

Characteristics of successful environmental courts and tribunals

Presentation by the Hon. Justice Brian J Preston SC* to the

Eco Forum Global Annual Conference Guiyang 2013: The 3rd Environmental Justice Seminar

19-21 July 2013, Guiyang, Guizhou, China

Introduction

Over the course of the past few decades, we have witnessed exponential growth in environmental courts and tribunals (“ECTs”). As Pring and Pring observe in their comprehensive study, over 350 of these specialised fora for resolving environmental disputes may now be found in many countries in every region throughout the world.¹ The surge in popularity of ECTs, and the concomitant benefits that have been experienced by stakeholders in jurisdictions that have established and utilised these specialised fora,² has led to much debate in countries that do not have ECTs. For the most part, the debate about ECTs in these countries has concentrated on a single question: should an ECT be created?³ While there may be contextual and/or other factors in individual jurisdictions that might suggest a negative response to this question,⁴ the advantages of an ECT suggest that these countries should establish one or more ECTs in their jurisdictions.

With this in mind, the purpose of this paper is to identify twelve key characteristics that are required for an ECT to operate successfully in practice. The paper will elucidate these characteristics through drawing upon examples from several jurisdictions, focusing particularly on the experience of the Land and Environment

* Chief Judge, Land and Environment Court of New South Wales. I gratefully acknowledge the assistance of my tipstaff, Guy Dwyer, in the research and writing of this article.

¹ George (Rock) Pring and Catherine (Kitty) Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative, 2009) 1. Cf. Nicholas A Robinson, “Ensuring Access to Justice Through Environmental Courts” (2012) 29 *Pace Environmental Law Review* 363, 381 (noting that informal estimates suggest there are over 400 ECTs throughout the world).

² See, eg, Brian J Preston, “Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study” (2012) 29 *Pace Environmental Law Review* 396, 396-440; Ulf Bjällås, “Experiences of Sweden’s Environmental Courts” (2010) 3 *Journal of Court Innovation* 177, 177-184; Merideth Wright, “The Vermont Environmental Court” (2010) 3 *Journal of Court Innovation* 201, 201-214.

³ Pring and Pring, above n 1, 1.

⁴ See, eg, Zhang Minchun and Zhang Bao, “Specialised Environmental Courts in China: Status Quo, Challenges and Responses” (2012) 30 *Journal of Energy & Natural Resources Law* 361, 363.

Court of New South Wales (“the Land and Environment Court of NSW”). In doing so, I will attempt to identify best practices, both substantive and procedural, from different ECTs throughout the world. This will assist not only those stakeholders and countries that are in the process of planning or creating ECTs in their jurisdictions, but also those stakeholders and countries that are looking to improve the functioning and performance of their own ECTs.

1. Status and authority

On first inspection, one cannot help but observe that the status and authority of successful ECTs located throughout the world does not necessarily correlate with the ECT being a court rather than a tribunal, or a court at a higher level in the hierarchy of courts. Some of these successful fora have been established as a superior court of record (e.g. the Land and Environment Court of NSW),⁵ or as a divisions of a superior court of record (e.g. the Environmental Division of the Superior Court of Vermont),⁶ whereas others have been established as inferior courts of record (e.g. the Environment Court of New Zealand,⁷ the Planning and Environment Court of Queensland,⁸ and the Environment, Resources and Development Court of South Australia)⁹ or tribunals with one or more environmental divisions or streams (e.g. the State Administrative Tribunal of Western Australia,¹⁰ the Victorian Civil and Administrative Tribunal¹¹ or the Environment and Lands Tribunals of Ontario).¹²

⁵ Brian J Preston, “Operating an environment court: The experience of the Land and Environment Court of New South Wales” (2008) 25 *Environmental and Planning Law Journal* 385, 387.

⁶ Vermont Judiciary, *Vermont Superior Court – Environmental Division* <<http://www.vermontjudiciary.org/gtc/environmental/default.aspx>>.

⁷ See generally Bret C Birdsong, “Adjudicating Sustainability: New Zealand’s Environment Court” (2002) 29 *Ecology Law Quarterly* 1, 26-38.

⁸ See generally Michael Rackemann, “The Planning and Environment Court of Queensland: A case study” (Paper presented to the Symposium on Environmental Decision-making, the Rule of Law and Environmental Justice, Asian Development Bank Headquarters, Manila, 28-29 July 2010) 1-6.

⁹ See generally Christine Trenorden, “The Environment, Resources and Development Court: An Overview” (Paper presented to the Australasian Conference of Planning and Environment Courts and Tribunals, Sydney, 2 September 2010) 1.

¹⁰ See David Parry, “Revolution in the West: The transformation of planning appeals in Western Australia” (2008) 14 *Local Government Law Journal* 119, 127.

¹¹ See Kevin Bell, *One VCAT: President’s Review of VCAT* (Victorian Civil and Administrative Tribunal, 30 November 2009) 9-18.

¹² See Michael Gottheil and Doug Ewart, “Improving Access to Justice through International Dialogue: Lessons for and from Ontario’s Cluster Approach to Tribunal Efficiency and Effectiveness” (Paper presented to the Australasian Conference of Planning and Environment Courts and Tribunals,

Equally, however, those ECTs throughout the world that have been less successful have been both courts and tribunals, and courts at a higher level in the court hierarchy. For example, the Environmental Commission of Trinidad & Tobago was established as a superior court of record but has struggled as an ECT in practice. The struggles of the Environmental Commission have been attributed to many factors. According to Sandra Paul, the former Chair of the Environmental Commission,¹³ one of the key reasons behind this ECT's lack of success has been the failure of the national government to enact the relevant environmental laws that were due to be enacted shortly after the Environmental Commission was established in 1995.¹⁴ The absence of such laws has resulted in an ECT that is vested with limited jurisdiction and has very low caseloads.¹⁵ There have also been other inferior courts (e.g. ECTs in the Chinese province of Liaoning)¹⁶ and tribunals (e.g. Local Government Appeals Tribunal of NSW and the Land and Resources Tribunal of Queensland) that were considered to be sufficiently unsuccessful (for varying reasons) that they have been abolished.

Bearing these examples in mind, it seems that one cannot determine the success or otherwise of an ECT merely on the basis of its status as a superior or inferior court or a tribunal. However, when one examines closely the more successful ECTs, it is evident that these fora demonstrate many common traits or characteristics that give the ECTs status and authority.

First, many of the successful ECTs enjoy a more comprehensive jurisdiction than their unsuccessful counterparts. For example, the Land and Environment Court of NSW has benefitted greatly from its comprehensive jurisdiction for dealing with various types of environmental, planning, development, building, local government, resources and land matters.¹⁷ The breadth of its jurisdiction is in part a function of it

Sydney, 2 September 2010) 1-9; Lorne Sossin and Jamie Baxter, "Ontario's administrative tribunal clusters: A glass half-full or half-empty for administrative justice" (2012) 12 *Oxford University Commonwealth Law Journal* 157, 160.

¹³ For a listing of current members of the Environmental Commission, see The Environmental Commission of Trinidad & Tobago, *Members of the Commission*

<<http://www.ttenvironmentalcommission.org/home/about-us/members-of-the-commission.html>>.

¹⁴ Sandra Paul, quoted in Pring and Pring, above n 1, 31.

¹⁵ Pring and Pring, above n 1, 31-32.

¹⁶ Zhang and Zhang, above n 4, 380.

¹⁷ See generally Preston, above n 5, 387.

being a superior court of record, able to exercise jurisdiction formerly exercised by the Supreme Court of New South Wales in relation to environmental matters. The Court has a merits review function, reviewing decisions of government bodies and officials in a wide range of environmental 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.¹⁸ The Court also has appellate functions, hearing appeals against conviction or sentence for environmental offences from the Local Court of NSW and appeals (on questions of law) from decisions of commissioners of the Court.¹⁹

The Environment Court of NZ provides a further example of an ECT that has benefitted from a comprehensive jurisdiction. Birdsong has noted that this court exercises its authority under the key piece of environmental legislation in New Zealand – the *Resource Management Act 1991* (NZ) (“the RM Act”) – in three main ways.²⁰ First, the Court has the power to make certain declarations of law, such as a declaration that a particular act or omission, or a proposed act or omission, contravenes or is likely to contravene the RM Act.²¹ Secondly, the Court has the authority to review *de novo* a wide range of decisions made by local and regional government authorities under the RM Act including, for instance, decisions on resource consents.²² Thirdly, it has the power to enforce the duties imposed on persons by the RM Act through civil or criminal proceedings.²³

In contrast to the Land and Environment Court of NSW and the Environment Court of NZ, those ECTs that have experienced less success will usually be vested with limited jurisdiction to hear and determine environmental matters and disputes. This

¹⁸ On this topic, see Brian J Preston, “Enforcement of environmental and planning laws in New South Wales” (2011) 16 *Local Government Law Journal* 72, 72-85.

¹⁹ Commissioners are persons with special knowledge and expertise (e.g. in town planning, environmental science, land valuation, heritage and so on) who hear cases on the merits in Classes 1-3 of the Land and Environment Court’s jurisdiction: see Preston, above n 5, 387-391 and *Land and Environment Court Act 1979* (NSW) s 12.

²⁰ Birdsong, above n 7, 28.

²¹ *Resource Management Act 1991* (NZ) s 310(c).

²² *Resource Management Act 1991* (NZ) s 120.

²³ See generally *Resource Management Act 1991* (NZ) ss 314-321.

is well reflected, for example, by the Environmental Commission of Trinidad & Tobago (as discussed above). Another example is provided by the National Environmental Tribunal in Kenya, an ECT which has had a low case load by virtue of its jurisdiction being limited to environmental impact assessment (“EIA”) appeals only.²⁴ The failure to accord ECTs with comprehensive jurisdiction to hear and determine environmental matters serves to curtail severely the ability of these specialised fora to contribute to the development of environmental jurisprudence, and facilitate good environmental governance.

Secondly, and in addition to enjoying comprehensive jurisdiction over various types of environmental matters, successful ECTs are usually recognised by governments, stakeholders and the wider community alike as *the* appropriate and legitimate forum for resolving environmental disputes.

For example, the establishment of the Land and Environment Court of NSW as a superior court of record with comprehensive jurisdiction in environmental matters represented a public acknowledgment of the importance of environmental issues and a public pronouncement of the importance of the Court and its decisions.²⁵ This has enabled the Court to attract and keep high calibre persons for judicial appointments. In particular, the decision-makers of the Court are environmentally literate and have substantial expertise in the matters they are hearing. Such expertise is a key factor which underscores the appropriateness of this ECT as the forum for resolving environmental disputes in NSW. Moreover, the establishment of the Land and Environment 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 and legitimacy. Granting the judges tenure until the statutory retirement age also enhances its judicial independence²⁶ which, in turn, supports observance of the rule of law.²⁷

²⁴ Pring and Pring, above n 1, 32.

²⁵ Preston, above n 2, 427.

²⁶ See Steven Rares, “What is a Quality Judiciary?” (2011) 20 *Journal of Judicial Administration* 133, 135.

²⁷ See Brian J Preston, “The enduring importance of the rule of law in times of change” (2012) 86 *Australian Law Journal* 175, 180; Joseph Raz, *The Authority of Law* (Clarendon Press, 1979) 216-217; Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 91-92.

The Swedish system of environmental courts provides a further example of the importance of comprehensive jurisdiction, coupled with appropriate expertise and legitimacy, to the success of ECTs. As Bjällås has noted, the success of environmental courts in Sweden may be attributed, in no small part, to the presence of two characteristics. First, the Swedish ECTs have enjoyed a substantial case load as a result of being vested by Sweden's Environmental Code with comprehensive civil and administrative jurisdiction and a range of enforcement powers.²⁸ Secondly, the Swedish ECTs have been viewed as highly credible institutions that "are fully accepted" by both industry groups and NGOs focusing on environmental protection.²⁹

Those ECTs throughout the world that have been less successful have often tended to be viewed as either inappropriate or illegitimate fora for resolving environmental disputes. This is well reflected, for example, by the Dhaka Environmental Court in Bangladesh which suffers from a lack of judicial and political independence from the other branches of government.³⁰ In order for a person to file a complaint in this ECT, he or she must first file a complaint with the Department of Environment ("the DOE"). It is only once the DOE has conducted an investigation into the complaint and issued a report that a person will be able to use the report as a basis for bringing a case before the Court. During an interview with the DOE, Pring and Pring were informed by its Director that "there are thousands of complaints, dating back years, which his agency will never investigate or generate a report which would permit a judicial filing".³¹ The consequence of such an approach has been a low case load for the Dhaka Environmental Court, with the DOE's complete control as a "gatekeeper" presenting a major obstacle to access to environmental justice.³² This approach has also served to undermine the legitimacy of the Dhaka Environmental Court as an independent and appropriate forum for resolving environmental disputes.

Thirdly, the status and authority of a more successful ECT is often enhanced through the presence of judges who are environmentally literate, or alternatively who may be

²⁸ Bjällås, above n 2, 178.

²⁹ *Ibid.* 182.

³⁰ Pring and Pring, above n 1, 32-33.

³¹ *Ibid.*

³² *Ibid.*

trained to be so literate, and can contribute to the development of environmental jurisprudence.³³

The ability of an ECT to develop environmental jurisprudence is, in turn, dependent upon it being presented with opportunities to do so (i.e. having a sufficient number of cases to decide).³⁴ Again, the Land and Environment Court of NSW provides an illustrative example. The Court has enjoyed a constant flow of cases since it first came into operation in September 1980.³⁵ This has enabled the Court to develop numerous precedents in four different yet related areas of environmental justice. First, the Court has been a leader in developing jurisprudence on substantive justice,³⁶ especially in relation to principles of ecologically sustainable development (“ESD”) (such as the precautionary principle),³⁷ EIA,³⁸ the public trust,³⁹ and sentencing for environmental crime.⁴⁰ Secondly, the Court has enunciated a number of principles of procedural environmental justice with respect to the removal of barriers to public interest litigation in relation to standing, interlocutory injunctions, security for costs, laches, and costs.⁴¹ Thirdly, the Court has articulated

³³ Preston, above n 2, 425-426 and 434-435.

³⁴ Ibid 434.

³⁵ See Preston, above n 5, 387 and 390.

³⁶ Preston, above n 2, 434.

³⁷ See cases discussed in Paul Stein AM, “Turning Soft Law into Hard – An Australian Experience with ESD Principles in Practice” (1997) 3 *The Judicial Review* 91, 91-97; Brian J Preston, “Leadership by the courts in achieving sustainability” (2010) 27 *Environmental and Planning Law Journal* 321, 321-330; Brian J Preston, “The Role of the Judiciary in Promoting Sustainable Development: the Experience of Asia and the Pacific” (2005) 9 *Asia-Pacific Journal of Environmental Law* 109, 144-211.

³⁸ See, eg, *Prineas v Forestry Commission of NSW* (1983) 49 LGRA 402, 417; *Warren v Electricity Commission of New South Wales* (1990) 130 LGERA 565, 569-571; *Shaffer Corporation Ltd v Hawkesbury City Council* (1992) 77 LGRA 21, 30-31; *Bentley v BGP Properties Pty Ltd* (2006) 145 LGERA 234, 245-246. See also Brian J Preston, “Adequacy of Environmental Impact Statements in New South Wales” (1986) 3 *Environmental and Planning Law Journal* 194; Brian J Preston, “The Environmental Impact Statement Threshold Test: When is an Activity Likely to Significantly Affect the Environment?” (1990) 7 *Environmental and Planning Law Journal* 147.

³⁹ See, eg, *Willoughby City Council v Minister Administering the National Parks & Wildlife Act* (1992) 78 LGRA 19. See also Tim Bonyhady, “A Usable Past: The Public Trust in Australia” (1995) 12 *Environmental and Planning Law Journal* 329; Preston (2005), above n 37, 203-206.

⁴⁰ See cases discussed in Brian J Preston, “Sentencing for Environmental Crime” (2006) 18 *Judicial Officers’ Bulletin* 41. For a full description of principled environmental sentencing, see Brian J Preston, “Principled sentencing for environmental offences – Part 1: Purposes of sentencing” (2007) 31 *Criminal Law Journal* 91 (“Preston (2007a)”); Brian J Preston, “Principled sentencing for environmental offences – Part 2: Sentencing considerations and options” (2007) 31 *Criminal Law Journal* 142 (“Preston (2007b)”).

⁴¹ See, eg, *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* (2010) 172 LGERA 280; *Hill Top Residents Action Group Inc v Minister for Planning (No 3)* (2010) 176 LGERA 20 (regarding costs in public interest litigation).

jurisprudence on the issue of distributive justice in environmental matters.⁴² Finally, the Court has taken an innovative approach in developing jurisprudence in the area of environmental crime by giving practical effect to abstract and theoretical notions of restorative justice.⁴³

2. Independent from government and impartial

Another characteristic that is generally shared by many of the more successful ECTs located throughout the world is independence from government, an issue that has been touched upon above. An essential component of a system of good environmental justice and governance is the existence of an independent and impartial adjudicator (i.e. an ECT) which can make decisions on the merits or review such decisions for errors of law, as the case may be.⁴⁴ Independence not only requires independence from the legislative and executive branches of government but also independence from all influences external to the ECT which might lead it to decide cases otherwise than on the legal and factual merits.⁴⁵ As Lord Bingham observed the principle of independence:

calls for decision-makers to be independent of local government, vested interests of any kind, public and parliamentary opinion, the media, political parties and pressure groups, and their own colleagues, particularly those senior to them. In short, they must be independent of anybody and anything which might lead them

⁴² See, eg, *Gray v Minister for Planning* (2006) 152 LGERA 234, 257-258; *Taralga Landscape Guardians Inc v Minister for Planning & RES Southern Cross Pty Ltd* (2007) 161 LGERA 1, 12; *Hub Action Group Incorporated v Minister for Planning & Orange City Council* (2008) 161 LGERA 136, 158; *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* [2013] NSWLEC 48, [485]-[495].

⁴³ See, eg, *Garrett v Williams* (2007) 151 LGERA 92 and cases discussed in Brian J Preston, "Sustainable Development Law in the Courts: The Polluter Pays Principle" (2009) 26 *Environmental and Planning Law Journal* 257. See also John M McDonald, "Restorative Justice Process in Case Law" (2008) 33 *Alternative Law Journal* 40; Mark Hamilton, "Restorative Justice Intervention in an Environmental Law Context: *Garrett v Williams*, Prosecutions under the *Resource Management Act 1991* (NZ), and Beyond" (2008) 25 *Environmental and Planning Law Journal* 263; Brian J Preston, "The Use of Restorative Justice for Environmental Crime" (2011) 35 *Criminal Law Journal* 136; Rob White, "Environmental crime and problem-solving courts" (2013) 59 *Crime, Law and Social Change* 267; Reece Walters and Diane Solomon Westerhuis, "Green crime and the role of environmental courts" (2013) 59 *Crime, Law and Social Change* 279.

⁴⁴ See generally Gordon Walker, *Environmental Justice: Concepts, evidence and politics* (Routledge, 2012) 48-49; Paul L Stein AM, "Courts and Tribunals – Appeal Systems Why Reinvent the Wheel?" (1999) 4 *Local Government Law Journal* 90, 90; Preston, above n 2, 427.

⁴⁵ See Preston, above n 27, 180-181. See also Brian J Preston, "Environmental Public Interest Litigation: Conditions for Success" (Paper presented to the International Symposium "Towards an Effective Guarantee of the Green Access: Japan's Achievements and Critical Points from a Global Perspective", Awaji Island, Japan, 30 March 2013) 30.

to decide issues coming before them on anything other than the legal and factual merits of the case as, in the exercise of their own judgment, they consider them to be.⁴⁶

This statement of the principle of independence is particularly apposite to specialised ECTs, as these types of fora deal with environmental and planning disputes where there is high potential for significant external pressures.⁴⁷

Closely related to the principle of independence is the requirement that a decision-maker be impartial. This requires that there be no conflict of interest and no actual or apprehended bias.⁴⁸ A decision-maker can, of course, not be a judge in his or her own cause.⁴⁹ It also requires decision-makers to alert themselves to, and to neutralise as far as possible, personal predilections or prejudices or any extraneous considerations that might pervert their judgment.⁵⁰

The independence and impartiality of ECT judges or decision-makers can be enabled by institutional arrangements and rules concerning: selection of judges or decision-makers on the basis of appropriate qualifications; long-term tenure and security of tenure; procedural and substantive protection against the removal of judges; the means of fixing and reviewing reasonable remuneration and other conditions of service; the publishing of reasons for decisions made; and sufficient resources to maintain a functioning ECT. Such institutional arrangements and rules are intended to guarantee that judges will be free from extraneous pressures and be independent from all authority except that of the law.⁵¹ There are several ECTs throughout the world that have successfully integrated these qualities of best practice into its design and ongoing day-to-day operations.

⁴⁶ Bingham, above n 27, 92.

⁴⁷ Preston, above n 27, 181.

⁴⁸ See generally Brian J Preston, "Natural justice by the courts: some recent cases" (2013) 11 *The Judicial Review* 193, 209-214.

⁴⁹ John Rawls, *A Theory of Justice* (Harvard University Press, revised ed, 1999) 210.

⁵⁰ Bingham, above n 27, 93.

⁵¹ See generally Pring and Pring, above n 1, 75; Raz, n 27, 217; Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) 124; Thomas Ginsberg, "The Politics of Courts in Democratization" in James J Heckman, Robert L Nelson and Lee Cabatingan (eds), *Global Perspectives on the Rule of Law* (Routledge, 2010) 176; Rares, above n 26, 135-136; Robert French, "The State of the Australian Judicature" (2010) 84 *Australian Law Journal* 310, 317-318.

The environmental courts of Brazil, for example, have been particularly successful in establishing formally independent and impartial ECTs such as the Amazonas State Environmental Court (trial) in Manaus and the Sao Paulo State Tribunal de Justiça (court of appeals) Environmental Chamber.⁵² As Pring and Pring note, “[s]ome of the most independent judges, in the sense of being free from political influence and party pressure, are in Brazil”.⁵³

Unlike many jurisdictions, the process for selecting trial and appellate environmental judges in Brazil is not managed by the government but rather the civil service.⁵⁴ If a person wishes to apply for a position as an environmental judge, he or she must undertake a civil service test involving an exam and rigorous personal interviews.⁵⁵ Successful candidates are then selected on merit, based on a combination of their exam scores, education and experience.⁵⁶ Once selected, a newly admitted judge acts as a “substitute judge” which is an entry-level position.⁵⁷ The substitute judge relieves more senior judges who are on leave or serve on ECTs that are overburdened. After a period of two years in office, these judges acquire life tenure up to the mandatory retirement age of seventy years.⁵⁸

Judges in Brazil are paid very well relative to professional salaries in that country and when compared to countries of a similar nature.⁵⁹ Independence and impartiality is further enhanced in Brazil by virtue of the fact that ECT budgets are insulated, as far as possible, from political manipulation (e.g. government deciding to

⁵² For an overview of environmental courts in Brazil, see Vladimir Passos de Freitas, “Environmental Law and Enforcement in Brazil” (Paper presented to the Australasian Conference of Planning and Environment Courts and Tribunals, Sydney, 2 September 2010) 3.

⁵³ Pring and Pring, above n 1, 72.

⁵⁴ *Ibid.* It should be noted, however, there is some political involvement in the selection and appointment of judges at the Superior Tribunal de Justiça level: see Nicholas S Bryner, “Brazil’s Green Court: Environmental Law in the *Superior Tribunal de Justiça* (High Court of Brazil)” (2012) 29 *Pace Environmental Law Review* 470, 483.

⁵⁵ Pring and Pring, above n 1, 72; Daniel Brinks, “Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium” (2005) 40 *Texas International Law Journal* 595, 614.

⁵⁶ Pring and Pring, above n 1, 72.

⁵⁷ See generally Maria Angela Jardim de Santa Cruz Oliveira and Nuno M Garoupa, “Choosing Judges in Brazil: Reassessing Legal Transplants from the US” (2011) 59 *American Journal of Comparative Law* 529, 536.

⁵⁸ *Ibid.*

⁵⁹ Pring and Pring, above n 1, 75.

reduce an ECT's funding on the basis that it has made a decision that the government does not agree with or is publically unpopular).⁶⁰

In contrast to the environmental courts of Brazil, those “captive” environmental tribunals located throughout the world are somewhat impaired from achieving independence and impartiality in the discharge of their decision-making functions. A “captive” tribunal is a body “whose members are appointed by, answerable to, and/or are housed in the environmental agency whose decisions they are supposed to review.”⁶¹

The Environmental Appeals Board (“the EAB”) in the United States, for example, is an administrative tribunal falling within the executive branch of the US government – more specifically, the Environmental Protection Agency (“the EPA”).⁶² This ECT is comprised of political appointees of the EPA and is required to give effect to the policies of the administration in power.⁶³ While the EPA has instituted “strict rules” governing the conduct of EAB decision-makers in an effort to ensure their neutrality and decisional independence,⁶⁴ and there is evidence to suggest that the decision-makers of the EAB are considered to be very professional,⁶⁵ it is arguable that an objective observer may view this “captive” tribunal as lacking independence and, consequently, impartiality.⁶⁶ Such a view is strengthened by the absence of tenure protections for members of the EAB.⁶⁷ In this respect, it is probably more desirable for environmental tribunals to not follow the “captive” model.⁶⁸

⁶⁰ Ibid.

⁶¹ Ibid 26.

⁶² See Anna L Wolgast, Kathie A Stein and Timothy R Epp, “The United States’ Environmental Adjudication Tribunal” (2010) 3 *Journal of Court Innovation* 185, 187. It has been observed that the EAB is “an impartial body independent of all EPA components outside of the Office of the Administrator”: see Robert W Collin, *The Environmental Protection Agency: Cleaning Up America’s Act* (Greenwood Press, 2006) 182. See also Nancy B Firestone, “The Environmental Protection Agency’s Environmental Appeals Board” (1994) 1 *The Environmental Lawyer* 1, 3. However, the Office of the Administrator, under which the EAB falls, is still a component of the EPA. Hence, the EAB is an administrative tribunal falling within the EPA, which is part of the executive branch of government.

⁶³ Pring and Pring, above n 1, 26.

⁶⁴ See Joseph J Lisa, “EPA Administrative Enforcement Actions: An Introduction to the Consolidated Rules of Practice” (2005) 24 *Temple Journal of Science, Technology and Environmental Law* 1, 9

⁶⁵ Pring and Pring, above n 1, 26.

⁶⁶ See generally Peter Cane, *Administrative Law* (Oxford University Press, 2011) 96.

⁶⁷ Russell L Weaver, “Appellate Review in Executive Departments and Agencies” (1996) 48 *Administrative Law Review* 251, 271. As Weaver notes, “[i]f the Administrator [of the EPA] becomes

Another factor that may hinder the achievement by an ECT of independence and impartiality is the temporary secondment of staff from the executive branch of government to an ECT. In such circumstances, there is a danger that the member of the ECT that has been seconded from the government will discharge his or her ECT functions in the interests of the department or agency from which he or she is seconded. This is especially so if that ECT member is obligated to return to his or her original department upon completion of his or her secondment.

Finally, the independence and impartiality of ECT members may be undermined in circumstances where those members are appointed for short-term periods without long-term security of tenure. This is illustrated, for example, by the *Umweltsenat* (Environmental Senate) of Austria.

The law of Austria provides that the *Umweltsenat* shall be comprised of ten judicial members and thirty-two additional members who are legally qualified.⁶⁹ All forty-two members of this ECT are appointed politically by the federal president upon recommendation of the federal government, and this recommendation must include eighteen members recommended by each of the nine state governments in Austria. A member of the *Umweltsenat* is only appointed for a period of six years and may be reappointed upon expiration of his or her term. Madner observes that a member's appointment may not be revoked during the six year period, and that members are required by law to exercise their functions independently.⁷⁰ Notwithstanding this, the very nature of a short-term appointment carries with it a serious risk that a member's prospects for being reappointed depend on making politically uncontroversial and acceptable decisions.⁷¹ This, in turn, may exert indirect influence upon a member to make decisions in a certain way.

dissatisfied with the board, or the decisions it renders, the Administrator can change the board's composition".

⁶⁸ On the issue of independence of "captive" environmental tribunals, see generally William A Tilleman, "Environmental Appeal Boards: A Comparative Look at the United States, Canada and England" (1996) 21 *Columbia Journal of Environmental Law* 1, 18-38.

⁶⁹ Verena Madner, "The Austrian Environmental Senate" (2010) 3 *Journal of Court Innovation* 23, 29.

⁷⁰ *Ibid.*

⁷¹ Pring and Pring, above n 1, 75.

The independence and impartiality of an ECT is, therefore, of the utmost importance. Antônio Benjamin, a Justice of the High Court of Brazil, recently remarked that “the true rule of law cannot exist without ecological sustainability and an independent judiciary”.⁷² In this respect, there can be no doubt that specialised environmental courts are better placed than generalist courts to secure the achievement of *both* ecological sustainability and an independent judiciary which, in turn, ultimately serves to achieve the rule of law.

3. Comprehensive and centralised jurisdiction

As discussed briefly above, many of the more successful ECTs located throughout the world have been characterised by a comprehensive jurisdiction (e.g. the Land and Environment Court of NSW, the Environmental Court of NZ and so on). The jurisdiction of an ECT should be comprehensive in various respects.

First, an ECT should enjoy comprehensive jurisdiction to hear, determine and dispose of matters and disputes arising under the environmental laws enacted by the government of the land.⁷³ To this end, the laws of the land must create or enable legal suits or actions in relation to the aspects of the environment that are sought to be used or protected when accessing the ECT.⁷⁴ If there is no right of action, the ECT will simply not have any jurisdiction at all to hear a party which feels aggrieved by a decision or action it believes to be unjust. Civil actions could be to enforce compliance with the law by the government and private sectors, and to restrain and remedy non-compliance (civil enforcement); to obtain compensation for loss or damage caused by breach of duties (damages actions); to review the legality of administrative decisions and conduct (judicial review); or to review the merits of administrative decisions on a rehearing (merits review). Criminal actions could be to prosecute and punish wrongdoers for offences against the laws.

Further, it must be recognised that in order for an ECT to enjoy comprehensive jurisdiction to hear, determine and dispose of matters and disputes arising under the

⁷² See Antônio Herman Benjamin, “We, the Judges, and the Environment” (2012) 29 *Pace Environmental Law Review* 582, 586.

⁷³ Pring and Pring, above n 1, 26-27.

⁷⁴ See generally Preston, above n 45, 1-2.

environmental laws of the land, those laws must themselves have adequate subject matter coverage, be effective and be enforceable by government, citizens and other stakeholders.⁷⁵

As to coverage, the laws should address all substantive aspects of regulating the conservation and wise use of the environment, including public and private natural resources, natural and cultural heritage, and biological diversity and ecological integrity, as well as procedural aspects such as EIA, access to information, public participation in decision-making, and access to justice in environmental matters.

As to effectiveness, the terms of the laws should give effect to the purpose of the laws and enable the achievement of any intended substantive or procedural outcome. This may be done by imposing public duties on decision-makers to take action or produce an outcome rather than conferring open-textured and unstructured discretionary powers which “provide an escape hatch for foot dragging agencies”.⁷⁶ Of course, it should be noted that the dynamic nature of environments may render it difficult to devise and subsequently impose legal duties upon a decision-maker to produce an outcome from decision-making (e.g. ESD).⁷⁷ In those circumstances, the effective or appropriate use of discretion by decision-makers may serve to facilitate individualised and/or environmental justice, and may potentially facilitate and enhance dialogue, democracy and citizen participation in decision-making.⁷⁸

As to enforceability, the laws should impose duties or confer rights that are enforceable, or enable wrongs to be remedied or punished, at the suit of government and citizens; enable judicial review or merits review of governmental decisions, exercises of discretionary power and conduct by citizens and other stakeholders; and enable the grant of appropriate remedies in suits brought by citizens and other

⁷⁵ Ibid 2.

⁷⁶ *Calvert Cliffs' Coordinating Committee Inc v United States Atomic Energy Commission* 449 F 2d 1109, 1114. A government agency's exercise of discretion may be unreviewable where the statute is drawn in such broad terms that there is no law to apply or there is no meaningful standard against which to judge the exercise of discretion: *Sierra Club v Jackson* 648 F 3d 848, 855 (DC Cir 2011).

⁷⁷ See D E Fisher, *Australian Environmental Law: Norms, Principles and Rules* (Thomson Reuters, 2nd ed, 2010) 157-158.

⁷⁸ See generally Guy J Dwyer and Mark P Taylor, “Moving from consideration to application: The uptake of principles of ecologically sustainable development in environmental decision-making in New South Wales” (2013) 30 *Environmental and Planning Law Journal* 185, 207-211.

stakeholders, including orders restraining, remediating or compensating for environmental harm.⁷⁹

Generally speaking, those ECTs throughout the world that have had more success have enjoyed a comprehensive jurisdiction with respect to coverage of matters and disputes arising under all of the environmental laws of the land. This is well reflected, for example, by the examples of the Land and Environment Court of NSW and Environmental Court of NZ (as discussed above). In contrast to these two courts, there are a number of other ECTs that currently have limited jurisdiction to deal with environmental matters. For example, the An Bord Pleanála (Planning Appeals Board) of Ireland and the National Environmental Tribunal of Kenya respectively only deal with land use (not environmental) laws and EIA appeals.⁸⁰ By limiting jurisdiction in this way, the Irish and Kenyan governments have curtailed the ability of these ECTs to make a holistic contribution to environmental governance in these jurisdictions.

Kenya has recently recognised the inherent limitations of the design of the National Environmental Tribunal by establishing a new Environment and Land Court under its new Constitution of 2010.⁸¹ The Environment and Land Court is a superior court of record that enjoys a comprehensive jurisdiction over environmental and land use matters.⁸²

While the constitutional reforms have established a clear and formal structure of courts in Kenya, Kaniaru has observed that the same cannot be said for the structure of tribunals in this country.⁸³ A high level of fragmentation exists in the structuring of tribunals in Kenya, where distinct, separate tribunals have jurisdiction to determine distinct types of environmental matters (e.g. disputes over natural resources as

⁷⁹ See, eg, Brian J Preston, "Public Enforcement of Environmental Laws in Australia" (1991) 6 *Journal of Environmental Law and Litigation* 39, 43-79.

⁸⁰ Pring and Pring, above n 1, 27; Donald W Kaniaru, "Jurisdiction, Structure and Civil Practice and Procedure in Overseas Courts and Tribunals: The Case of the National Environment Tribunal (NET) of Kenya" (Paper presented to the Australasian Conference of Planning and Environment Courts and Tribunals, Sydney, 2 September 2010) 3-5.

⁸¹ See Donald W Kaniaru, "Environmental Courts and Tribunals: The Case of Kenya" (2012) 29 *Pace Environmental Law Review* 566, 572.

⁸² *Ibid* 573-581.

⁸³ *Ibid* 575.

distinct from land use disputes). Kaniaru suggests that there would be much benefit in reforming the existing structure of tribunals in Kenya by establishing a single tribunal with consolidated jurisdiction over all environmental, land use and natural resource issues, reasoning that regulation of the environment “cannot be dissected into small compartments”.⁸⁴

Secondly, and as indicated above, the ECTs should enjoy comprehensive jurisdiction with respect to the administrative, civil *and* criminal enforcement of environmental laws.⁸⁵ In relation to administrative and civil enforcement actions, the government of the land should facilitate comprehensive jurisdiction by ensuring that: causes of action or other legal suits are justiciable by the courts; interested parties have standing to sue; and, financially disadvantaged parties are assisted in building their case through access to lawyers, experts and environmental information (e.g. by offering of pro bono publico services and devising procedures to facilitate freedom of information).⁸⁶

There are many ECTs throughout the world that possess powers with respect to administrative, civil and criminal enforcement. These include the powerful “hybrid” ECTs located in Sweden, the Land and Environment Court of NSW, the Environmental Court of NZ, ECTs in Brazil and a number of local government ECTs in the United States.⁸⁷ Deterrence is an important factor to be considered in devising an ECT’s enforcement jurisdiction, not only in criminal matters⁸⁸ but also in administrative and civil enforcement.⁸⁹ An ECT is likely to be more successful in circumstances where one of its key characteristics is the authority to impose a variety of civil, administrative and criminal penalties, ranging from monetary penalties (civil) or fines (criminal) to jail terms and other criminal sanctions that are sufficiently high as to act as an effective deterrent.⁹⁰

⁸⁴ Ibid.

⁸⁵ Pring and Pring, above n 1, 27.

⁸⁶ See generally Preston, above n 45, 3-20.

⁸⁷ Pring and Pring, above n 1, 27.

⁸⁸ See also Preston (2007a), above n 40, 94-96.

⁸⁹ Pring and Pring, above n 1, 27.

⁹⁰ Ibid. See also Preston (2007b), above n 40, 142-164.

Thirdly, it is ideal for ECTs to have not only comprehensive and integrated jurisdiction in terms of the number of substantive environmental matters it deals with (e.g. land use planning, environmental protection, pollution control, compulsory acquisition of property, development assessment, approvals and so on),⁹¹ but also comprehensive jurisdiction in terms of the types of cases it has authority to hear (e.g. merits review, judicial review, civil enforcement, criminal proceedings and so on). More successful ECTs, such as the Land and Environment Court of NSW, have the authority to hear, determine and dispose of many different types of cases. These include cases involving trial, review or appeal of government decisions, review of commissioner decisions by judges,⁹² appeals from decisions of inferior courts, as well as original jurisdiction to determine tree disputes and mining matters.⁹³ By enabling all of these types of cases to be centralised in a “one-stop shop”, the quality, consistency and speed of decision-making can all be enhanced.⁹⁴

This brings me to a characteristic that goes hand-in-hand with comprehensive jurisdiction: centralisation. Centralisation and rationalisation of jurisdiction enables a court to enjoy a comprehensive, integrated, and coherent environmental jurisdiction.⁹⁵ It also facilitates the bringing together of jurisdiction and all laws covering the different legal aspects of environmental disputes, and may in some circumstances enable an ECT to adopt a creative and innovative “problem solving” approach to restraining, remediating or compensating for environmental harm. Such a creative and innovative approach enables an ECT to effectively determine not only the legal aspects of disputes but also the non-legal aspects of a dispute (e.g. ecological integrity).⁹⁶ The centralisation of jurisdiction will usually increase the number of cases that are brought in an ECT and ensure there is a “critical mass” of cases, which results in economies of scale not able to be achieved by dissipation of environmental matters throughout different courts and tribunals.

⁹¹ Pring and Pring, above n 1, 28.

⁹² *Land and Environment Court Act 1979* (NSW) s 56A.

⁹³ Brian J Preston, “The Land and Environment Court of New South Wales: Moving towards a multi-door courthouse – Part II” (2008) 19 *Australasian Dispute Resolution Journal* 144, 144.

⁹⁴ Pring and Pring, above n 1, 28-30.

⁹⁵ See generally Preston, above n 2, 424-425.

⁹⁶ On this topic, see generally Zhang and Zhang, above n 4, 387-389.

There are also economic efficiencies, including lower transaction costs, for users and public resources in having a “one-stop shop”. Paul Stein, a former judge of the Land and Environment Court of NSW, posited that 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.⁹⁷

A one-stop shop also facilitates better quality and innovative decision-making in both substance and procedure by cross-fertilisation between the different jurisdictions composing an ECT. The ECT becomes a focus of environmental 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 promotes good governance, a critical element to achieving ESD.⁹⁸

There are several ECTs that have been successful in their efforts to centralise jurisdiction. As mentioned above, examples of such ECTs include the Land and Environment Court of NSW and the Environmental Court of NZ. Other instructive examples may be found in China and Canada.

First, Wang and Gao have observed that while the traditional practice in the Chinese court system has been to separate civil, criminal or administrative divisions, there are a number of environmental courts in the Guizhou, Jiangsu and Yunnan provinces that have adopted new rules to enable them to deal with all three types of environmental cases.⁹⁹ Moreover, although enforcement of judgments has also been traditionally handled by a separate enforcement division, some of these

⁹⁷ Paul L Stein AM, “A Specialist Environmental Court: An Australian Experience” in David Robinson and John Dunkley (eds), *Public Interest Perspectives in Environmental Law* (Wiley Chancery, 1995) 255, 263.

⁹⁸ *Hub Action Group Inc v Minister for Planning and Orange City Council* (2008) 161 LGERA 136, 139.

⁹⁹ Alex L Wang and Jie Gao, “Environmental Courts and the Development of Public Interest Litigation in China” (2010) 3 *Journal of Court Innovation* 37, 39-40.

environmental courts have also incorporated enforcement authority as well.¹⁰⁰ While noting that it is still too early to render a verdict on the overall success of these newly established environmental courts in China, Wang and Gao observe that preliminary evidence suggests that the courts are improving the effectiveness of environmental protection and enforcement.¹⁰¹

Secondly, the recently formed Environment and Lands Tribunal of Ontario (“the ELTO”) in Canada reflects a further example of the benefits of centralisation. The ELTO represents an early example of the “tribunal clustering” model. It brings together five previously separate tribunals that had overlapping subject matter expertise in land use planning, land acquisition, environmental regulation, and heritage conservation.¹⁰² Commentators suggest that the formation of the ELTO may lead to efficiencies not only in terms of cost, but also in terms of reducing the fragmentation between the previously separate tribunals with respect to practice and procedure, and increasing consistency in decision-making.¹⁰³ The push for the creation of “super tribunals” like the ELTO is also occurring in other jurisdictions, including Australia¹⁰⁴ and the United Kingdom.¹⁰⁵

Thus, it can be seen that centralisation of jurisdiction in a “one-stop shop” is a characteristic that is and should be common to successful ECTs. In short, centralisation can reduce: inconsistent decision-making between different courts and tribunals; fragmentation of the multiple and differing fora for resolving environmental disputes; delay in determining environmental disputes, which assists developers in containing the cost of its projects and the environment by preventing ongoing deterioration and destruction of environmental condition while a matter is

¹⁰⁰ Ibid 40.

¹⁰¹ Ibid 48-50.

¹⁰² Sossin and Baxter, above n 12, 160; Gottheil and Ewart, above n 12, 4.

¹⁰³ Sossin and Baxter, above n 12, 160-165; Gottheil and Ewart, above n 12, 10.

¹⁰⁴ See, eg, the Victorian Civil and Administrative Tribunal, *Who we are* (20 June 2013) <<http://www.vcat.vic.gov.au/about-vcat/who-we-are-0>>; State Administrative Tribunal of Western Australia, *About SAT* <http://www.sat.justice.wa.gov.au/A/about_sat.aspx?uid=5793-8155-0296-7651>; Queensland Civil and Administrative Tribunal, *About QCAT* (19 February 2013) <<http://www.qcat.qld.gov.au/about-qcat>>; the ACT Civil and Administrative Tribunal <<http://www.acat.act.gov.au/>>. See also NSW Civil and Administrative Tribunal <<http://www.tribunals.lawlink.nsw.gov.au/tribunals/index.html>> (this tribunal is due to commence in January 2014).

¹⁰⁵ See Sir Robert Carnwath, “Tribunal Justice – a New Start” [2009] *Public Law* 48, 48-69.

being resolved; and the costs associated with having to attend and file cases in multiple, disparate fora.

4. Judges and members are knowledgeable and competent

An essential characteristic of successful ECTs is specialisation.¹⁰⁶ Environmental issues and the legal and policy responses to them demand special knowledge and expertise. In order to be competent, judges and other ECT members need to be educated about and attuned to environmental issues and the legal and policy responses – they need to be environmentally literate. Ideally, judges and other ECT members should be environmentally literate prior to their being appointed. There is a need for education for judges and other members to be appointed to a specialised ECT as well as continuing professional development of judges and other ECT members during their tenure.¹⁰⁷ Having a critical mass of cases also enables judges and other members to increase knowledge and expertise over time: practice makes perfect.

Decision-making quality, effectiveness, and efficiency can be enhanced by the availability of technical experts within an ECT. Bringing together in the one specialised forum decision-makers (both judges and technical experts) with knowledge and expertise in environmental law and other related disciplines creates a centre of excellence, a think tank on environmental law and decision-making. Bringing experts together creates a synergy and facilitates a free and beneficial exchange of ideas and information which enables ECTs to gain internal expertise. In particular, the presence of multidisciplinary decision-makers enables the assembling of panels of decision-makers with expertise relevant to the issues in the case so as to facilitate interdisciplinary decision-making. This, in turn, serves to produce better quality decisions not only in terms of devising and applying general principles to environmental matters, but also in terms of facilitating greater consistency in

¹⁰⁶ See generally Preston, above n 2, 425-426.

¹⁰⁷ Pring and Pring, above n 1, 73-75. As Pring and Pring note, many governmental and non-governmental organisations have supported environmental training for judges, lawyers, and others involved in ECTs all over the world, including, for example, the UN Environment Programme, the International Union for the Conservation of Nature, and the Environmental Law Alliance Worldwide.

decision-making. This may result in greater certainty in decision-making and less disputes arising or matters being brought before an ECT for determination.

There have been several ECTs that have been successful in their efforts to develop a centralised and specialised forum for hearing, determining and disposing of environmental matters and disputes. For example, each of the five regional environmental courts in Sweden has a panel which comprises one law-trained judge, one environmental technical advisor, and two lay expert members.¹⁰⁸ The judge and the technical advisor are employed by the Court and work full time as environmental judges.¹⁰⁹ One of the lay expert members must possess expertise regarding the responsibility of the Swedish Environmental Protection Agency while the other must have some form of specialisation in industry or local government.¹¹⁰ The regional environmental courts hear appeals relating to matters such as pollution and contamination of land in addition to dealing, as a court of first instance, with permits for construction of water-related infrastructure, among other areas.¹¹¹

Ulf Bjällås, a former Presiding Judge of the Environmental Court of Appeal in Stockholm, has opined that the creation of specialised environmental courts in Sweden staffed by expert judges and other members has had many benefits. Perhaps most importantly, he suggests that the process of determining “the correct balance point” between economic benefits of enterprise and the environmental harm associated with it has been made easier as a result of the creation of specialised environmental courts.¹¹²

Environmental litigation and dispute resolution involves matters of significant scientific and technical complexity.¹¹³ In certain specialised ECTs, specially qualified persons are appointed as members, either on a full time or part time basis, to provide expert assistance to judges or to hear, determine and dispose of

¹⁰⁸ Bjällås, above n 2, 180. See also Helle Tegner Anker and Annika Nilsson, “The Role of Courts in Environmental Law – Nordic Perspectives” (2010) 3 *Journal of Court Innovation* 111, 115.

¹⁰⁹ Bjällås, above n 2, 180.

¹¹⁰ Anker and Nilsson, above n 108, 115.

¹¹¹ Bjällås, above n 2, 180-181.

¹¹² *Ibid* 182-183.

¹¹³ Zhang and Zhang, above n 4, 367-368; Pring and Pring, above n 1, 55. Of course, this is just one characteristic of environmental litigation and dispute resolution. For others, see Hal Wootten, “Environmental Dispute Resolution” (1993) 15 *Adelaide Law Review* 33, 65-66.

environmental disputes. As noted above, the Land and Environment Court of NSW is one such ECT. It comprises of judges as well as commissioners with qualifications, knowledge and experience in environmental or town or country planning; environmental science or matters relating to the protection of the environment and environmental assessment; land valuation; architecture, engineering, surveying or building construction; management of natural resources; Aboriginal land rights; or urban design or heritage.¹¹⁴

These “internal” experts may either advise and assist judges in the hearing of environmental cases,¹¹⁵ or hear and determine cases themselves.¹¹⁶ Either way, they bring to bear their expert knowledge and experience in the determination of the proceedings. In this way, they improve the availability of expert assistance to parties in resolving complex environmental disputes and improve the quality of decision-making on environmental matters.¹¹⁷ Other ECTs that have combatted complexity in environmental litigation and dispute resolution by appointing commissioners or expert members with specialised knowledge include, among others, the NZ Environmental Court, the Environment, Resources and Development Court of South Australia, the Resource Management and Planning Appeals Tribunal in Tasmania, the Victorian Civil and Administrative Tribunal, the State Administrative Tribunal in Western Australia and the environmental courts of Sweden.¹¹⁸

5. Operates as a multi-door courthouse

Centralisation, specialisation, and the availability of a range of court personnel facilitate a range of alternative dispute resolution (“ADR”) mechanisms. Centralisation enables an ECT to deal with multiple facets of an environmental dispute without the constriction of jurisdictional limitations. 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

¹¹⁴ *Land and Environment Court Act 1979* (NSW) s 12(2).

¹¹⁵ *Land and Environment Court Act 1979* (NSW) s 37.

¹¹⁶ *Land and Environment Court Act 1979* (NSW) s 30.

¹¹⁷ Preston, above n 45, 20.

¹¹⁸ See generally Pring and Pring, above n 1, 56-61.

characteristics of environmental disputes and selection of the appropriate dispute resolution for each particular dispute.¹¹⁹ Availability of technical experts or commissioners in an ECT enables their involvement in conciliation, mediation and neutral evaluation, as well as improving the quality, effectiveness, and efficiency of adjudication.

Many ECTs throughout the world now offer court-annexed and other ADR services to parties who wish to resolve their disputes without resorting to full-blown litigation.¹²⁰ As King et al note, a number of commentators have argued that ADR mechanisms may offer a number of benefits over litigation.¹²¹ First, these non-adjudicative mechanisms can, in some circumstances, offer a more affordable source of justice than traditional litigation.¹²² Secondly, resolution of a dispute through ADR mechanisms will often be quicker and more efficient than court proceedings.¹²³ Thirdly, attempting to resolve a dispute through ADR can often yield creative “win-win” solutions for parties that could not be sanctioned by the adversarial legal system.¹²⁴ Fourthly, parties will often prefer ADR to litigation on the basis that they have greater power over the outcome of the dispute resolution process.¹²⁵ Finally, some forms of ADR may potentially enhance communication, develop cooperation and preserve existing relationships between parties that could otherwise be damaged through stressful and conflict-based litigation.¹²⁶

¹¹⁹ On the appropriateness of different types of dispute resolution mechanisms in environmental matters, see Brian J Preston, “The use of alternative dispute resolution in administrative disputes” (2011) 22 *Australasian Dispute Resolution Journal* 144, 151-153; Brian J Preston, “The Land and Environment Court of New South Wales: Moving towards a multi-door courthouse – Part I” (2008) 19 *Australasian Dispute Resolution Journal* 72; Brian J Preston, “Limits of environmental dispute resolution mechanisms” (1995) 13 *Australian Bar Review* 148.

¹²⁰ Examples of such ECTs include the Environmental Court of NZ, the Resource Management and Planning Appeals Tribunal in Tasmania, and the Tribunal Ambiental Administrativo in Costa Rica: see generally Laurie Newhook, “Challenges and Changes in the Environment Court” (Paper presented to the 3rd Annual Environmental Law and Regulation Conference, Wellington, 16-17 April 2013); Laurie Newhook, “Alternative Dispute Resolution: Thinking outside the square” (Paper presented to the RMLA Conference, Hamilton, October 2011); Pring and Pring, above n 1, 61-72.

¹²¹ See Michael King, Arie Freiberg, Becky Batagol and Ross Hyams, *Non-Adversarial Justice* (The Federation Press, 2009) 91-94.

¹²² *Ibid* 91-92.

¹²³ *Ibid* 92.

¹²⁴ *Ibid*.

¹²⁵ *Ibid*.

¹²⁶ *Ibid* 93-94.

Of course, it should be recognised that there are also arguments against the use of ADR mechanisms in resolving environmental disputes.¹²⁷ The key questions, however, to ask are: (1) what is the most appropriate mechanism for resolving the given dispute before the ECT, and (2) how should that dispute resolution mechanism be organised and conducted so as to resolve the dispute effectively?¹²⁸ In answering these questions, ECTs should adopt and use a formal screening and intake process.¹²⁹ This process would be conducted by the ECT which would be responsible for first diagnosing the relevant matter before referring that matter to the appropriate dispute resolution process on the basis of the diagnosis.¹³⁰

The Land and Environment Court, for example, offers a variety of ADR processes, both in-house and externally to parties.¹³¹ 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.¹³² In-house ADR processes offered by the Court are: conciliation in Classes 1-3 of the Court's jurisdiction (by commissioners or registrars);¹³³ mediation in Classes 1-4 and 8 (by trained mediators, being the registrar, full time commissioners and some acting commissioners);¹³⁴ and neutral evaluation in classes 1-3 (by commissioners).¹³⁵ There are also informal mechanisms such as case management, which may result in negotiated settlement.¹³⁶ The Court also facilitates external dispute resolution processes of: mediation by accredited mediators (in proceedings in Classes 1-4 and 8);¹³⁷ neutral evaluation by neutral evaluators (such as a retired judge);¹³⁸ and referral of the whole or part of a matter in Classes 1-4 and 8 to an external referee with special knowledge or expertise for enquiry and report to the Court.¹³⁹

¹²⁷ Ibid 94-96; Preston (1995), above n 119, 173-176.

¹²⁸ Preston (1995), above n 119, 153 and 173-176.

¹²⁹ Pring and Pring, above n 1, 72.

¹³⁰ See especially Preston (2008), above n 119, 78-82.

¹³¹ For further information on the nature of these dispute resolution mechanisms, see Preston, above n 2, 411-416.

¹³² Preston (2011), above n 119, 152.

¹³³ *Land and Environment Court Act 1979* (NSW) s 34.

¹³⁴ *Civil Procedure Act 2005* (NSW) s 26.

¹³⁵ *Land and Environment Court Rules 2007* (NSW) pt 6 r 6.2.

¹³⁶ Preston (2011), above n 119, 151-153.

¹³⁷ *Civil Procedure Act 2005* (NSW) s 26.

¹³⁸ *Land and Environment Court Rules 2007* (NSW) pt 6 r 6.2.

¹³⁹ *Uniform Civil Procedure Rules 2005* (NSW) pt 20 r 20.14.

Another notable example of ADR processes offered by ECTs is provided by the Planning and Environment Court of Queensland. This Court has specifically appointed an ADR Registrar who is a former senior practitioner in the planning and environmental law field.¹⁴⁰ The ADR Registrar is responsible for conducting mediations, case management conferences, chairing without prejudice meetings and meetings between experts appearing for the parties to a dispute.¹⁴¹ ADR is not used simply as a last resort, prior to trial, in the absence of an agreement otherwise reached through consent of the parties. Rather, the ADR Registrar is involved at an early stage in the dispute resolution process and assists the parties to identify and narrow the issues in dispute and work towards their resolution in a collaborative, problem-solving manner.¹⁴² This program has been a great success, with approximately 60-70% of all cases filed with the Court being settled through the help of the ADR Registrar.¹⁴³ Members of other ECTs are now considering whether they should also institute this practice.¹⁴⁴

6. Provides access to scientific and technical expertise

The resolution of environmental disputes will invariably turn on complex scientific evidence and expert testimony in areas such as causation, damages and prospects for environmental harm in circumstances where development is approved.¹⁴⁵ As I have discussed above, many of the more successful ECTs have addressed the issue of access to internal scientific and technical expertise through appointing technical experts (such as commissioners) to hear, determine and dispose of complex environmental disputes. In addition to having such technical experts on staff, it is also vitally important for ECTs to implement procedures that are directed towards eliminating, or at least reducing, the potential for partisan and biased testimony from external experts. Such procedures will, in turn, serve to assist the trier of fact to draw correct inferences in decision-making. This will especially be so in environmental public interest litigation matters, where plaintiffs often encounter

¹⁴⁰ See Michael Rackemann, "Environmental Dispute Resolution – Lessons from the States" (2013) 30 *Environmental and Planning Law Journal* 329, 338.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ Pring and Pring, above n 1, 64.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.* 55.

difficulty in being able to access, and afford to pay for access to, external experts who not only satisfy the minimum criteria for being an expert, but also have excellent knowledge, experience, reputation and communication skills so as to be reliable, credible and persuasive.¹⁴⁶

A number of the more successful ECTs have implemented procedures to manage parties' expert witnesses and their evidence to eliminate or reduce bias. Again, the Land and Environment Court of NSW and the Planning and Environment Court of Queensland provide instructive examples of jurisdictions to have implemented such procedures.

The Land and Environment Court of NSW has implemented rules allowing for the appointment of court appointed and parties' single experts.¹⁴⁷ First, if an issue for an expert arises in any proceedings, the Court may appoint an expert (referred to as a court appointed expert) to inquire into and report to the Court on the issue, including inquiring into and reporting on any facts relevant to the inquiry.¹⁴⁸ The Court may appoint as a court appointed expert a person selected by the parties, or by the Court, or in a manner directed by the Court.¹⁴⁹ The remuneration of the court appointed expert is fixed by agreement between the parties or, failing agreement, by the Court. The Court can direct when and by whom a court appointed expert is to be paid.¹⁵⁰

Secondly, the Court can order that a single expert be engaged jointly by the parties (referred to as a parties' single expert).¹⁵¹ A parties' single expert is selected by agreement of the parties or, failing agreement, by the Court.¹⁵² The remuneration of

¹⁴⁶ Preston, above n 45, 18. See also J Berton Fisher and William R Keffer, "Selection, use and management of experts in environmental legal practice" (1998) 33 *Tulsa Law Journal* 1003 as to selection of experts, and Brian J Preston, "Science and the Law: Evaluating the evidentiary reliability" (2003) 23 *Australian Bar Review* 1 as to reliability of expert evidence.

¹⁴⁷ See generally Preston, above n 45, 19-20; Peter Biscoe, "Court practice and procedure for experts" (Paper presented to the Environmental Institute of Australia and New Zealand, Professional Practice Course Program, Sydney, 15 May 2008); Rachel Pepper, "Expert evidence in the Land and Environment Court" (Paper presented to the Australian Property Institute, Sydney, 21 March 2012); Malcolm Craig, "Expert evidence in the Land and Environment Court of NSW: A synopsis" (Paper presented to the Australasian Conference of Planning and Environment Courts and Tribunals, Perth, 29 August 2012).

¹⁴⁸ See *Uniform Civil Procedure Rules 2005* (NSW) pt 31, r 31.46(1) ("UCPR").

¹⁴⁹ UCPR r 31.46(2).

¹⁵⁰ UCPR r 31.53.

¹⁵¹ UCPR r 31.37(1).

¹⁵² UCPR r 31.37(2).

the parties' single expert is fixed by agreement of the parties or, failing agreement, by the Court. The Court may direct when and by whom the parties' single expert is to be paid.¹⁵³

By the appointment of a court appointed expert or by ordering a parties' single expert, the cost of obtaining expert evidence is reduced for the parties. The Court's power to direct by whom the expert is to be paid enables the Court to take into account a plaintiff's financial means and direct that the defendant be responsible for a proportionately larger share or all of the expert's remuneration.

Thirdly, the Court may obtain the assistance of any person specially qualified on any matter in the proceedings and may act on the adviser's opinion.¹⁵⁴ The rules for remuneration of such a person apply in the same way as they do to a court appointed expert.¹⁵⁵ This is akin to a court's use of an assessor to advise and assist the Court for matters raising issues requiring special expertise.

Finally, the Court has instituted an innovative process of expert testimony that may be referred to formally as "concurrent evidence", or informally "hottubbing".¹⁵⁶ This process was implemented by Peter McClellan (the former Chief Judge of the Land and Environment Court of NSW). He has described the concurrent evidence procedure, as followed in hearings in his Court, as follows:

[T]he procedure commonly followed involves the experts being sworn and their written reports tendered together with the document which reflects their pre-trial discussion of the matters upon which they agree or disagree. I then identify, with the help of the advocates and in the presence of the witnesses, the topics which require discussion in order to resolve the outstanding issues. Having identified those matters, I invite each witness to briefly speak to their position on the first issue followed by a general discussion of the issue during which they can ask each other questions. I invite the advocates to join in the discussion by asking questions of their own and any other witness. Having completed the discussion on one issue we move on until the discussion of all the issues has been completed.¹⁵⁷

¹⁵³ UCPR r 31.45.

¹⁵⁴ UCPR r 31.54(1).

¹⁵⁵ UCPR r 31.54(2).

¹⁵⁶ On this method of expert testimony, see Peter McClellan, "Expert Evidence: Aces Up Your Sleeve?" (2007) 8 *The Judicial Review* 215, 222-224. See also Pring and Pring, above n 1, 60.

¹⁵⁷ McClellan, above n 156, 223.

All of the methods of expert evidence implemented by the Land and Environment Court of NSW may, when used appropriately, result a significant number of benefits which, among others, include: more efficient use of time and money when a method of expert evidence is adopted and managed effectively; eliminating or at least minimising the operation of adversarial bias; facilitation of a less adversarial and more flexible, problem-solving based approach to expert testimony where participants are all working towards resolution of issues in dispute; and, providing judges and commissioners with greater assistance when reviewing the evidence given by experts on discrete issues.¹⁵⁸

There are, of course, other ways in which an ECT may better enable access to external scientific and technical expertise. The Planning and Environment Court of Queensland, for example, has preferred a somewhat different approach to that adopted by the Land and Environment Court of NSW.¹⁵⁹ In that court, experts are required to meet and confer at an early stage in the dispute resolution process.¹⁶⁰ The experts are given appropriate space and time, away from the supervision of the lawyers and parties that have retained them, to consider and formulate their final opinions with each other.¹⁶¹ Importantly, an expert appearing in the Planning and Environment Court of Queensland has an overriding duty to the Court; not to the party who has retained him or her.¹⁶²

Michael Rackemann, a judge of the Planning and Environment Court of Queensland, has noted that the practice and procedure followed by his Court for managing access to external expert evidence has produced a number of benefits, including the virtual elimination of disputes between parties as to scientific methodology; the achievement of consensus on many issues which were previously in dispute before trial or settling of disputes; and the facilitation of a collaborative, problem-solving approach to environmental matters filed with the Court.¹⁶³

¹⁵⁸ See Biscoe, above n 147, 12; Craig, above n 147, 18-19.

¹⁵⁹ See M E Rackemann, "The management of experts" (2012) 21 *Journal of Judicial Administration* 168. See also Pepper, above n 147, 20-21.

¹⁶⁰ Rackemann, above n 159, 173.

¹⁶¹ *Ibid* 173-174.

¹⁶² *Ibid* 173. This is also the case in the Land and Environment Court of NSW: see UCPR r 31.23 and Sch 7 ("Expert Witness Code of Conduct"). See also Biscoe, above n 147, 2.

¹⁶³ Rackemann, above n 159, 174.

7. Facilitates access to justice

A fundamental characteristic of successful ECTs is the facilitation of access to justice. Access to justice includes access to environmental justice.¹⁶⁴ An ECT may facilitate access to justice both by its substantive decisions and its practice and procedures.¹⁶⁵

First, the substantive decisions of an ECT can uphold fundamental constitutional, statutory and human rights of access to justice. Such rights may include, for example, 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 EIA; public rights to review and appeal legislative and administrative decisions and conduct; and international law rights that have been either transformed or incorporated into the domestic environmental laws of the land. As I have discussed above, numerous decisions upholding such rights of access to justice have been made by the Land and Environment Court of NSW.¹⁶⁶

Secondly, an ECT can adopt innovative practices and procedures to facilitate access to justice, including the removal of barriers to environmental public interest litigation. Again, the Land and Environment Court of NSW has facilitated such litigation by its decisions to: liberally construe standing requirements;¹⁶⁷ not necessarily require an undertaking for damages as a pre-requisite for granting interlocutory injunctive relief;¹⁶⁸ not necessarily require an impecunious public interest litigant to lodge

¹⁶⁴ See *Rio Declaration on Environment and Development*, 31 ILM 874 (1992), Principle 10; *Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001) recitals, arts 1, 3 and 9.

¹⁶⁵ See also Preston, above n 2, 428-430.

¹⁶⁶ See discussion in Preston, above n 2, 428-435 and cases cited therein.

¹⁶⁷ See, eg, *Haughton v Minister for Planning and Macquarie Generation* (2011) 185 LGERA 373, 392-401; *Building Owners & Managers Association of Australia Ltd v Sydney City Council* (1984) 53 LGRA 54, 72-73.

¹⁶⁸ *Ross v State Rail Authority (NSW)* (1987) 70 LGRA 91, 100; *Tegra (NSW) Pty Ltd v Gundagai Shire Council* (2007) 160 LGERA 1, 11-12. See also Brian J Preston, "Injunctions in planning and environmental cases" (2012) 36 *Australian Bar Review* 84, 94. A similar approach has been adopted in Kenya in environmental public interest litigation: see *Fadhila S Ali & 2 others v National Housing Corporation & Another* [2012] eKLR, High Court of Kenya (E M Muriithi J, 4 December 2012).

security for the costs of the proceedings;¹⁶⁹ not summarily dismiss proceedings on the ground of laches; and not necessarily require an unsuccessful public interest litigant to pay the costs of the proceedings.¹⁷⁰ Additionally, parties may appear in this ECT by legal representation, by agent authorised in writing (with leave of the Court), or in person.¹⁷¹ The Land and Environment Court's approach to practice and procedure may be contrasted with the prevailing approach in China, where rules of practice and procedure have been criticised for their failure "to respond to the particularity of environmental problems",¹⁷² and have been inconsistently applied.¹⁷³

Thirdly, an ECT can address inequality of arms between parties. As I have noted above, specialisation and the availability of technical experts (eg. commissioners) may redress, in part, the inequality of resources and access to expert assistance and evidence. The Land and Environment Court has also implemented a range of other initiatives to ensure: access for persons with disabilities; access to help and information (by information from the Court's 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).¹⁷⁴

Of course, it should be noted that there have been examples of non-specialised or generalist courts that have facilitated access to justice for public interest litigants in environmental cases brought before them. The Supreme Court of the Philippines, for example, has adopted one of the most progressive or liberal interpretations of standing to sue in the world. In the landmark decision of *Oposa v Factoran*,¹⁷⁵ well-known international public interest environmental lawyer Tony Oposa Jr won a world-

¹⁶⁹ *Land and Environment Court Rules 2007* (NSW) r 4.2(2). Recently, new civil procedure rules in NSW dealing with judicial review proceedings provide that a plaintiff is not required to provide security for costs in respect of judicial review proceedings except in exceptional circumstances: see UCPR r 59.11(1). See also Peter Biscoe, "The New Judicial Review Rules 2013" (Paper presented to the Environment and Planning Law Association of NSW Seminar, Sydney, 30 April 2013) 5.

¹⁷⁰ See, eg, *Caroona Coal Action Group v Coal Mines Australia Pty Ltd (No 3)* (2010) 173 LGERA 280, 285.

¹⁷¹ *Land and Environment Court Act 1979* (NSW) s 63.

¹⁷² See Zhang and Zhang, above n 4, 381.

¹⁷³ *Ibid* 382.

¹⁷⁴ See generally Preston, above n 2, 430.

¹⁷⁵ 33 ILM 173 (1994); G R No 101083 (Supreme Court of the Philippines, Manila, 30 July 1993) <http://www.lawphil.net/judjuris/juri1993/jul1993/gr_101083_1993.html>.

famous lawsuit on behalf of his own children's and future generations' rights to enjoy forests and a healthy environment. Importantly, the Supreme Court, in making its decision, acknowledged that a person has a right of standing to sue to protect the environment, not only for the benefit of members of the present generation but also future generations.¹⁷⁶

8. Achieves just, quick and cheap resolution of disputes

“The delay of justice is a denial of justice” pronounced Lord Denning MR. He 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].¹⁷⁷

Delay is particularly pernicious for environmental public interest litigation and dispute resolution. The purpose of much environmental litigation and dispute resolution is to prevent or mitigate harm to the environment. Delay in the final determination of the proceedings defers the making of an order preventing or mitigating that environmental harm. In some instances, the order may be too late – the harm may have already occurred and be irreversible. The heritage building may have been demolished, the old growth forest clear felled or the wetland drained or filled. Environmental litigation and dispute resolution, therefore, needs to be heard and determined in a timely manner.¹⁷⁸

There are various mechanisms for reducing delay. First, allocation of environmental cases to environmentally specialised bodies, such as an ECT (green court or tribunal), an environmental division or chamber of a court (green chamber or green bench) or certified environmental judges (green judges), can assist in reducing delay. Such specialised bodies have a better understanding of the characteristics of environmental disputes and environmental law, and are better positioned to move more quickly through environmental cases, achieve efficiencies and reduce the overall cost of the litigation and dispute resolution process.¹⁷⁹

¹⁷⁶ Ibid. See also Pring and Pring, above n 1, 34-35.

¹⁷⁷ *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, 245.

¹⁷⁸ Preston, above n 45, 28.

¹⁷⁹ Pring and Pring, above n 1, 14; Preston, above n 2, 425-426 and 436.

Secondly, delay can be reduced by efficient case management. The overriding purpose of an ECT's court practice and procedure should be to facilitate the just, quick and cheap resolution of proceedings.¹⁸⁰ The Land and Environment Court of NSW again provides an instructive example of case management.

In order to achieve the just, quick and cheap resolution of proceedings in its jurisdiction, the Court is obligated to manage proceedings with a view to achieving the objectives of: the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.¹⁸¹

Case management involves a variety of policies, processes and technologies to achieve the just, quick and cheap resolution of proceedings. Policies may include ECT rules, practice notes and policies regarding the dispute resolution process from filing to finalisation. These policies can employ differential case management to deal discriminatively with the different types of cases. The Court rules and practice of the Land and Environment Court of NSW deal differentially with the various types of cases that come before the Court.¹⁸²

Processes used include: directions hearings before judges, commissioners or registrars to set timelines in the particular proceedings for filing of applications, documents and evidence, document and information exchange between the parties, interlocutory applications and the final hearing; case management conferences; ADR processes such as conciliation conferences or mediations; and case review by the Court to assure appropriate handling and timing of the case and ensure that deadlines are met and filed documents are complete.¹⁸³

The Land and Environment Court of NSW has also adopted an innovative approach to case management in its Class 5 criminal proceedings. In 2012, amendments to the *Criminal Procedure Act 1986* (NSW) had the effect of allowing provision for case

¹⁸⁰ See, eg, *Civil Procedure Act 2005* (NSW) s 56.

¹⁸¹ See *Civil Procedure Act 2005* (NSW) s 57.

¹⁸² See Preston, above n 2, 420.

¹⁸³ *Ibid* 419-421.

management procedures and preliminary conferences in Class 5 criminal matters.¹⁸⁴ Such matters are now managed weekly by the List Judge, who is charged with the task of making appropriate directions for preparation for trial or sentence hearing and to allow for the entry of early pleas prior to trial. Walters and Westerhuis have commented that criminal cases are now treated more like planning cases, with negotiations often taking place between prosecution and defence about a range of issues prior to trial. They believe that one likely effect of this approach to case management in criminal matters will be an increase in the use by the Court of negotiated non-criminal outcomes, such as self-reporting and self-regulation, as alternatives to traditional forms of criminal sanction.¹⁸⁵

Technologies used by the Court in case management include a clear, comprehensive and current Court website providing all necessary information for parties; electronic filing and processing capability (eCourt); teleconferencing and videoconferencing capability for hearings and taking evidence; and computer data management systems that track the status, progress and deadlines for each case and provide regular reports on individual cases and overall caseload.¹⁸⁶

Thirdly, ECTs need to deal promptly with interlocutory applications and rebut attempts to adjourn or delay the final hearing and disposal of the proceedings. Defendants to environmental public interest litigation may make interlocutory applications with the intention, or that may have the effect, of staying or summarily dismissing the litigation.¹⁸⁷ These applications may include an application for dismissal of the proceedings on the basis that they are frivolous or vexatious, disclose no reasonable cause of action, or are an abuse of process of the Court¹⁸⁸ or that the plaintiff provide security for costs and that the proceedings be stayed until the plaintiff does so.¹⁸⁹

¹⁸⁴ See Walters and Westerhuis, above n 43, 285. See also *Criminal Procedure Act 1986* (NSW) ch 4 pt 5 div 2A.

¹⁸⁵ Walters and Westerhuis, above n 43, 285.

¹⁸⁶ See *Land and Environment Court Annual Review 2011*, 17, 23, 34 and 36-37; Pring and Pring, above n 1, 76-78.

¹⁸⁷ See generally Preston, above n 45, 29-30.

¹⁸⁸ See, eg, UCPR r 13.4.

¹⁸⁹ See, eg, UCPR r 42.21.

The defendant may also make applications which have the effect of delaying or increasing the costs of the proceedings, thereby depleting the already limited financial resources of public interest plaintiffs. These may include applications concerning the adequacy of the originating process or pleadings; applications to set aside subpoenas or notices to produce; applications concerning evidence, including its content and admissibility; and applications that a question or questions be heard separately from other questions in the proceedings.

ECTs need to deal with such interlocutory applications promptly and hasten the final hearing and judgment of environmental public interest proceedings to avoid adverse effects on access to justice.

In addition to the Land and Environment Court of NSW, there have been several other ECTs that have instituted practices and procedures directed towards the just, quick and cheap resolution of environmental matters and disputes. The Planning and Environment Court of Queensland, for example, has adopted a system of individualised case management where each case is the subject of orders or directions by a judge upon review of the individual matter in Court.¹⁹⁰ It has been said that this approach to case management has the advantage of flexibility, not only in terms of tailoring procedures to the needs of an individual case but also in terms of permitting judges to fine tune and adjust the direction of a case in light of changing circumstances.¹⁹¹

The State Administrative Tribunal of Western Australia (Development and Resources stream) provides a further example of a jurisdiction that has implemented practices and procedures directed towards the just, quick and cheap resolution of town planning appeals. David Parry, formerly head of the Development and Resources stream and now a Judge and Deputy President of this ECT, noted that a cultural change in the practice and procedure of the tribunal has resulted in emphasis being placed on the approach of “facilitative dispute resolution”.¹⁹² This approach is underpinned by active case management, directions hearings, mediations and

¹⁹⁰ Rackemann, above n 8, 24.

¹⁹¹ Ibid 24-25.

¹⁹² Parry, above n 10, 130-131.

compulsory conference sessions for parties to a planning dispute.¹⁹³ According to Parry, the tribunal has experienced much success as a result of these reforms. Benefits cited include: creative approaches to dispute resolution through mediation and compulsory conferences; time and costs savings; collaboration between the parties has resulted in superior community planning outcomes; and the narrowing of issues in dispute should a matter not settle and proceed to trial.¹⁹⁴

9. Responsive to environmental problems and relevant

Successful ECTs are better able to address the pressing, pervasive, and pernicious environmental problems that confront society (such as climate change and loss of biodiversity).¹⁹⁵ 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. Centralisation and rationalisation enlarges the remedies available. An ECT is better positioned than an ordinary court or tribunal to develop innovative remedies and holistic solutions to environmental problems. Responsiveness to environmental problems is a key characteristic of ECTs that enables these specialised fora to remain relevant and influential in the broader schema of environmental governance.

As noted above, one of the key environmental problems confronting society at present is climate change. Climate change litigation can have both direct and indirect effects on governmental regulatory decision-making, corporate behaviour, and public understanding of the issue of climate change.¹⁹⁶ Osofsky argues that both successful cases and those with little hope of succeeding have together helped to change the regulatory landscape at multiple levels of government by putting both legal and moral pressure on a wide range of individuals and entities to act.¹⁹⁷

¹⁹³ Ibid.

¹⁹⁴ Ibid 133.

¹⁹⁵ See generally Preston, above n 2, 427-428.

¹⁹⁶ See Hari Osofsky, "The Continuing Importance of Climate Change Litigation" (2010) 1 *Climate Law* 3, 5. See also Hari M Osofsky and Jacqueline Peel, "The role of litigation in multilevel climate change governance: Possibilities for a lower carbon future?" (2013) 30 *Environmental and Planning Law Journal* 303.

¹⁹⁷ Osofsky, above n 196, 9.

In the climate change context, courts have moved beyond their primary function of resolving disputes between private individuals and are now being used by public interest litigants as vehicles for achieving social change (e.g. use of courts as arenas for protest and political discourse).¹⁹⁸ This has been particularly noticeable in Australia, which has had a relatively high number of climate change cases, at least when compared to other Commonwealth jurisdictions.¹⁹⁹ Lin argues that an important factor behind this trend is the existence of specialised ECTs in Australia which have expertise in environmental law and a history of advancing the goals of ESD.²⁰⁰ She suggests that such specialised fora are “likely to adopt a sympathetic approach to arguments based on climate change impacts”.²⁰¹

The goals of climate change litigation include indirect effects beyond the parties to the litigation and beyond the litigation’s specific claims.²⁰² Even unsuccessful cases can focus public attention on a particular issue through media exposure, and may reveal weaknesses in the law that require reform. One way in which the Land and Environment Court of NSW has remained relevant and influential has been through its decisions in climate change litigation matters.²⁰³

For example, the decision of the Court in *Gray v Minister for Planning*²⁰⁴ has had at least three influences.²⁰⁵ The first is that the decision is part of a series of decisions evidencing a process of judicial reasoning by analogy in relation to the principles of ESD, each decision drawing on prior decisions and in turn influencing subsequent decisions. Incrementally, each decision develops the jurisprudence on principles of ESD and affirms their relevance and importance.²⁰⁶ The decision applies the findings made in cases concerning development under Part 4 of the *Environmental*

¹⁹⁸ Ibid 6-7.

¹⁹⁹ See Jolene Lin, “Climate change and the courts” (2012) 32 *Legal Studies* 35, 41.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Osofsky, above n 196, 7.

²⁰³ On this topic, see especially Brian J Preston, “The Influence of Climate Change Litigation on Governments and the Private Sector” (2011) 2 *Climate Law* 485. As noted in this article, the Planning and Environment Division of the Victorian Civil and Administrative Tribunal has also similarly influenced the actions of government and the private sectors through its decisions in climate change litigation cases.

²⁰⁴ (2006) 152 LGERA 258.

²⁰⁵ For an overview of the facts in this case, see Preston, above n 203, 493-494.

²⁰⁶ See Brian J Preston, “The Art of Judging Environmental Disputes” (2009) 12 *Southern Cross University Law Review* 103, 115-121.

Planning and Assessment Act 1979 (NSW) (“the EPA Act”), that decision-makers are required to consider the public interest in determining whether to grant a development consent and the public interest includes the principles of ESD, and extends those findings to projects under the now repealed Part 3A of the EPA Act.

Secondly, the decision augmented the approach taken in the earlier decision of the Victorian Civil and Administrative Tribunal in *Australian Conservation Foundation v Latrobe City Council*²⁰⁷ of the relevance of downstream, scope 3 GHG emissions to an environmental assessment of new mining projects.²⁰⁸

Thirdly, the decision prompted in part a legislative response, with the NSW Government subsequently introducing the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* to ensure that indirect emissions from extractive industries are considered in the decision-making process.²⁰⁹

Moreover, the decision of the Land and Environment Court at first instance in *Walker v Minister for Planning*,²¹⁰ and the subsequent reversal of that decision by the NSW Court of Appeal in *Minister for Planning v Walker*,²¹¹ provide further examples of the influence climate change litigation can have beyond the mere resolution of a legal dispute between two or more parties.²¹² The decisions in the *Walker* cases have had at least six influences.

The first is that the Court of Appeal approved earlier decisions of the Land and Environment Court that a consent authority in determining a development application for development under Part 4 of the EPA Act, and a court hearing a merits appeal from such a determination, is required to consider the public interest and that the

²⁰⁷ (2004) 140 LGERA 100.

²⁰⁸ David Farrier, “The limits of judicial review: Anvil Hill in the Land and Environment Court” in Tim Bonyhady and Peter Christoff (eds), *Climate Law in Australia* (Federation Press, 2007) 189, 190, 199 and 207.

²⁰⁹ See *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* cl 14.

²¹⁰ (2007) 157 LGERA 124.

²¹¹ (2008) 161 LGERA 423.

²¹² For an overview of these decisions, see Preston, above n 203, 495-498.

public interest embraces ESD.²¹³ The Court of Appeal also held that the Minister in approving both a concept plan and a project approval under the now repealed Part 3A of the EPA Act must consider the public interest.²¹⁴ The public interest includes ESD for a project approval²¹⁵ and is likely in the future to include ESD for a concept plan.²¹⁶

Secondly, the Court of Appeal's decision, particularly its comments that ESD would need to be considered at the project approval stage,²¹⁷ led to the project proponent modifying the project to address additional information about the consequences of climate change on flooding.

Thirdly, when the proponent made an application to carry out the project, the principles of ESD, and in particular the effect of climate change flood risk, were conscientiously addressed by the Minister in determining to grant approval to carry out the project.

Fourthly, the Court of Appeal's decision, and the proponent's and Minister's responses, led to further judicial review challenges regarding development at Sandon Point. One of these challenges was to the project approval in *Kennedy v NSW Minister for Planning*²¹⁸ on the ground that the Minister had failed to consider the flooding impacts of the development. The Land and Environment Court held that at the time of making the determination, the Minister had numerous documents before her addressing the issue of climate change and flooding.²¹⁹ These documents included the proponent's environmental assessment that contained sections on flooding issues and ESD; the Director General's report that specifically addressed the Court of Appeal's comments in *Walker* and the independent expert advice received by the Department which reviewed the proponent's flood studies and climate change impact reports; and a report prepared by the Planning Assessment

²¹³ (2008) 161 LGERA 423, [42], [43] approving *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 146 LGERA 10, [121]-[124].

²¹⁴ *Ibid* [39].

²¹⁵ *Ibid* [63].

²¹⁶ *Ibid* [56]. See also Dwyer and Taylor, above n 78, 202.

²¹⁷ *Ibid* [63].

²¹⁸ (2010) 176 LGERA 395.

²¹⁹ *Ibid* [86].

Commission who the Minister had requested review the reasonableness of the Director-General's report which concluded that the implications of climate change as related to rainfall intensity assessment and flooding risk had been dealt with adequately.²²⁰ Accordingly, the Court rejected this ground of challenge.²²¹

Fifthly, there has been a legislative response to the Court of Appeal's decision in *Walker*. The *Standard Instrument – Principal Local Environmental Plan* ("Standard Instrument LEP") was amended to insert a new clause 5.5 regarding development within the coastal zone. Two of the objectives of the clause are to implement the principles in the NSW Coastal Policy and to "recognise and accommodate coastal processes and climate change".²²² Under the Standard Instrument LEP development consent must not be granted to development on land that is wholly or partly within the coastal zone unless the consent authority is satisfied that: the proposed development will not be significantly affected by coastal hazards, or have a significant impact on coastal hazards, or increase the risk of coastal hazards in relation to any other land.²²³ The *Wollongong Local Environmental Plan 2009*, which applies to the Wollongong local government area, including Sandon Point, now contains this provision.²²⁴

Sixthly, there has been an executive response. In November 2009, the NSW government issued a Sea Level Rise Policy Statement.²²⁵ The Policy Statement includes sea level planning benchmarks, which have been developed to support consistent consideration of sea level rise in land-use planning and coastal investment decision-making.

Another way in which the Land and Environment Court of NSW has remained relevant and influential is through its development of innovative remedies and holistic solutions to environmental problems. Indeed, Walters and Westerhuis have

²²⁰ Ibid [87]-[90].

²²¹ Ibid [91].

²²² *Standard Instrument – Principle Local Environmental Plan* cl 5.5(1)(b)(iv).

²²³ Ibid cl 5.5(3)(d).

²²⁴ *Wollongong Local Environmental Plan 2009* cl 5.5(3)(d).

²²⁵ See generally Zada Lipman and Robert Stokes, "That sinking feeling: A legal assessment of the coastal planning system in New South Wales" (2011) 28 *Environmental and Planning Law Journal* 182, 184.

expressed the view that the Court's focus on environmental harms, scientific evidence to assess such harms and use of alternative methods of criminal punishment "set [it] apart from other criminal courts in unique attempts to achieve environmental justice".²²⁶ This is well reflected, for example, by the Court's use of restorative justice as a holistic solution to environmental crime that seeks to understand and address the dynamics of criminal behaviour, its causes and its consequences.²²⁷ In the case of *Garrett v Williams*,²²⁸ a restorative justice conference was held in relation to offences of damaging Aboriginal objects and an Aboriginal place. The fact that the defendant participated in the restorative justice intervention in this case was taken into account by the Court in determining the appropriate penalty for the environmental offences he had committed.²²⁹

Of course, it should be recognised that there are examples of non-specialised, generalist courts that have demonstrated an ability to respond to environmental problems in a way that maintains their relevance and influence. The Supreme Court of the Philippines is a particularly good example of this.²³⁰ In 2010, the innovative "Rules of Procedure for Environmental Cases" were put into effect.²³¹ The rules, which were promulgated to enforce the existing constitutional right to a "balanced and healthful ecology",²³² provide for the granting of innovative remedies. These include "continuing mandamus"²³³ and the writ of *kaliksan*, which is an immediate remedy for actual or threatened violations of the constitutional right mentioned above.²³⁴ It is anticipated that this writ will continue to improve the efficiency of

²²⁶ Walters and Westerhuis, above n 43, 285.

²²⁷ See Preston (2011), above n 43, 136; White, above n 43, 267-278; Walters and Westerhuis, above n 43, 286-288; Hamilton, above n 43, 263-271.

²²⁸ (2007) 151 LGERA 92.

²²⁹ *Ibid* [115]-[121].

²³⁰ Another example is the Supreme Court of India: see C M Abraham, *Environmental Jurisprudence in India* (Kluwer Law International, 1999); Jahid Hossain Bhuiyan, "Access to justice for the impoverished and downtrodden segments of the people through public interest litigation: A Bangladesh, India and Pakistan perspective" [2007] *LAWASIA Journal* 1; Bharat H Desai and Balraj Sidhu, "On the Quest for Green Courts in India" (2010) 3 *Journal of Court Innovation* 79, 91-98.

²³¹ See generally Hilario G Davide Jr and Sara Vinson, "Green Courts Initiative in the Philippines" (2010) 3 *Journal of Court Innovation* 121, 126-129; Diosdado M Peralta, "A Brief Overview: The Environmental Initiatives of the Philippine Supreme Court" (Paper presented to the Australasian Conference of Planning and Environment Courts and Tribunals, Sydney, 1 September 2010) 9-13.

²³² *Constitution of the Republic of the Philippines* (1987), art II, s 16.

²³³ See Pring and Pring, above n 1, 83 for an example of a case from the Philippines involving the imposition of a "continuing mandamus".

²³⁴ Davide Jr and Vinson, above n 231, 128-129.

resolving environmental cases in the Supreme Court. Thus, it is evident that some generalist courts may also be effective in responding to environmental problems.

However, there have also been instances where some generalist courts have been less responsive to environmental problems. In the Federal Court of Australia, for example, plaintiffs have had less success in bringing climate change litigation before that Court than they have experienced in the Land and Environment Court of NSW.²³⁵ This can largely be attributed to the nature of Australia's federal environmental laws which have a narrower application to certain matters of national environmental significance, making the indirect impacts of GHGs from potential projects on matters of national environmental significance, such as the Great Barrier Reef, difficult to prove.²³⁶ The lack of success may also be attributed to the fact that the Federal Court hears and determines cases involving judicial review only, and not cases involving merits review or civil enforcement. In any event, these cases have nonetheless highlighted areas in need of law reform. Unsuccessful cases have also provided a vehicle for the development of the law, allowing subsequent cases to build on the legal arguments and scientific evidence presented.²³⁷

While the efforts of generalist courts to respond effectively to environmental problems should be encouraged, ECTs with comprehensive jurisdiction generally remain better equipped at responding to environmental problems on the basis of their specialisation in resolving problems of this nature.

10. Develops environmental jurisprudence

ECTs which have the requisite status, comprehensive jurisdiction and specialised knowledge will invariably hear a large number of cases. As a result, these ECTs will be presented with greater opportunities to develop environmental jurisprudence. I have already touched upon the Land and Environment Court of NSW as an example of an ECT that has been a leader in the development of environmental

²³⁵ Preston, above n 203, 486-487.

²³⁶ See, eg, *Wildlife Preservation Society v Minister for the Environment and Heritage* (2006) 232 ALR 510; *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* (2007) 243 ALR 784.

²³⁷ Felicity Millner and Kirsty Ruddock, "Climate Litigation: Lessons learned and future opportunities" (2011) 36 *Alternative Law Journal* 27, 27.

jurisprudence through its decisions on matters of substantive, procedural, distributive and restorative justice. However, I would like to explore further one particular strand of decisions that the Court has made in a specific area of substantive justice: namely, the interpretation of principles of ESD.²³⁸

Before I do this, however, it is necessary to make some preliminary comments on the art of judging. The famous American scholar, Roscoe Pound, identified a three-step process to be followed in the adjudication of a dispute: (1) finding the law; (2) interpreting the law; and (3) applying the law.²³⁹ For present purposes, I am principally concerned with the first step of finding the law. The first step involves ascertaining which legal rule is to be applied when determining a dispute or matter that is before the Court. At times, this involves no particular difficulty. The legal rule to be applied may be prescribed by statute, either primary or subordinate, or be settled by precedent.²⁴⁰

In many cases, however, this first step of finding the law is not so simple. There might be more than one legal rule or principle which might apply and the parties are contending which should be made the basis of the decision. In that event, the several rules or principles must be interpreted in order for a rational selection to be made. If none of the existing rules or principles are adequate to cover the case, then a new one must be supplied.²⁴¹ One way of supplying a new rule or principle is reasoning by analogy. Where no binding precedent containing the relevant rule or principle exists, a rule of law described in an earlier case or line of cases might be extended logically so as to apply to the case at hand because of “resemblances which can reasonably be defended as both legally relevant and sufficiently close”.²⁴²

An illustration of development of a rule or principle along the line of logical progression, that is, the use of the rule of analogy, is the series of decisions of the

²³⁸ On this topic generally, see Preston, above n 206, 115-121.

²³⁹ See Roscoe Pound, *An Introduction to the Philosophy of Law* (Yale University Press, 1954) 48.

²⁴⁰ As to the rules of precedent, see Sir Rupert Cross and J W Harris, *Precedent in English Law* (Clarendon Press, 4th ed, 1991); John Lockhart, “The Doctrine of Precedent – Today and Tomorrow” (1987) 3 *Australian Bar Review* 1; Sir Anthony Mason, “The Use and Abuse of Precedent” (1988) 4 *Australian Bar Review* 93.

²⁴¹ Pound, above n 239, 50.

²⁴² H L A Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 127.

Land and Environment Court of NSW holding that the principles of ESD are relevant matters to be considered in determining an application for approval to carry out development that is likely to impact the environment.²⁴³

The first case in which one of the principles of ESD, namely the precautionary principle, arose was *Leatch v National Parks and Wildlife Service*.²⁴⁴ In that case, Stein J held that, while there was no express statutory provision in the *National Parks and Wildlife Act 1974* (NSW) (“the NPW Act”) requiring consideration of the precautionary principle, nevertheless it was a relevant matter to be considered by means of other statutory provisions²⁴⁵ and having regard to the subject matter, scope and purpose of the NPW Act.²⁴⁶

The issue subsequently arose under a different enactment, the EPA Act, in *Carstens v Pittwater Council*.²⁴⁷ The EPA Act had, by this time, been amended to add the encouragement of ESD as an object of the Act.²⁴⁸ However, the list of matters in s 79C(1) that a consent authority (including the Court on a merits review appeal) is required to take into account in determining a development application did not expressly refer to the principles of ESD, although the list did include “the public interest” (s 79C(1)(e)). In this case, Lloyd J held that the principles of ESD could not be said to be irrelevant for two reasons: first, it is not an irrelevant consideration for a decision-maker to take into account a matter relating to the objects of the Act, one of which is to encourage ESD and, secondly, one of the considerations mentioned is “the public interest” and it is in the public interest, in determining a development application, to give effect to the objects of the Act.²⁴⁹

The rule that a principle of ESD may be considered under the heading of “the public interest” was therefore transposed to a different statutory enactment and cast as a not irrelevant consideration.

²⁴³ Preston, above n 206, 115.

²⁴⁴ (1993) 81 LGERA 270.

²⁴⁵ For example, the then applicable s 92C of the *National Parks and Wildlife Act 1974* (NSW) and s 39(4) of the *Land and Environment Court Act 1979* (NSW).

²⁴⁶ (1993) 81 LGERA 270, 282-283.

²⁴⁷ (1999) 111 LGERA 1.

²⁴⁸ *Environmental Planning and Assessment Act 1979* (NSW) s 5(a)(vii).

²⁴⁹ (1999) 111 LGERA 1, 25 [74].

In the next case, *Hutchison Telecommunications (Australia) Pty Ltd v Baulkham Hills Shire Council*,²⁵⁰ Pain J held that the precautionary principle is a relevant consideration under s 79C of the EPA Act, given reference to ESD in the Act's objects.²⁵¹ Although Pain J stated that this approach was also taken by Lloyd J in *Carstens*, in fact, Pain J's decision was an extension of Lloyd J's decision. Lloyd J had held that the principles of ESD were not irrelevant matters under s 79C(1) (which is different to holding that they were relevant matters). Pain J extended this to hold that the principles of ESD were relevant matters under s 79C(1).

In *BGP Properties Pty Limited v Lake Macquarie City Council*,²⁵² McClellan CJ examined in detail whether the principles of ESD were relevant matters to be considered when determining a development application under the EPA Act. The judgment does not refer to Pain J's decision in *Hutchison Telecommunications*. McClellan CJ agreed with Lloyd J's conclusion in *Carstens*,²⁵³ but went further to hold that:

by requiring a consent authority (including the Court) to have regard to the public interest, [s 79C(1)(e)] of the EP&A Act obliges the decision maker to have regard to the principles of ecologically sustainable development in cases where issues relevant to those principles arise.²⁵⁴

Again, this holding is cast in positive terms (the principles of ESD are relevant matters to be considered), not the double negative terms that Lloyd J had used (the principles of ESD are not irrelevant matters).

In arriving at the conclusion that the principles of ESD are relevant matters, McClellan CJ had regard to a variety of sources of law, both domestic and international. Domestic sources of law included other statutes referring to the principles of ESD, quasi-legislative policy documents, persuasive precedents in prior decisions of the Court and of courts in other Australian jurisdictions while the international sources of law consisted particularly of international soft law on the principles of ESD.

²⁵⁰ [2004] NSWLEC 104.

²⁵¹ *Ibid* [26].

²⁵² (2004) 138 LGERA 237.

²⁵³ *Ibid* 257 [101].

²⁵⁴ *Ibid* 263 [113].

Subsequent cases have affirmed the rule that had now been articulated by these cases, that the principles of ESD are relevant matters to be considered by a consent authority when determining a development application under Part 4 of the EPA Act, under the rubric of the “public interest”.²⁵⁵ The evolution of the rule has continued, and no doubt will continue, over time.²⁵⁶

The development of environmental jurisprudence by specialised ECTs may also facilitate cross fertilisation of environmental law whereby domestic ECTs draw upon the environmental jurisprudence of other countries.²⁵⁷ Australian courts have shown a willingness to rely on overseas comparative approaches in developing and refining the common law and in constitutional interpretation.²⁵⁸ A comparative approach is useful for standardising particular areas of law, for assisting in clarifying aspects of the law and for identifying the concepts and values that shape our own laws.²⁵⁹ Such an approach is assisted both by a degree of expertise to evaluate the relevance of foreign decisions and the self-confidence in one’s own legal system to accommodate foreign ideas.²⁶⁰

An illustration of foreign jurisprudence being considered by a domestic Australian court is the decision of *Telstra Corporation Ltd v Hornsby Shire Council*²⁶¹ where the Land and Environment Court of NSW referred to judicial decisions of other jurisdictions throughout the world on the precautionary principle, including the European Court of Justice, courts of New Zealand, India, the United Kingdom, the United States and Pakistan, as well as the International Court of Justice.²⁶²

²⁵⁵ *Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning* [2005] NSWLEC 426, [54]; *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 146 LGERA 10, 38 [121]-[124]; *Minister for Planning v Walker* [2008] NSWCA 224, [42]-[43].

²⁵⁶ For a detailed discussion of the continuing evolution of the rule, see Preston, above n 206, 119-121. For a summary of the existing rules concerning ESD as a relevant consideration, see Dwyer and Taylor, above n 78, 201-203.

²⁵⁷ Ben Boer, “The Rise of Environmental Law in the Asian Region” (1999) 32 *University of Richmond Law Review* 1503, 1510.

²⁵⁸ John Basten, “International Influence on Domestic Law: Neither Jingoistic Exceptionalism nor Blind Servility” in Justin T Gleeson and Ruth C A Higgins (eds), *Constituting Law: Legal Argument and Social Values* (The Federation Press, 2011) 202.

²⁵⁹ Susan Kiefel, “English, European and Australian Law: Convergence or Divergence” (2005) 79 *Australian Law Journal* 220, 227.

²⁶⁰ Basten, above n 258, 210.

²⁶¹ (2006) 146 LGERA 10 (“Telstra”).

²⁶² *Ibid* [125]-[183], citing *Monsanto Agricoltura Italia v Presidenza del Consiglio dei Ministri* (European Court of Justice, Case C-236/01, 13 March 2003, unreported); *National Farmers’ Union v Secretary Central of the French Government* (European Court of Justice, Case C-241/01, 2 July

Although the precautionary principle was not activated on the facts of the case, the decision's articulation of the principle and explanation of the application of the principle have contributed to the growing jurisprudence relating to this principle of ESD. The decision of the Land and Environment Court of NSW in *Telstra* has, in turn, been cited by courts of other jurisdictions when dealing with evidence of risk of environmental harm, including in Victoria,²⁶³ South Australia,²⁶⁴ Queensland,²⁶⁵ and the Federal Court of Australia²⁶⁶ and in Australian and overseas journal articles.²⁶⁷ Through the development of environmental jurisprudence, ECTs have the ability to make a valued contribution to environmental governance at all scales, ranging from the global to the local. I shall return to the value-adding function of ECTs shortly.

2002, unreported); *Hungary v Slovakia, Re Gabčíkovo-Nagymaros Project (Danube Dam case)* [1997] ICJ Rep 7; *Pfizer Animal Health SA v Council of the European Union* [2002] ECR II-3305; *Mahon v Air New Zealand Ltd* [1984] 1 AC 808; *Vellore Citizens Welfare Forum v Union of India* AIR 1996 SC 2715; *A P Pollution Control Board v Bayadu* AIR 1999 SC 812; *Narmada Bachao Andolan v Union of India* AIR 2000 SC 3751; *R v Secretary of State for Trade and Industry; Ex parte Duddridge* [1995] Env LR 151; *Zia v WAPDA* (1994) PLD SC 693; *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993); *Industrial Union Department AFL-CIO v American Petroleum Institute* 448 US 607 (1980).

²⁶³ See, eg, *Environment East Gippsland Inc v VicForests* [2010] VSC 335, [188], [190], [195]; *Rozen v Macedon Ranges Shire Council* [2010] VSC 583, [43]-[56]; *MyEnvironment v VicForests* [2012] VSC 91, [260]-[336]; *Dual Gas Pty Ltd v Environment Protection Authority* [2012] VCAT 308, [212], [218].

²⁶⁴ See, eg, *Thornton v Adelaide Hills Council* [2006] SAERDC 41; 151 LGERA 1, 12-13; *Rowe v Lindner (No 2)* [2007] SASC 189, [60].

²⁶⁵ See, eg, *Telstra Corp Ltd v Cairns Regional Council* [2010] QPELR 128; [2009] QPEC 84, [21].

²⁶⁶ See, eg, *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2009] FCA 330, [89].

²⁶⁷ See, eg, Rosemary Lyster, "Chasing Down the Climate Change Footprint of the Private and Public Sectors: Forces Converge" (2007) 24 *Environmental and Planning Law Journal* 281; Jacqueline Peel, "The Role of Climate Change Litigation in Australia's Response to Global Warming" (2007) 24 *Environmental and Planning Law Journal* 90; Jacqueline Peel, "When (Scientific) Rationality Rules: (Mis)Application of the Precautionary Principle in Australian Mobile Phone Tower Cases" (2007) 19 *Journal of Environmental Law* 103; Arla Marie Kerr, "Untapped Potential: Administrative Law and International Environmental Obligations" (2008) 6 *New Zealand Journal of Public and International Law* 81; Jacqueline Peel, "Climate Change Law: The Emergence of a New Legal Discipline" (2008) 32 *Melbourne University Law Review* 922; Jennifer Scott, Louise Hayward and Andrew Joyce, "Climate Change Adaptation: Socialising the Science" (2008) *Local Government Law Journal* 52; Chris Tollefson and Jamie Thornback, "Litigating the Precautionary Principle in Domestic Courts" (2008) 19 *Journal of Environmental Law and Practice* 33; Mike Dolan and Jack Rowley, "The Precautionary Principle in the Context of Mobile Phone and Base Station Radiofrequency Exposures" (2009) 117(9) *Environmental Health Perspectives*, 1329; David Parry, "Ecologically Sustainable Development in Western Australian Planning Cases" (2009) 26 *Environmental and Planning Law Journal* 375; Linda Pearson and Peter Williams, "The New South Wales Planning Reforms: Undermining External Merits Review of Land-Use Decision-Making?" (2009) 26 *Environmental and Planning Law Journal* 19; Martin ZP Olszynski, "Adaptive Management in Canadian Environmental Assessment Law: Exploring Uses and Limitations" (2010) 21 *Journal of Environmental Law and Practice* 1; Dwyer and Taylor, above n 78, 198.

11. Underlying ethos and mission

Centralisation and specialisation give an organic coherence to an ECT and its work. The nature of environmental law gives a unifying ethos and mission, for as Lord Woolf once remarked: “[t]he 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.”²⁶⁸

Many of the ECTs located throughout the world that have enjoyed greater success have a clear sense of direction with respect to the role they play in the broader schema of environmental governance. Often, this clear sense of direction is encapsulated in the form of a statement of purpose, mission statement or charter.

The Land and Environment Court, for example, has adopted a statement of purpose which guides its day-to-day operations.²⁶⁹ The Court’s purpose is to safeguard and maintain: the rule of law; equality of all before the law; access to justice; fairness, impartiality and independence in decision-making; processes that are consistently transparent, timely and certain; accountability in its conduct and its use of public resources; and, the highest standards of competency and personal integrity of its judges, commissioners and support staff.²⁷⁰

The Resource Management and Planning Appeals Tribunal of Tasmania also has adopted a statement of purpose to guide its day-to-day operations.²⁷¹ The objectives of this ECT are to: promote the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity; provide for the fair, orderly and sustainable use and development of air, land and water; encourage public involvement in resource management and planning; facilitate economic development in accordance with these objectives; and promote

²⁶⁸ Sir Harry Woolf, “Are the Judiciary Environmentally Myopic?” (1992) 4 *Journal of Environmental Law* 1, 4.

²⁶⁹ See Land and Environment Court of NSW, *About Us* (21 November 2012) <<http://www.lec.lawlink.nsw.gov.au/lec/about.html>>.

²⁷⁰ *Ibid.*

²⁷¹ See Resource Management and Planning Appeals Tribunal of Tasmania, *Home Page* (8 May 2013) <<http://www.rmpat.tas.gov.au/>>.

the sharing of responsibility for resource management and planning between the different spheres of government, the community and industry in Tasmania.²⁷²

By devising and implementing a statement of purpose, mission statement or charter, ECTs will possess a general benchmark against which its performance may be measured or compared. This, in turn, assists in determining the degree of success a given ECT is having at any particular time.

12. Flexible, innovative and provides value-adding function

An ECT's decisions and work can generate value apart from the particular case or task involved. The decisions of an ECT may uphold, interpret, and explicate environmental laws and values. Where environmental laws and values are underdeveloped, an ECT can add flesh to the skeletal form of those existing laws and values.²⁷³

First, an ECT may add value beyond the resolution of particular environmental disputes through developing environmental jurisprudence. In particular, the development of environmental jurisprudence by specialist ECTs may facilitate cross fertilisation of environmental law in circumstances where domestic ECTs draw upon the environmental jurisprudence of other countries.²⁷⁴ I have previously discussed this above through the example of the *Telstra* case decided in the Land and Environment Court of NSW.

Secondly, in merits review appeals, ECT decisions can add value to administrative decision-making by formulating and applying non-binding principles. The principles derive from the case at hand, but can be of more general applicability. This involves rulemaking by adjudication and is distinguishable from legislative rulemaking. ECTs undertaking merits review can add value to administrative decision-making by extrapolating principles from the cases that come before them and publicising these

²⁷² Ibid.

²⁷³ See generally Preston, above n 2, 436-437.

²⁷⁴ Boer, above n 257, 1510.

to the target audience, who can apply them in future administrative decision-making.²⁷⁵

The Land and Environment Court of NSW has recognised the value-adding benefits of principles in merits review appeals and has encouraged, in appropriate cases, the formulation of planning principles in planning appeals²⁷⁶ and tree dispute principles in tree applications.²⁷⁷ The Court has developed over 40 planning principles to date, including two relating to principles of ESD.²⁷⁸ Tree dispute principles are similar in nature to planning principles but are more specific in addressing aspects of tree disputes.²⁷⁹

Thirdly, successful ECTs can add value through innovations in practice and procedure.²⁸⁰ Large, established courts can be conservative and have inertia; change is slow and resisted. In contrast, successful ECTs are often characterised by their flexible and innovative nature. Changes to practices and procedure in these fora can often be achieved quickly and with wide support within the given institution. In particular, the use of practice notes or other similar instruments by an ECT has the advantage of enabling that ECT to adapt quickly and appropriately to inefficiencies in its own practices and procedures.

The flexibility and innovativeness of the Land and Environment Court of NSW has been demonstrated by a number of initiatives, many of which I have discussed above. The method of concurrent evidence, for example, which was first trialled in the Court by Peter McClellan, has been very successful, and has since been implemented by the Supreme Court of NSW and the Federal Court of Australia.²⁸¹ In moving towards a multi-door courthouse, the Court has demonstrated a flexible

²⁷⁵ See generally Linda Pearson, "Policy, principles and guidance: Tribunal rule making" (2012) 23 *Public Law Review* 16; Clifford Ireland, "Planning Merits Review and the Doctrine of Precedent" (2006) 27 *Australian Bar Review* 231.

²⁷⁶ Planning appeals are made against decisions under the *Environmental Planning and Assessment Act 1979* (NSW).

²⁷⁷ Tree applications are made under the *Trees (Disputes Between Neighbours) Act 2006* (NSW).

²⁷⁸ See Land and Environment Court of NSW, *Planning principles* (21 March 2013)

<http://www.lec.lawlink.nsw.gov.au/lec/principles/planning_principles.html>.

²⁷⁹ See Land and Environment Court of NSW, *Tree dispute principles* (21 November 2012)

<http://www.lec.lawlink.nsw.gov.au/lec/principles/tree_principles.html>.

²⁸⁰ Preston, above n 2, 438-440.

²⁸¹ See Craig, above n 147, 19.

approach to environmental dispute resolution and affords the judges, commissioners and the parties, at least to some extent, a degree of choice in selecting the most appropriate dispute resolution mechanism for resolving a particular dispute (e.g. conciliation, mediation, neutral evaluation or adjudication by litigation).

The Court has made great strides forward in promoting access to justice by breaking down geographical and other barriers through the use of onsite hearings and eCourt case management. The Court's implementation of case management procedures such as court-directed joint conferencing and reporting has had the effect of creating a problem solving, rather than conflict-based, approach to dispute resolution. It has adopted a creative approach to remediation and punishment of environmental crime through use of restorative justice principles. Many other ECTs located throughout the world have followed the Land and Environment Court's lead by implementing similar initiatives. There will, no doubt, be more ECTs to do so in the future.

While the initiatives I have just mentioned are all very important, there are two special initiatives that I have yet to discuss which warrant some attention. First, in late 2008, the Court agreed to adopt and implement the International Framework for Court Excellence;²⁸² becoming the first court in the world to do so.²⁸³ The Framework provides a methodology for assessing a court's performance against seven areas of court excellence and guidance for courts intending to improve their performance: (1) court leadership and management; (2) court planning and policies; (3) court proceedings; (4) public trust and confidence; (5) user satisfaction; (6) court resources; and (7) affordable and accessible services.²⁸⁴ The Framework takes a holistic approach to court performance. It requires a whole-court approach to delivering court excellence rather than simply presenting a limited range of performance measures directed to limited aspects of court activity.

²⁸² See International Consortium for Court Excellence, *The Framework* (March 2013) <<http://www.courtexcellence.com/Resources/The-Framework.aspx>>.

²⁸³ See generally Brian J Preston, "Implementing the International Framework for Court Excellence: The experience of the Land and Environment Court of New South Wales" (Paper presented to the Asia Pacific Courts Conference, Singapore, 4-6 October 2010). See also *Land and Environment Court Annual Review 2009*, 3-4 and 23-25; *Land and Environment Court Annual Review 2011*, 23.

²⁸⁴ *Land and Environment Court Annual Review 2011*, 23-24.

The Court repeated the self-assessment process under the Framework in November 2011 (after first undertaking this process in 2009), and recorded “good to excellent” results in most key indicators.²⁸⁵ The Court continues to monitor its progress and identify ways in which its performance may be improved.²⁸⁶

Secondly, the Court, in conjunction with the Judicial Commission of New South Wales, established in 2008 the world’s first sentencing database for environmental offences, as part of the Judicial Information Research System (“JIRS”).²⁸⁷ Sentencing statistics for environmental offences display sentencing graphs and a range of objective and subjective features relevant to environmental offences. The user is able to access directly the remarks on sentencing behind each graph. It is anticipated that the features of the JIRS sentencing database will produce many benefits and assist in: improving consistency in sentences through the adoption of a principled approach to sentencing for environmental crime; balancing individualised justice and consistency; improving accessibility and transparency of sentencing decisions; indicating a range of sentences; facilitating appellate review and monitoring and, if appropriate, registering disapproval by appellate courts of sentencing patterns.²⁸⁸ It is likely to provide an instructive environmental sentencing model for other jurisdictions to follow in the future.²⁸⁹

Finally, the Qingzhen environmental court of China has also demonstrated signs of innovation.²⁹⁰ This is reflected, for example, by its decision in the case of *Guiyang Two Lakes and One Reservoir Management Bureau v Guizhou Tianfeng Chemical Ltd*. In that case, the Guiyang Municipal Two Lakes and One Reservoir Administrative Bureau (acting as environmental public interest litigants) successfully brought a suit against a fertilizer plant that was polluting Guiyang’s drinking water

²⁸⁵ Ibid.

²⁸⁶ Preston, above n 5, 409.

²⁸⁷ *Land and Environment Court Annual Review 2011*, 26. For a review of JIRS sentencing database, see Brian J Preston and Hugh Donnelly, “The establishment of an environmental crime sentencing database in New South Wales” (2008) 32 *Criminal Law Journal* 214; Brian J Preston, “A Judge’s Perspective on Using Sentencing Databases” (2010) 3 *Journal of Court Innovation* 247.

²⁸⁸ Preston and Donnelly, above n 287, 235; White, above n 43, 270.

²⁸⁹ Preston and Donnelly, above n 287, 235; White, above n 43, 270.

²⁹⁰ See also Jingjing Liu, “Environmental Justice with Chinese Characteristics: Recent Developments in Using Environmental Public Interest Litigation to Strengthen Environmental Justice” (2012) 7 *Florida A & M Law Review* 225, 254-258 and 259-260.

source. Wang observes that this case was noteworthy for innovations in three key areas.²⁹¹

First, the defendant fertilizer plant was outside of the normal jurisdiction of the Court, but was granted special jurisdiction over the case by the superior level court.²⁹²

Secondly, the crux of the remedy granted to plaintiffs in this case was an injunction to stop the defendant from dumping waste and an order to remediate the existing waste that had been deposited into the drinking water source.²⁹³ Thirdly, the Court required the plaintiffs to meet a low evidentiary burden in this case by basing its decision on a mere showing that the water quality standards had been violated, rather than requiring the plaintiffs to demonstrate the tortious elements of duty, breach, causation and harm.²⁹⁴

Conclusion

In this paper, I have identified twelve characteristics that are required, in my view, for an ECT to operate successfully. I have also attempted to identify best practices, both substantive and procedural, from different ECTs located throughout the world. It is evident that the lack of success of some ECTs may be attributed to the absence of some of these characteristics. These ECTs can learn from the examples of successful ECTs that have been provided by other jurisdictions. Those jurisdictions that have not yet implemented an ECT can also learn from the best practices identified in this paper.

Even for those ECTs that have enjoyed much success and already display many, if not all, of the characteristics I have identified, there is still work to be done. An ECT, whether it currently be successful or otherwise, can always learn from its fellow ECTs. As Gething observes “an excellent organisation is one that is continually looking, learning, changing and improving towards the concept of excellence it has

²⁹¹ Alex L Wang, “Environmental Courts and Public Interest Litigation in China” (2010) 43 *Chinese Law and Government* 4, 12-13.

²⁹² *Ibid* 13.

²⁹³ *Ibid*.

²⁹⁴ *Ibid*.

set for itself. Excellence is more of a journey than a static destination”.²⁹⁵ An ECT must recognise this need for adaptive management by continually monitoring its performance against the objectives it has set for itself to achieve. An ECT must also adjust its procedural and substantive goals and performance in response to such monitoring data. By doing so, the ECT will remain relevant and influential in meeting the environmental challenges of the future.

²⁹⁵ Michael Gething, “A Pathway to Excellence for a Court – Part 1: Defining the Pathway” (2008) 17 *Journal of Judicial Administration* 237, 242.