
- (d) procedural fairness be accorded in the hearing and determination of matters;
- (e) the court prevent abuse of process so as to maintain public confidence in the administration of justice;
- (f) the hearing or trial be fair; and
- (g) in criminal matters, victims of crime, and the community generally, understand the reasons for criminal sentences.⁹³

The principles of open justice, with its attendant rules, is the basic mechanism of ensuring judicial accountability⁹⁴. To the requirements of open justice summarised above, which ensure accountability, may be added the mechanism for litigants or other members of the public to make a complaint about a judicial officer to a specially established, independent body, the Judicial Commission of New South Wales.⁹⁵ That body has the power to uphold the complaint and recommend appropriate disciplinary action. This can include review by a Conduct Division and recommendation to Parliament for the removal of the judicial officer.

There are also informal mechanisms of accountability. Gleeson notes that “the corollary of the obligation of judges to conduct their business in public, and to give reasons for their decisions, is that they are exposed, and are regularly subjected to public comment and criticism...Public obloquy is a powerful sanction...”⁹⁶.

The Land and Environment Court upholds the principles of open justice, accountability and transparency in all its functions:

- (a) All proceedings are conducted in an open forum (for both court hearings and on-site hearings), to which the public and press have access;
- (b) The Court is obliged to give reasons for its decisions. The reasons are to be in writing or, if given orally, to be recorded and reproduced in writing. All decisions are published, not just to the parties, but to the public. They are posted on the internet, both on the Attorney-General's Caselaw database as well as on AustLii. They may be accessed online free of charge. More significant decisions of judges are reported in the authorised law reports of the Local Government and Environmental Reports of Australia or, occasionally, the New South Wales Law Reports.

⁹² *Home Office v Harman* [1982] 2 WLR 338; 1 All ER 532 at 547.

⁹³ Spigelman J J, “Seen to be done: The principles of open justice – Part I” (2000) 74 *Australian Law Journal* 290 at 294-295.

⁹⁴ Spigelman J J, “Seen to be done: The principles of open justice – Part II” (2000) 74 *Australian Law Journal* 378 at 378.

⁹⁵ Established under s 5 of the *Judicial Officers Act 1986*.

⁹⁶ Gleeson M, “Judicial Accountability” (1995) 2 *The Judicial Review* 117 at 123,124.

- (c) The rules of procedural fairness apply in the hearing and determination of matters by the Court.
- (d) The Court reports publicly on its performance in an annual review. The Court's annual review is presented to the executive (through the Attorney-General) and the legislature (available to Parliament) and to the public (distributed to court users and is available online and may be downloaded from the Court's website). It is available in hard copy, CD or electronically.
- (e) The Court hold quarterly meetings of the Court Users Group, at which meetings the Court's performance can be discussed and feedback obtained.
- (f) The press regularly follow, report and comment on and, from time to time, criticise the decisions of the Court.

Accountability is also ensured by the rights of appeal and review. Decisions of Commissioners are appellable on questions of law to a judge of the Court⁹⁷. Decisions of judges are appellable to the Court of Appeal (in the case of civil matters)⁹⁸ and to the Court of Criminal Appeal (in the case of criminal matters).⁹⁹ Decisions of the Registrar are able to be reviewed by a Judge of the Court.¹⁰⁰

Benefits of the Land and Environment Court: the “Desirable Dozen”

The Land and Environment Court is a successful model of a specialist environment court. It may be helpful to endeavour to summarise some of the benefits that have flowed from the establishment and operation of the Court over the last quarter of a century. At least a dozen benefits can be identified:

1. Rationalisation;
2. Specialisation;
3. Multi-Door Courtroom;
4. Superior court of record;
5. Independence from government;
6. Responsiveness to environmental problems;
7. Facilitates access to justice;
8. Development of environmental jurisprudence;
9. Better court administration;
10. Unifying ethos and mission;
11. Decision-making is value-adding; and
12. Flexible and innovative.

I will deal with each of the benefits.

1. Rationalisation

Rationalisation and centralisation of jurisdiction has resulted in the Court having an integrated and coherent environmental jurisdiction. This results in a “critical mass”. There are economic efficiencies for users and public resources in having a “one-stop shop”. Stein,

⁹⁷ s 56A(1) of the *Land and Environment Court Act 1979*.

⁹⁸ s 57(1) of the *Land and Environment Court Act 1979*.

⁹⁹ See ss 5AB, 5AE, 5A(3), 5BA, 5C, 5D, 5DA and 5F of the *Criminal Appeal Act 1912*.

¹⁰⁰ Pt 49 r 49.19 of the *Uniform Civil Procedure Rules 2005*.

a former judge of the Court, posited the following benefits of having an integrated, wide-ranging jurisdiction (a one-stop shop):

- “- decreases multiple proceedings arising out of the same environmental dispute;
- reduces costs and delays and may lead to cheaper project development and prices for consumers;
- greater convenience, efficiency and effectiveness in development control decisions;
- a greater degree of certainty in development projects;
- a single combined jurisdiction is administratively cheaper than multiple separate tribunals;
- litigation will often be reduced with consequent savings to the community.¹⁰¹”

A one-stop shop also facilitates better quality and innovative decision-making in both substance and procedure by cross fertilisation between different classes of jurisdiction. The Court becomes a focus of environmental legal decision-making. It increases the awareness of users, government, environmental NGOs, civil society, legal and other professions and educational institutions of environmental law, policy and issues. Increased awareness, in turn, facilitates increased recourse to and enforcement of environmental law. This improves good governance, a critical element in achieving ecologically sustainable development.¹⁰²

2. *Specialisation*

Environmental issues and the legal and policy responses demand special knowledge and expertise. Judges need to be educated about and attuned to environmental issues and the legal and policy responses. Decision-making quality, effectiveness and efficiency can be enhanced by the availability within the court of technical experts. Specialisation increases knowledge and expertise over time: “practice makes perfect”.

3. *Multi-Door Courtroom*

Rationalisation, specialisation and the availability of a range of court personnel facilitates a range of ADR mechanisms. Rationalisation means that the Court can deal with multiple facets of an environmental dispute and is not unduly limited by jurisdictional limits of a court. For example, remedies for breach of law could include not only civil remedies of a prohibitory or mandatory injunction but also administrative remedies of grant of approval to make the conduct lawful in the future. Specialisation facilitates a better appreciation of the nature and characteristics of environmental disputes and selection of the appropriate dispute resolution mechanism for each dispute. Availability of technical experts (commissioners) in the court enables their use in conciliation and neutral evaluation, as well as improving the quality, effectiveness and efficiency of adjudication.

¹⁰¹ Stein P L, “A Specialist Environmental Court: An Australian Experience” in Robinson D and Dunkley J (eds), *Public Interest Perspectives in Environmental Law*, Wiley Chancery, 1995, p 263.

¹⁰² *Hub Action Group Inc v Minister for Planning and Orange City Council* [2008] NSWLEC 116 (17 March 2008) at [2], [69].

4. *Superior Court of Record*

Establishing an environmental court as a superior court of record enlarges the jurisdiction of the court to include those powers only a superior court of record possesses. The Land and Environment Court has the same powers as the Supreme Court of New South Wales in relation to judicial review, granting equitable remedies for civil enforcement, granting easements over land in certain circumstances, and appellate review of administrative (merits review) decisions and criminal decisions. A superior court of record enjoys a higher status than either an inferior court or tribunal. According that status is a public acknowledgment of the importance of environmental issues and a public pronouncement of the importance of the court and its decisions. A superior court is better able to attract and keep high calibre persons for judicial appointments.

5. *Independence from Government*

Establishing an environmental court as a court, rather than as an organ of the executive branch of government, and as a superior court of record, rather than an inferior court or tribunal, enhances independence. Granting the judges tenure until the statutory retirement age also enhances judicial independence.

6. *Responsiveness to environmental problems*

An environmental court is better able to address the pressing, pervasive and pernicious environmental problems that confront society (such as global warming and loss of biodiversity). New institutions and creative attitudes are required to address these problems. Specialisation enables use of special knowledge and expertise in both the process and the substance of resolution of these problems. Rationalisation enlarges the remedies available.

7. *Facilitates access to justice*

Access to justice includes access to environmental justice¹⁰³. A court can facilitate access to justice both by its substantive decisions and its practices and procedures.

Substantive decisions can uphold fundamental constitutional, statutory and human rights of access to justice. The Land and Environment Court has upheld statutory rights of public access to information; rights to public participation in legislative and administrative decision-making, including requirements for public notification, exhibition and submission and requirements for adequate environmental impact assessment; and public rights to review and appeal legislative and administrative decisions and conduct.

A court can adopt practices and procedures to facilitate access to justice, including removing barriers to public interest litigation. The Land and Environment Court has facilitated public interest litigation by its decisions to: construe liberally standing requirements; not necessarily require an undertaking for damages as a pre-requisite for granting interlocutory injunctive relief; not necessarily require an impecunious public interest litigant to lodge security for the costs of the proceedings; not summarily dismiss proceedings on the ground of laches; and

¹⁰³ See Principle 10 of the *Declaration on Environment and Development* done in Rio de Janeiro, Brazil in 1992 and *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* done at Aarhus, Denmark on 25 June 1998 (in particular Recitals and Articles 1, 3 and 9).

not necessarily require an unsuccessful public interest litigant to pay the costs of the proceedings¹⁰⁴.

The Court Act allows parties to appear by legal representation, by agent authorised in writing or in person¹⁰⁵.

The Court's Rules and Practice Notes require government agencies to discover relevant documents in merits review appeals¹⁰⁶ and in judicial review proceedings and to give reasons in judicial review proceedings¹⁰⁷.

A court can ensure the just, quick and cheap resolution of proceedings, thereby ensuring that rights of review and appeal are not merely theoretically, but are actually available to all who are entitled to seek review or appeal. The Court has particularly adapted its practice and procedure for merits review appeals in Classes 1,2 and 3 to this end. Merits review appeals in Class 1, 2 and 3 are conducted with as little formality and technicality, and with as much expedition, as the requirements of relevant statutes and as the proper consideration of the matters before the Court permit¹⁰⁸. Further, the Court is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits¹⁰⁹.

A court can address inequality of arms between parties. Specialisation and the availability of technical experts (commissioners) in the Court redresses in part inequality of resources and access to expert assistance and evidence. The Court ensures: access for persons with disabilities; access to help and information (by information from the LEC website, information sheets and registry staff); access for unrepresented litigants (special fact sheet as well as other sources of self-help above); and geographical accessibility (use of eCourt, telephone conferences, video-conferencing, country hearings, on-site hearings and taking evidence on site).

8. *Development of environmental jurisprudence*

The Court has shown that an environmental court of the requisite status has more specialised knowledge to, has an increased number of cases and hence more opportunity to, and is more likely to develop environmental jurisprudence. The Court's decisions have developed aspects of substantive, procedural, restorative, therapeutic and distributive justice:

- (a) Substantive justice: the Court has been a leader in developing jurisprudence in relation to principles of ecologically sustainable development (principle of integration, precautionary principle, inter and intra generational equity, conservation of biological diversity and ecological integrity and internalisation of external, environmental costs including the polluter pays principle)¹¹⁰, environmental impact assessment¹¹¹, public trust¹¹², sentencing for environmental crime¹¹³;

¹⁰⁴ Pt 4 r 4.2 of the *Land and Environment Court Rules 2007* and articles in footnote 26.

¹⁰⁵ s 63 of the *Land and Environment Court Act 1979*.

¹⁰⁶ See Practice Note Class 1 – Development Appeals, para 11; Practice Note – Classes 1, 2 and 3 Miscellaneous Appeals, para 6; Practice Note – Class 3 Valuation Objections, para 10.

¹⁰⁷ Pt 4 r 4.3 of the *Land and Environment Court Rules 2007* and Practice Note – Class 4 Proceedings, para 14.

¹⁰⁸ s 38(1) of the *Land and Environment Court Act 1979*.

¹⁰⁹ s 38(2) of the *Land and Environment Court Act 1979*.

¹¹⁰ See cases discussed in Preston B J, "The Role of the Judiciary in Promoting Sustainable Development: the Experience of Asia and the Pacific" (2005) 9 (2&3) *Asia Pacific Journal of Environmental Law* 109.

¹¹¹ See *Prineas v Forestry Commission of NSW* (1983) 49 LGRA 402 at 417, *Warren v Electricity Commission of NSW* (1990) 130 LGRA 565 at 569-571; *Schaffer Corporation Ltd v Hawkesbury City Council* (1992) 77 LGRA 21 at 30-31; *Bentley v BGP Properties Pty Ltd* (2006) 145 LGRA 234 at 245 [67] – 246 [71] and *F & D*

- (b) Procedural justice: access to justice including removal of barriers to public interest litigation in relation to standing, interlocutory injunctions, security for costs, laches and costs¹¹⁴;
- (c) Distributive justice: inter and intra generational equity¹¹⁵, polluter pays principle¹¹⁶, balancing public and private rights and responsibilities;
- (d) Restorative justice: victim-offender mediation¹¹⁷ and polluter pays principle for environmental crime; and
- (e) Therapeutic justice: adopting Court practice and procedure to improve welfare of litigants.

9. *Better Court administration*

The Court model has facilitated better achievement of the objectives of court administration of equity, effectiveness and efficiency. The Court has, relative to other courts in New South Wales, minimal delay and backlog, and high clearance rates and productivity.

10. *Unifying ethos and mission*

Rationalisation and specialisation give an organic coherence to the Court and its work. The nature of environmental law gives a unifying ethos and mission. As Lord Woolf has said: "The primary focus of environmental law is not on the protection of private rights but on the protection of the environment for the public in general".¹¹⁸

Court personnel (judges, commissioners, registrars and court staff) all believe they are engaged in an important and worthwhile endeavour; the Court and its work matter and are making a difference. They view themselves as part of a team; not as individuals working independently. There is an "esprit de corps". The users, legal representatives and experts also share in this spirit and mission.

Bonaccorso Pty Ltd v Canada Bay Council & Ors (No 2) (2007) 158 LGERA 250 at 271 [55] -273 [60]. See further Preston B J, "Adequacy of Environmental Impact Statements in New South Wales" (1986) 3 *Environmental Planning Law Journal* 194 and Preston B J, "The Environmental Impact Statement Threshold Test: When is an Activity Likely to Significantly Affect the Environment." (1990) 7 *Environmental Planning Law Journal* 147.

¹¹² *Willoughby City Council v Minister Administering the National Parks and Wildlife Act* (1992) 78 LGRA 19, Bonyhady T "A Usable Past: The Public Trust in Australia" (1995) 12 *Environmental Planning and Law Journal* 329 and Preston B J, "The Role of the Judiciary in Promoting Sustainable Development: the Experience of Asia and the Pacific" (2005) 9 (2&3) *Asia Pacific Journal of Environmental Law* 109 at 203-206.

¹¹³ See cases in Preston B J, "Sentencing for environmental crime", (2006) 18(6) *Judicial Officers' Bulletin* 41; Preston B J "Principled sentencing for environmental offences – Part 1: purposes of sentencing" (2007) 31 *Criminal Law Journal* 91 and Preston B J "Principled sentencing for environmental offences – Part 2: sentencing considerations and options" (2007) 31 *Criminal Law Journal* 142.

¹¹⁴ See articles in footnote 26.

¹¹⁵ *Gray v Minister for Planning* (2006) 152 LGERA 258 at 293-294; *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59 (12 February 2007) at [73]-[74] and *Hub Action Group Inc v Minister for Planning and Orange City Council* [2008] NSWLEC 116 (17 March 2008) at [72].

¹¹⁶ *Bentley v BGP Properties Pty Ltd* (2006) 145 LGERA 234 at 257 [156] – 258 [157] and *Environment Protection Authority v Waste Recycling and Processing Authority* (2006) 148 LGERA 299 at 341 [230]-[232].

¹¹⁷ *Garrett v Williams* (2007) 151 LGERA 92 and McDonald J M, "Restorative Justice Process in Case Law" (2008) 33 *Alternative Law Journal* 40 and Hamilton M, "Restorative Justice Intervention in an Environmental Law Context: *Garrett v Williams*, Prosecutions under the Resource Management Act 1991 (NZ), and Beyond" (2008) 25 *Environmental Planning Law Journal* 263.

¹¹⁸ Lord Woolf, "Are the Judiciary Environmentally Myopic" (1992) 4 *Journal of Environmental Law* 1 at 4.

11. *Value adding function*

The Court's decisions and work have generated value apart from the particular case or task involved. In merits review appeals, the court's decisions add value to administrative decision-making. The court extrapolates principles from the cases and publicises them. The principles can be used by agencies in future decision-making. Planning principles are published on the Court website. The Court has also been an innovator and national leader in court practices and procedures including: eCourt case management; expert evidence including court-directed joint conferencing and report, concurrent evidence and parties' single experts; and on-site hearings and taking evidence on site. Other courts have followed the Court's lead.

12. *Flexibility and innovation*

Large, established courts can be conservative and have inertia; change is slow and resisted. The fact that this Court is a separate court has enabled flexibility and innovation. Changes to practices and procedure could be achieved quickly and with wide support within the institution. The Court's recent Practice Notes exemplify the Court's ability to adapt quickly and appropriately its practices and procedures.

Conclusion

The Court is undoubtedly a model of a successful environment court. It is long established - now 28 years. It has a pre-eminent international and national reputation. It has received many favourable reviews and been a basis for recommendations for an environment court around the world. However, the Court cannot rest on its laurels. As Gething observes "an excellent organisation is one that is continually looking, learning, changing and improving towards the concept of excellence it has set itself. Excellence is more of a journey than a static destination"¹¹⁹. The Court recognises this need for adaptive management. It continues to monitor its performance against the objectives of court administration - equity, efficiency and effectiveness. It adjusts its procedural and substantive goals and performance in response to the monitoring data. It continues to adapt to meet the environmental challenges of the future.

¹¹⁹ Gething M, "A pathway to excellence for a court: Part 1: Defining the pathway" (2008) 17 *Journal of Judicial Administration* 237 at 237, 242.