

Characteristics of successful environmental courts and tribunals

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Abstract

Over the course of the past few decades, there has been an exponential growth in environmental courts and tribunals. At present, over 350 of these specialised fora for resolving environmental disputes exist, spanning across every region throughout the world. Some of the environmental courts and tribunals have been more successful but others have been less successful. This article identifies twelve characteristics that experience suggests are required for an environmental court or tribunal to operate successfully in practice, drawing upon examples from multiple jurisdictions. In identifying best practices, both substantive and procedural, from existing environmental courts and tribunals, this article will assist two groups: first, stakeholders who are in the process of planning or creating environmental courts or tribunals in their jurisdictions and, secondly, stakeholders and countries that are looking to improve the functioning and performance of their own environmental courts and tribunals.

Introduction

Over the past few decades, there has been an 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 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

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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 Envtl L Rev 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 Envtl L Rev 396, 396-440; Ulf Bjällås, ‘Experiences of Sweden’s Environmental Courts’ (2010) 3 J Ct Innovation 177, 177-184; Merideth Wright, ‘The Vermont Environmental Court’ (2010) 3 J Ct Innovation 201, 201-214.

³ Pring and Pring (n 1) 1.

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 article is to identify twelve key characteristics that are required for an ECT to operate successfully in practice. The article will elucidate these characteristics through drawing upon examples from several jurisdictions, focusing particularly on the experience of the Land and Environment Court of New South Wales. In doing so, it 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, the status and authority of successful ECTs 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

⁴ See Zhang Minchun and Zhang Bao, 'Specialised Environmental Courts in China: Status Quo, Challenges and Responses' (2012) 30 J En & Nat Res L 361, 363.

⁵ Brian J Preston, 'Operating an environment court: The experience of the Land and Environment Court of New South Wales' (2008) 25 EPLJ 385, 387.

⁶ Vermont Judiciary, 'Vermont Superior Court – Environmental Division', <<http://www.vermontjudiciary.org/gtc/environmental/default.aspx>> accessed 28 November 2013.

⁷ See Bret C Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' (2002) 29 Ecology LQ 1, 26-38.

⁸ See Michael Rackemann, 'The Planning and Environment Court of Queensland: A case study' (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 Christine Trenorden, 'The Environment, Resources and Development Court: An Overview' (Australasian Conference of Planning and Environment Courts and Tribunals, Sydney, 2 September 2010) 1.

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

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, 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 1995.¹³ The absence of such laws resulted in an ECT with limited jurisdiction and very low caseloads.¹⁴ There have also been other inferior courts (e.g. ECTs in the Chinese province of Liaoning)¹⁵ 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 were 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 that give the ECTs status and authority.

¹⁰ See David Parry, 'Revolution in the West: The transformation of planning appeals in Western Australia' (2008) 14 LGLJ 119, 127.

¹¹ See Kevin Bell, *One VCAT: President's Review of VCAT* (Victorian Civil and Administrative Tribunal, 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' (Australasian Conference of Planning and Environment Courts and Tribunals, 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 OUCJLJ 157, 160.

¹³ Sandra Paul, quoted in Pring and Pring (n 1) 31.

¹⁴ Pring and Pring (n 1) 31-32.

¹⁵ Zhang and Zhang (n 4) 380.

First, many of the successful ECTs enjoy a more comprehensive jurisdiction than their unsuccessful counterparts. This is discussed below. Secondly, 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.¹⁶ The Swedish system of environmental courts is another example. As Bjällås has noted, the success of environmental courts in Sweden may be attributed 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.¹⁷ 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.¹⁸

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.¹⁹ 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”.²⁰ 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”

¹⁶ Preston (n 2) 427.

¹⁷ Bjällås (n 2) 178.

¹⁸ *ibid* 182.

¹⁹ Pring and Pring (n 1) 32-33.

²⁰ *ibid*.

presenting a major obstacle to access to environmental justice.²¹ 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 trained to be so literate, and who can contribute to the development of environmental jurisprudence.²² Such expertise maintains public trust and confidence in the ECT as the forum for resolving environmental disputes.

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).²³ Again, the Land and Environment Court of NSW provides an example. The Court has enjoyed a constant flow of cases since it first came into operation in September 1980.²⁴ This has enabled the Court to develop numerous precedents in four areas of environmental justice. First, the Court has been a leader in developing jurisprudence on substantive justice,²⁵ especially in relation to principles of ecologically sustainable development (“ESD”) (such as the precautionary principle),²⁶ EIA,²⁷ the public trust,²⁸ and sentencing for environmental crime.²⁹ Secondly, the Court has enunciated a number of principles of procedural

²¹ *ibid.*

²² Preston (n 2) 425-426 and 434-435.

²³ *ibid.* 434.

²⁴ See Preston (n 5) 387 and 390.

²⁵ Preston (n 2) 434.

²⁶ See cases discussed in Paul Stein AM, ‘Turning Soft Law into Hard – An Australian Experience with ESD Principles in Practice’ (1997) 3 TJR 91, 91-97; Brian J Preston, ‘Leadership by the courts in achieving sustainability’ (2010) 27 EPLJ 321, 321-330; Brian J Preston, ‘The Role of the Judiciary in Promoting Sustainable Development: the Experience of Asia and the Pacific’ (2005) 9 APJEL 109, 144-211.

²⁷ See, eg, *Prineas v Forestry Commission of NSW* (1983) 49 LGRA 402, 417; *Warren v Electricity Commission of New South Wales* (1990) 130 LGRA 565, 569-571; *Shaffer Corporation Ltd v Hawkesbury City Council* (1992) 77 LGRA 21, 30-31; *Bentley v BGP Properties Pty Ltd* (2006) 145 LGRA 234, 245-246. See also Brian J Preston, ‘Adequacy of Environmental Impact Statements in New South Wales’ (1986) 3 EPLJ 194; Brian J Preston, ‘The Environmental Impact Statement Threshold Test: When is an Activity Likely to Significantly Affect the Environment?’ (1990) 7 EPLJ 147.

²⁸ 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 EPLJ 329; Preston (2005) (n 27) 203-206.

²⁹ See cases discussed in Brian J Preston, ‘Sentencing for Environmental Crime’ (2006) 18 JOB 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 Crim LJ 91; Brian

justice with respect to the removal of barriers to public interest litigation in relation to standing, interlocutory injunctions, security for costs, laches, and costs.³⁰ Thirdly, the Court has articulated jurisprudence on the issue of distributive justice in environmental matters.³¹ 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.³²

2. Independent from government and impartial

Another characteristic generally shared by successful ECTs is independence from government. An essential component of a system of good environmental justice and governance is the existence of an independent and impartial adjudicator.³³

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.³⁴ As Lord Bingham observed the principle of independence:

J Preston, 'Principled sentencing for environmental offences – Part 2: Sentencing considerations and options' (2007) 31 Crim LJ 142.

³⁰ 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).

³¹ 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].

³² 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 EPLJ 257. See also John M McDonald, 'Restorative Justice Process in Case Law' (2008) 33 Alt LJ 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 EPLJ 263; Brian J Preston, 'The Use of Restorative Justice for Environmental Crime' (2011) 35 Crim LJ 136; Rob White, 'Environmental crime and problem-solving courts' (2013) 59 Crim, Law and Soc Change 267; Reece Walters and Diane Solomon Westerhuis, 'Green crime and the role of environmental courts' (2013) 59 Crim, Law and Soc Change 279.

³³ See 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 LGLJ 90, 90; Preston (n 2) 427.

³⁴ See Brian J Preston, 'The enduring importance of the rule of law in times of change' (2012) 86 ALJ 175, 180. See also Brian J Preston, 'Environmental Public Interest Litigation: Conditions for Success' (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, published in Japanese in K. Uga (ed) *Towards an Effective Guarantee of the Green Access* (Shinzansha, 2014).

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 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.³⁵

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.³⁶

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.³⁷ A decision-maker can, of course, not be a judge in his or her own cause.³⁸ 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.³⁹

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.⁴⁰

³⁵ Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 91-92.

³⁶ Preston, 'The enduring importance of the rule of law' (n 34) 181.

³⁷ See Brian J Preston, 'Natural justice by the courts: some recent cases' (2013) 11 TJR 193, 209-214.

³⁸ John Rawls, *A Theory of Justice* (Harvard University Press, revised ed, 1999) 210.

³⁹ Bingham (n 35) 93.

⁴⁰ See Pring and Pring, (n 1) 75; Joseph Raz, *The Authority of Law* (Clarendon Press, 1979) 217; Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP, 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; Stephen Rares,

There are several ECTs throughout the world that have successfully integrated these qualities of best practice into their design and ongoing day-to-day operations. 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.⁴¹ 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”.⁴²

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.⁴³ 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.⁴⁴ Successful candidates are then selected on merit, based on a combination of their exam scores, education and experience.⁴⁵ Once selected, a newly admitted judge acts as a “substitute judge” which is an entry-level position.⁴⁶ 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.⁴⁷

Judges in Brazil are paid very well relative to professional salaries in that country and when compared to countries of a similar nature.⁴⁸ Independence and

‘What is a Quality Judiciary?’ (2011) 20 J Jud Admin 133, 135-136; Robert French, ‘The State of the Australian Judicature’ (2010) 84 ALJ 310, 317-318.

⁴¹ For an overview of environmental courts in Brazil, see Vladimir Passos de Freitas, ‘Environmental Law and Enforcement in Brazil’ (Australasian Conference of Planning and Environment Courts and Tribunals, Sydney, 2 September 2010) 3.

⁴² Pring and Pring (n 1) 72.

⁴³ *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 Env’tl L Rev 470, 483.

⁴⁴ Pring and Pring (n 1) 72; Daniel Brinks, ‘Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium’ (2005) 40 Tex Intl LJ 595, 614.

⁴⁵ Pring and Pring (n 1) 72.

⁴⁶ See Maria Angela Jardim de Santa Cruz Oliveira and Nuno M Garoupa, ‘Choosing Judges in Brazil: Reassessing Legal Transplants from the US’ (2011) 59 Am J Comp L 529, 536.

⁴⁷ *ibid.*

⁴⁸ Pring and Pring (n 1) 75.

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 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).⁴⁹

In contrast to the environmental courts of Brazil, “captive” environmental tribunals throughout the world are 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.”⁵⁰ 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”).⁵¹ This ECT is comprised of political appointees of the EPA and is required to give effect to the policies of the administration in power.⁵² While the EPA has instituted “strict rules” governing the conduct of EAB decision-makers in an effort to ensure their neutrality and decisional independence,⁵³ and there is evidence to suggest that the decision-makers of the EAB are considered to be very professional,⁵⁴ it is arguable that an objective observer may view this “captive” tribunal as lacking independence and, consequently, impartiality.⁵⁵ Such a view is strengthened by the absence of tenure protections for members of the EAB.⁵⁶ In this respect, it is probably more desirable

⁴⁹ *ibid.*

⁵⁰ *ibid.* 26.

⁵¹ See Anna L Wolgast, Kathie A Stein and Timothy R Epp, ‘The United States’ Environmental Adjudication Tribunal’ (2010) 3 J Ct 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 *Envtl 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.

⁵² Pring and Pring (n 1) 26.

⁵³ See Joseph J Lisa, ‘EPA Administrative Enforcement Actions: An Introduction to the Consolidated Rules of Practice’ (2005) 24 *Temp J Sci, Tech & Env’tl L* 1, 9.

⁵⁴ Pring and Pring (n 1) 26.

⁵⁵ See Peter Cane, *Administrative Law* (OUP, 2011) 96.

⁵⁶ Russell L Weaver, ‘Appellate Review in Executive Departments and Agencies’ (1996) 48 *Admin L Rev* 251, 271. As Weaver notes, “[i]f the Administrator [of the EPA] becomes dissatisfied with the board, or the decisions it renders, the Administrator can change the board’s composition”.

for environmental tribunals to not follow the “captive” model.⁵⁷

The independence and impartiality of ECT members may also be undermined in circumstances where those members are appointed for short-term periods without long-term security of tenure. This is illustrated by the *Umweltsenat* (Environmental Senate) of Austria. The *Umweltsenat* is comprised of ten judicial members and 32 additional members who are legally qualified.⁵⁸ All 42 members are appointed politically by the federal president upon recommendation of the federal government, and this recommendation must include 18 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.⁵⁹ 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.⁶⁰ This, in turn, may exert indirect influence upon a member to make decisions in a certain way.

3. Comprehensive and centralised jurisdiction

Many of the more successful ECTs located throughout the world have been characterised by a comprehensive jurisdiction. The jurisdiction of an ECT should be comprehensive in three respects.

First, an ECT should enjoy comprehensive jurisdiction to hear, determine and dispose of matters and disputes arising under all environmental laws enacted by the government of the land.⁶¹ To this end, the laws must create or enable legal suits in relation to the aspects of the environment that are sought to be used or protected

⁵⁷ On the issue of independence of “captive” environmental tribunals, see William A Tilleman, ‘Environmental Appeal Boards: A Comparative Look at the United States, Canada and England’ (1996) 21 *Colum J Envtl L* 1, 18-38.

⁵⁸ Verena Madner, ‘The Austrian Environmental Senate’ (2010) 3 *J Ct Innovation* 23, 29.

⁵⁹ *ibid.*

⁶⁰ Pring and Pring (n 1) 75.

⁶¹ Pring and Pring (n 1) 26-27.

when accessing the ECT.⁶² If there is no right of action, the ECT will simply not have any jurisdiction 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, in order for an ECT to enjoy comprehensive jurisdiction to hear, determine and dispose of matters and disputes arising under the environmental laws, those laws must themselves have adequate subject matter coverage, be effective and be enforceable by government, citizens and other stakeholders.⁶³

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”.⁶⁴ Of course, the dynamic nature of environments may render it difficult to devise and subsequently impose legal duties upon a decision-maker to produce an outcome

⁶² See Preston, ‘Environmental Public Interest Litigation’ (n 34) 1-2.

⁶³ *ibid* 2.

⁶⁴ *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).

from decision-making (e.g. ESD).⁶⁵ In those circumstances, the effective or appropriate use of discretion by decision-makers may facilitate individualised and/or environmental justice, and may potentially facilitate and enhance dialogue, democracy and citizen participation in decision-making.⁶⁶

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 stakeholders, including orders restraining, remediating or compensating for environmental harm.⁶⁷

Generally speaking, more successful ECTs have a comprehensive jurisdiction with respect to coverage of matters and disputes arising under all of the environmental laws of the land. For example, the Land and Environment Court of NSW has comprehensive jurisdiction to deal with various types of environmental, planning, development, building, local government, resources and land matters.⁶⁸ The breadth of its jurisdiction is in part a function of it 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.⁶⁹ The

⁶⁵ See DE Fisher, *Australian Environmental Law: Norms, Principles and Rules* (2nd ed, Thomson Reuters, 2010) 157-158.

⁶⁶ See 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 EPLJ 185, 207-211.

⁶⁷ See, eg, Brian J Preston, 'Public Enforcement of Environmental Laws in Australia' (1991) 6 J Envtl L & Litig 39, 43-79.

⁶⁸ See Preston (n 5) 387.

⁶⁹ See Brian J Preston, 'Enforcement of environmental and planning laws in New South Wales' (2011) 16 LGLJ 72, 72-85.

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.⁷⁰

The Environment Court of NZ is another example of an ECT that has 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.⁷¹ 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.⁷² 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.⁷³ Thirdly, it has the power to enforce the duties imposed on persons by the RM Act through civil or criminal proceedings.⁷⁴

In contrast to these two courts, there are a number of other ECTs that currently have limited jurisdiction to deal with environmental matters. The Environment Commission of Trinidad and Tobago is one example (as discussed above). Two other examples are the An Bord Pleanála (Planning Appeals Board) of Ireland and the National Environmental Tribunal of Kenya that only deal with land use (not environmental) laws and EIA appeals.⁷⁵ 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 National Environmental Tribunal by establishing a new Environment and Land Court under its new Constitution of

⁷⁰ Commissioners are persons with special knowledge and expertise (eg. 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 (n 5) 387-391 and Land and Environment Court Act 1979 (NSW), s 12.

⁷¹ Birdsong (n 7) 28.

⁷² Resource Management Act 1991 (NZ), s 310(c).

⁷³ Resource Management Act 1991 (NZ), s 120.

⁷⁴ See Resource Management Act 1991 (NZ), ss 314-321.

⁷⁵ Pring and Pring (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’ (Australasian Conference of Planning and Environment Courts and Tribunals, Sydney, 2 September 2010) 3-5.

2010.⁷⁶ The Environment and Land Court is a superior court of record that enjoys a comprehensive jurisdiction over environmental and land use matters.⁷⁷

Secondly, the ECTs should enjoy comprehensive jurisdiction with respect to the administrative, civil and criminal enforcement of environmental laws.⁷⁸ Examples of ECTs that possess powers with respect to administrative, civil and criminal enforcement include the powerful 'hybrid' environmental courts in Sweden, the Land and Environment Court of NSW, the Environmental Court of NZ, the ECTs in Brazil and a number of local government ECTs in the United States.⁷⁹ Deterrence is an important factor to be considered in devising an ECT's enforcement jurisdiction, not only in criminal matters⁸⁰ but also in administrative and civil enforcement.⁸¹ 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.⁸²

Thirdly, it is ideal for ECTs to have not only comprehensive and integrated jurisdiction in terms of the range 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),⁸³ 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,⁸⁴ appeals from decisions of inferior courts, as

⁷⁶ See Donald W Kaniaru, 'Environmental Courts and Tribunals: The Case of Kenya' (2012) 29 *Pace Env'tl L Rev* 566, 572.

⁷⁷ *ibid* 573-581.

⁷⁸ Pring and Pring (n 1) 27.

⁷⁹ *ibid*.

⁸⁰ See also Preston, 'Principled sentencing for environmental offences – Part 1: Purposes of sentencing' (n 29) 94-96.

⁸¹ Pring and Pring (n 1) 27.

⁸² *ibid*. See also Preston, 'Principled sentencing for environmental offences – Part 2: Sentencing considerations and options' (n 29) 142-164.

⁸³ Pring and Pring (n 1) 28.

⁸⁴ Land and Environment Court Act 1979 (NSW), s 56A.

well as original jurisdiction to determine tree disputes and mining matters.⁸⁵ 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.⁸⁶

A characteristic that goes hand-in-hand with comprehensive jurisdiction is centralisation. Centralisation and rationalisation of jurisdiction in a particular ECT enable it to enjoy a comprehensive, integrated, and coherent environmental jurisdiction.⁸⁷ The ECT has jurisdiction to resolve the different legal aspects of environmental disputes, and is better able 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 (eg ecological integrity).⁸⁸ 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.

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:

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.⁸⁹

⁸⁵ Brian J Preston, ‘The Land and Environment Court of New South Wales: Moving towards a multi-door courthouse – Part II’ (2008) 19 ADRJ 144, 144.

⁸⁶ Pring and Pring (n 1) 28-30.

⁸⁷ See Preston (n 2) 424-425.

⁸⁸ See Zhang and Zhang (n 4) 387-389.

⁸⁹ 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.

A one-stop shop also facilitates better quality and innovative decision-making in both substance and procedure by cross-fertilisation between the different jurisdictions of 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.⁹⁰

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.

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.⁹¹ Moreover, although enforcement of judgments has also been traditionally handled by a separate enforcement division, some of these environmental courts have also incorporated enforcement authority as well.⁹² 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.⁹³

The 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

⁹⁰ *Hub Action Group Inc v Minister for Planning and Orange City Council* (2008) 161 LGERA 136, 139.

⁹¹ Alex L Wang and Jie Gao, ‘Environmental Courts and the Development of Public Interest Litigation in China’ (2010) 3 J Ct Innovation 37, 39-40.

⁹² *ibid* 40.

⁹³ *ibid* 48-50.

tribunals that had overlapping subject matter expertise in land use planning, land acquisition, environmental regulation, and heritage conservation.⁹⁴ 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.⁹⁵ The push for the creation of “super tribunals” like the ELTO is also occurring in other jurisdictions, including Australia⁹⁶ and the United Kingdom.⁹⁷

4. Judges and members are knowledgeable and competent

An essential characteristic of successful ECTs is specialisation.⁹⁸ 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 who are to be appointed to a specialised ECT as well as continuing professional development of judges and other ECT members during their tenure.⁹⁹ Having a critical mass of cases also enables judges and other members to increase knowledge and expertise over time: practice makes perfect.

⁹⁴ Sossin and Baxter (n 12) 160; Gottheil and Ewart (n 12) 4.

⁹⁵ Sossin and Baxter (n 12) 160-165; Gottheil and Ewart (n 12) 10.

⁹⁶ 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>> accessed 28 November 2013; State Administrative Tribunal of Western Australia, ‘About SAT’, <http://www.sat.justice.wa.gov.au/A/about_sat.aspx?uid=5793-8155-0296-7651>, accessed 28 November 2013; Queensland Civil and Administrative Tribunal, ‘About QCAT’ (19 February 2013), <<http://www.qcat.qld.gov.au/about-qcat>>, accessed 28 November 2013; the ACT Civil and Administrative Tribunal, <<http://www.acat.act.gov.au/>> accessed 28 November 2013. See also NSW Civil and Administrative Tribunal, <<http://www.tribunals.lawlink.nsw.gov.au/tribunals/index.html>>, accessed 23 May 2014.

⁹⁷ See Sir Robert Carnwath, ‘Tribunal Justice – a New Start’ [2009] Pub L 48, 48-69.

⁹⁸ See Preston (n 2) 425-426.

⁹⁹ Pring and Pring (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 quality, effectiveness, and efficiency can be enhanced by the availability of technical experts within an ECT. Bringing together in the one specialised forum both judges and technical experts creates a synergy and facilitates a free and beneficial exchange of ideas and information, thereby developing the ECT's 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 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.¹⁰⁰ The judge and the technical advisor are employed by the court and work full time as environmental judges.¹⁰¹ 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.¹⁰² 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.¹⁰³

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

¹⁰⁰ Bjällås (n 2) 180. See also Helle Tegner Anker and Annika Nilsson, 'The Role of Courts in Environmental Law – Nordic Perspectives' (2010) 3 J Ct Innovation 111, 115.

¹⁰¹ Bjällås (n 2) 180.

¹⁰² Anker and Nilsson (n 100) 115.

¹⁰³ Bjällås (n 2) 180-181.

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.¹⁰⁴

Environmental litigation and dispute resolution involve matters of significant scientific and technical complexity.¹⁰⁵ 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 environmental disputes. As noted above, the Land and Environment Court of NSW is one such ECT. It comprises 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.¹⁰⁶

These “internal” experts may either advise and assist judges in the hearing of environmental cases,¹⁰⁷ or hear and determine cases themselves.¹⁰⁸ 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.¹⁰⁹ Other ECTs that have combatted complexity in environmental litigation and dispute resolution by appointing commissioners or expert members with specialised knowledge include 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.¹¹⁰

¹⁰⁴ *ibid* 182-183.

¹⁰⁵ Zhang and Zhang (n 4) 367-368; Pring and Pring (n 1) 55.

¹⁰⁶ Land and Environment Court Act 1979 (NSW), s 12(2).

¹⁰⁷ Land and Environment Court Act 1979 (NSW), s 37.

¹⁰⁸ Land and Environment Court Act 1979 (NSW), s 30.

¹⁰⁹ Preston, ‘Environmental Public Interest Litigation’ (n 34) 20.

¹¹⁰ See Pring and Pring (n 1) 56-61.

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 the grant of approval to make the conduct lawful in the future. Specialisation facilitates a better appreciation of the nature and characteristics of environmental disputes and selection of the appropriate dispute resolution for each particular dispute.¹¹¹ Availability of technical experts 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.¹¹² As King et al note, ADR mechanisms may offer a number of benefits over litigation.¹¹³ First, these non-adjudicative mechanisms can, in some circumstances, offer a more affordable source of justice than traditional litigation.¹¹⁴ Secondly, resolution of a dispute through ADR mechanisms will often be quicker and more efficient than court proceedings.¹¹⁵ 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.¹¹⁶ Fourthly, parties will often prefer ADR to litigation on the basis that they have greater power over the outcome of the

¹¹¹ 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 ADRJ 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 ADRJ 72; Brian J Preston, ‘Limits of environmental dispute resolution mechanisms’ (1995) 13 Aust Bar Rev 148.

¹¹² 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 Laurie Newhook, ‘Challenges and Changes in the Environment Court’ (3rd Annual Environmental Law and Regulation Conference, Wellington, 16-17 April 2013); Laurie Newhook, ‘Alternative Dispute Resolution: Thinking outside the square’ (RMLA Conference, Hamilton, October 2011); Pring and Pring (n 1) 61-72.

¹¹³ See Michael King, Arie Freiberg, Becky Batagol and Ross Hyams, *Non-Adversarial Justice* (The Federation Press, 2009) 91-94.

¹¹⁴ *ibid* 91-92.

¹¹⁵ *ibid* 92.

¹¹⁶ *ibid*.

dispute resolution process.¹¹⁷ 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.¹¹⁸

Of course, it should be recognised that there are also arguments against the use of ADR mechanisms in resolving environmental disputes.¹¹⁹ 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?¹²⁰ In answering these questions, ECTs should adopt and use a formal screening and intake process.¹²¹ This process involves first diagnosing the relevant matter before referring that matter to the appropriate dispute resolution process on the basis of the diagnosis.¹²²

The Land and Environment Court, for example, offers a variety of ADR processes, both in-house and externally to parties.¹²³ 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.¹²⁴ In-house ADR processes offered by the Court are: conciliation (by commissioners or registrars);¹²⁵ mediation (by trained mediators, being the registrar, full time commissioners and some acting commissioners);¹²⁶ and neutral evaluation (by commissioners).¹²⁷ There are also informal mechanisms such as case management, which may result in negotiated settlement.¹²⁸ The Court also facilitates external dispute resolution processes of: mediation by accredited

¹¹⁷ *ibid.*

¹¹⁸ *ibid* 93-94.

¹¹⁹ *ibid* 94-96; Preston, 'Limits of environmental dispute resolution mechanisms' (n 111) 173-176.

¹²⁰ Preston, 'Limits of environmental dispute resolution mechanisms' (n 111) 153 and 173-176.

¹²¹ Pring and Pring (n 1) 72.

¹²² See especially Preston, 'The Land and Environment Court of New South Wales: Moving towards a multi-door courthouse – Part I' (n 111) 78-82.

¹²³ For further information on the nature of these dispute resolution mechanisms, see Preston (n 2) 411-416.

¹²⁴ Preston, 'The use of alternative dispute resolution in administrative disputes' (n 111) 152.

¹²⁵ Land and Environment Court Act 1979 (NSW), s 34.

¹²⁶ Civil Procedure Act 2005 (NSW), s 26.

¹²⁷ Land and Environment Court Rules 2007 (NSW), pt 6 r 6.2.

¹²⁸ Preston, 'The use of alternative dispute resolution in administrative disputes' (n 111) 151-153.

mediators;¹²⁹ neutral evaluation by neutral evaluators (such as a retired judge);¹³⁰ and referral of the whole or part of a matter to an external referee with special knowledge or expertise for enquiry and report to the Court.¹³¹

Another notable example of an ECT offering ADR processes is 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.¹³² 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.¹³³ 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.¹³⁴ 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.¹³⁵

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 likely environmental harm if development is approved.¹³⁶ As I have discussed above, many of the more successful ECTs have addressed the issue of access to scientific and technical expertise through appointing internal 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 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

¹²⁹ Civil Procedure Act 2005 (NSW), s 26.

¹³⁰ Land and Environment Court Rules 2007 (NSW), pt 6 r 6.2.

¹³¹ Uniform Civil Procedure Rules 2005 (NSW), pt 20 r 20.14 ("UCPR").

¹³² See Michael Rackemann, 'Environmental Dispute Resolution – Lessons from the States' (2013) 30 EPLJ 329, 338.

¹³³ *ibid.*

¹³⁴ *ibid.*

¹³⁵ Pring and Pring (n 1) 64.

¹³⁶ *ibid.* 55.

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 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.¹³⁷

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 experts and parties' single experts.¹³⁸ 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. 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.¹³⁹ This is akin to a court's use of an assessor to advise and assist the Court for matters raising issues requiring special expertise.

The Court may also direct parties' individual experts to jointly confer and report to the court. The experts' testimony is taken by a process referred to as concurrent evidence. Peter McClellan, a former Chief Judge of the Land and Environment Court of NSW, has described the concurrent evidence procedure as follows:

¹³⁷ Preston, 'Environmental Public Interest Litigation' (n 34) 18. See also J Berton Fisher and William R. Keffer, 'Selection, use and management of experts in environmental legal practice' (1998) 33 Tulsa LJ 1003 as to selection of experts, and Brian J Preston, 'Science and the Law: Evaluating the evidentiary reliability' (2003) 23 Aust Bar Rev 1 as to reliability of expert evidence.

¹³⁸ UCPR pt 31 rr 31.46, 31.37. See Preston, 'Environmental Public Interest Litigation' (n 34) 19-20; Malcolm Craig, 'Expert evidence in the Land and Environment Court of NSW: a synopsis' (2012) 27(8) AE 269.

¹³⁹ UCPR, r 31.54(1).

[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.¹⁴⁰

All of the methods of expert evidence implemented by the Land and Environment Court of NSW may, when used appropriately, result in a significant number of benefits, including: 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.¹⁴¹

The Planning and Environment Court of Queensland also requires experts to meet and confer at an early stage in the dispute resolution process, and provide a joint expert report to the court.¹⁴²

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.¹⁴³ An ECT may

¹⁴⁰ Peter McClellan, 'Expert Evidence: Aces Up Your Sleeve?' (2007) 8 TJR 215, 223.

¹⁴¹ See Peter Biscoe, 'Court practice and procedure for experts' (Environmental Institute of Australia and New Zealand, Professional Practice Course Program, Sydney, 15 May 2008) 12; Craig (n 138) 275.

¹⁴² M E Rackemann, 'The management of experts' (2012) 21 J Jud Admin 168.

facilitate access to justice both by its substantive decisions and its practice and procedures.¹⁴⁴

First, the substantive decisions of an ECT can uphold fundamental constitutional, statutory and human rights of access to justice. Such rights may include 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.¹⁴⁵

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;¹⁴⁶ not necessarily require an undertaking for damages as a pre-requisite for granting interlocutory injunctive relief;¹⁴⁷ not necessarily require an impecunious public interest litigant to lodge security for the costs of the proceedings;¹⁴⁸ not summarily dismiss proceedings on the ground of laches; and not necessarily require an unsuccessful public interest

¹⁴³ 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.

¹⁴⁴ See also Preston (n 2) 428-430.

¹⁴⁵ See discussion in Preston (n 2) 428-435 and cases cited therein.

¹⁴⁶ 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.

¹⁴⁷ *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 Aust Bar Rev 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).

¹⁴⁸ 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.

litigant to pay the costs of the proceedings.¹⁴⁹ Additionally, parties may appear in this ECT by legal representation, by agent authorised in writing (with leave of the Court), or in person.¹⁵⁰ 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",¹⁵¹ and have been inconsistently applied.¹⁵²

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).¹⁵³

Of course, 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 is an example.¹⁵⁴ In the landmark decision of *Oposa v Factoran*,¹⁵⁵ the Supreme Court upheld the standing of children to sue to uphold the constitutional right to a healthy environment, not only for the benefit of members of the present generation but also future generations.¹⁵⁶ The Supreme Court of the Philippines also adopted in 2010 "Rules of Procedure for

¹⁴⁹ See, eg, *Caroona Coal Action Group v Coal Mines Australia Pty Ltd (No 3)* (2010) 173 LGERA 280, 285.

¹⁵⁰ Land and Environment Court Act 1979 (NSW), s 63.

¹⁵¹ See Zhang and Zhang (n 4) 381.

¹⁵² *ibid* 382.

¹⁵³ See Preston (n 2) 430.

¹⁵⁴ 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' (2010) LAWASIA Journal 1; Bharat H Desai and Balraj Sidhu, 'On the Quest for Green Courts in India' (2010) 3 J Ct Innovation 79, 91-98.

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

¹⁵⁶ *ibid*. See also Pring and Pring (n 1) 34-35.

Environmental Cases”.¹⁵⁷ The rules, which were promulgated to enforce the existing constitutional right to a “balanced and healthful ecology”,¹⁵⁸ provide for the granting of innovative remedies. These include “continuing mandamus”¹⁵⁹ and the writ of *kaliksan*, which is an immediate remedy for actual or threatened violations of the constitutional right mentioned above.¹⁶⁰

8. Achieves just, quick and cheap resolution of disputes

“The delay of justice is a denial of justice”.¹⁶¹ Delay is particularly pernicious for environmental public interest litigation and dispute resolution. The purpose of much environmental litigation 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, therefore, needs to be heard and determined in a timely manner.¹⁶²

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.¹⁶³

¹⁵⁷ See Hilario G Davide Jr and Sara Vinson, ‘Green Courts Initiative in the Philippines’ (2010) 3 J Ct Innovation 121, 126-129; Diosdado M Peralta, ‘A Brief Overview: The Environmental Initiatives of the Philippine Supreme Court’ (Australasian Conference of Planning and Environment Courts and Tribunals, Sydney, 1 September 2010) 9-13.

¹⁵⁸ *Constitution of the Republic of the Philippines* (1987), art II, s 16.

¹⁵⁹ See Pring and Pring (n 1) 83 for an example of a case from the Philippines involving the imposition of a “continuing mandamus”.

¹⁶⁰ Davide Jr and Vinson (n 157) 128-129.

¹⁶¹ *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, 245.

¹⁶² Preston, ‘Environmental Public Interest Litigation’ (n 34) 28.

¹⁶³ Pring and Pring (n 1) 14; Preston (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.¹⁶⁴ 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.¹⁶⁵

Case management involves a variety of policies, processes and technologies to achieve the just, quick and cheap resolution of proceedings. Policies may include court rules, practice notes and policies regarding the dispute resolution process from filing to finalisation. These policies can employ differential case management to deal discriminatingly 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.¹⁶⁶

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.¹⁶⁷

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

¹⁶⁴ See, eg, Civil Procedure Act 2005 (NSW), s 56.

¹⁶⁵ See Civil Procedure Act 2005 (NSW), s 57.

¹⁶⁶ See Preston (n 2) 420.

¹⁶⁷ *ibid* 419-421.

management systems that track the status, progress and deadlines for each case and provide regular reports on individual cases and overall caseload.¹⁶⁸

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.¹⁶⁹ 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 Court¹⁷⁰ or that the plaintiff provide security for costs and that the proceedings be stayed until the plaintiff does so.¹⁷¹

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

¹⁶⁸ See, eg, *Land and Environment Court Annual Review 2011*, 17, 23, 34 and 36-37; Pring and Pring, (n 1) 76-78.

¹⁶⁹ See Preston, 'Environmental Public Interest Litigation' (n 34) 29-30.

¹⁷⁰ See, eg, UCPR, r 13.4.

¹⁷¹ See, eg, UCPR, r 42.21.

directions by a judge upon review of the individual matter in Court.¹⁷² 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.¹⁷³

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. Parry 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”.¹⁷⁴ This approach is underpinned by active case management, directions hearings, mediations and compulsory conference sessions for parties to a planning dispute.¹⁷⁵ 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.¹⁷⁶

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).¹⁷⁷ 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

¹⁷² Rackemann (n 8) 24.

¹⁷³ *ibid* 24-25.

¹⁷⁴ Parry (n 10) 130-131.

¹⁷⁵ *ibid*.

¹⁷⁶ *ibid* 133.

¹⁷⁷ See Preston (n 2) 427-428.

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.¹⁷⁸ 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.¹⁷⁹ 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).¹⁸⁰ 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.¹⁸¹ 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.¹⁸² She suggests that such specialised fora are “likely to adopt a sympathetic approach to arguments based on climate change impacts”.¹⁸³

The goals of climate change litigation include indirect effects beyond the parties to the litigation and beyond the litigation’s specific claims.¹⁸⁴ 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

¹⁷⁸ See Hari Osofsky, ‘The Continuing Importance of Climate Change Litigation’ (2010) 1 Clim L 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 EPLJ 303.

¹⁷⁹ Osofsky (n 178) 9.

¹⁸⁰ *ibid* 6-7.

¹⁸¹ See Jolene Lin, ‘Climate change and the courts’ (2012) 32 Leg Stud 35, 41.

¹⁸² *ibid*.

¹⁸³ *ibid*.

¹⁸⁴ Osofsky (n 178) 7.

Environment Court of NSW has remained relevant and influential has been through its decisions in climate change litigation matters.¹⁸⁵

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 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".¹⁸⁶ 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.¹⁸⁷ In the case of *Garrett v Williams*,¹⁸⁸ 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.¹⁸⁹

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 jurisprudence through its decisions on matters of substantive, procedural, distributive and restorative justice.

¹⁸⁵ See Brian J Preston, 'The Influence of Climate Change Litigation on Governments and the Private Sector' (2011) 2 Clim L 485.

¹⁸⁶ Walters and Westerhuis (n 32) 285.

¹⁸⁷ See Preston, 'The Use of Restorative Justice for Environmental Crime' (n 32) 136; White (n 32) 267-278; Walters and Westerhuis (n 32) 286-288; Hamilton (n 32) 263-271.

¹⁸⁸ (2007) 151 LGERA 92.

¹⁸⁹ *ibid* [115]-[121].

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.¹⁹⁰ Australian courts have shown a willingness to rely on overseas comparative approaches in developing and refining the common law and in constitutional interpretation.¹⁹¹ 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.¹⁹² 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.¹⁹³

An illustration of foreign jurisprudence being considered by a domestic Australian court is the decision of *Telstra Corporation Ltd v Hornsby Shire Council*¹⁹⁴ 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.¹⁹⁵ 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

¹⁹⁰ Ben Boer, 'The Rise of Environmental Law in the Asian Region' (1999) 32 U Rich L Rev 1503, 1510.

¹⁹¹ 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.

¹⁹² Susan Kiefel, 'English, European and Australian Law: Convergence or Divergence' (2005) 79 ALJ 220, 227.

¹⁹³ Basten (n 191) 210.

¹⁹⁴ (2006) 146 LGERA 10 ("Telstra").

¹⁹⁵ *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 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 (U.K.); *Vellore Citizens Welfare Forum v Union of India* AIR 1996 SC 2715 (India); *A P Pollution Control Board v Bayadu* AIR 1999 SC 812 (India); *Narmada Bachao Andolan v Union of India* AIR 2000 SC 3751 (India); *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).

environmental harm, including in Victoria,¹⁹⁶ South Australia,¹⁹⁷ Queensland,¹⁹⁸ and the Federal Court of Australia¹⁹⁹ and in Australian and overseas journal articles.²⁰⁰ 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.

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.”²⁰¹

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.

¹⁹⁶ 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].

¹⁹⁷ See, eg, *Thornton v Adelaide Hills Council* [2006] SAERDC 41; 151 LGERA 1, 12-13; *Rowe v Lindner (No 2)* [2007] SASC 189, [60].

¹⁹⁸ See, eg, *Telstra Corp Ltd v Cairns Regional Council* [2010] QPELR 128; [2009] QPEC 84, [21].

¹⁹⁹ See, eg, *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2009] FCA 330, [89].

²⁰⁰ See, eg, Rosemary Lyster, ‘Chasing Down the Climate Change Footprint of the Private and Public Sectors: Forces Converge’ (2007) 24 EPLJ 281; Jacqueline Peel, ‘The Role of Climate Change Litigation in Australia’s Response to Global Warming’ (2007) 24 EPLJ 90; Jacqueline Peel, ‘When (Scientific) Rationality Rules: (Mis)Application of the Precautionary Principle in Australian Mobile Phone Tower Cases’ (2007) 19 JEL 103; Arla Marie Kerr, ‘Untapped Potential: Administrative Law and International Environmental Obligations’ (2008) 6 NZ J Pub & Intl L 81; Jacqueline Peel, ‘Climate Change Law: The Emergence of a New Legal Discipline’ (2008) 32 MULR 922; Jennifer Scott, Louise Hayward and Andrew Joyce, ‘Climate Change Adaptation: Socialising the Science’ (2008) 14 LGLJ 52; Chris Tollefson and Jamie Thornback, ‘Litigating the Precautionary Principle in Domestic Courts’ (2008) 19 JELP 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 EPLJ 375; Linda Pearson and Peter Williams, ‘The New South Wales Planning Reforms: Undermining External Merits Review of Land-Use Decision-Making?’ (2009) 26 EPLJ 19; Martin ZP Olszynski, ‘Adaptive Management in Canadian Environmental Assessment Law: Exploring Uses and Limitations’ (2010) 21 JELP 1; Dwyer and Taylor (n 66) 198; Jan McDonald and Megan C Styles, ‘Legal Strategies for Adaptive Management under Climate Change’ (2014) 26 JEL 25.

²⁰¹ Sir Harry Woolf, ‘Are the Judiciary Environmentally Myopic?’ (1992) 4 JEL 1, 4.

The Land and Environment Court, for example, has adopted a statement of purpose which guides its day-to-day operations.²⁰² 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.²⁰³

The Resource Management and Planning Appeals Tribunal of Tasmania also has adopted a statement of purpose to guide its day-to-day operations.²⁰⁴ 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 the sharing of responsibility for resource management and planning between the different spheres of government, the community and industry in Tasmania.²⁰⁵

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

²⁰² See Land and Environment Court of NSW, 'About Us' (21 November 2012) <<http://www.lec.lawlink.nsw.gov.au/lec/about.html>> accessed 28 November 2013.

²⁰³ *ibid.*

²⁰⁴ See Resource Management and Planning Appeals Tribunal of Tasmania, 'Home Page' (8 May 2013), available at <<http://www.rmpat.tas.gov.au/>>.

²⁰⁵ *ibid.*

underdeveloped, an ECT can add flesh to the skeletal form of those existing laws and values.²⁰⁶

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.²⁰⁷ An example is 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 to the target audience, who can apply them in future administrative decision-making.²⁰⁸

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 appeals.²⁰⁹ The Court has developed over 40 planning principles to date, including two relating to principles of ESD.²¹⁰

Thirdly, successful ECTs can add value through innovations in practice and procedure.²¹¹ Large, established courts can be conservative and have inertia; change is slow and resisted. In contrast, successful ECTs are often characterised

²⁰⁶ See Preston (n 2) 436-437.

²⁰⁷ Boer (n 190) 1510.

²⁰⁸ See Linda Pearson, 'Policy, principles and guidance: Tribunal rule making' (2012) 23 Pub L Rev 16; Clifford Ireland, 'Planning Merits Review and the Doctrine of Precedent' (2006) 27 Aust Bar Rev 231.

²⁰⁹ Planning appeals are made against decisions under the Environmental Planning and Assessment Act 1979 (NSW).

²¹⁰ See Land and Environment Court of NSW, 'Planning principles' (21 March 2013) <http://www.lec.lawlink.nsw.gov.au/lec/principles/planning_principles.html> accessed 28 November 2013.

²¹¹ Preston (n 2) 438-440.

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 have been discussed above. The method of concurrent evidence has been very successful, and has since been implemented by the Supreme Court of NSW and the Federal Court of Australia.²¹² In moving towards a multi-door courthouse, the Court has demonstrated a flexible 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 promoted access to justice by breaking down geographical and other barriers through the use of onsite hearings and eCourt case management.

The Land and Environment Court of NSW, 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").²¹³ 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. The JIRS sentencing database produces many benefits and assists 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

²¹² See Craig (n 138) 275.

²¹³ *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 Crim LJ 214; Brian J Preston, 'A Judge's Perspective on Using Sentencing Databases' (2010) 3 J Ct Innovation 247.

sentencing patterns.²¹⁴ It is likely to provide an instructive environmental sentencing model for other jurisdictions to follow.

Finally, the Qingzhen environmental court of China has also demonstrated signs of innovation.²¹⁵ This is illustrated 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 source. Wang observes that this case was noteworthy for innovations in three key areas.²¹⁶ 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.²¹⁷ 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.²¹⁸ 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.²¹⁹

Conclusion

This article has identified twelve characteristics of successful ECTs, and identified best practices, both substantive and procedural, from different ECTs 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

²¹⁴ Preston and Donnelly (n 213) 235; White (n 32) 270.

²¹⁵ See also Jingjing Liu, 'Environmental Justice with Chinese Characteristics: Recent Developments in Using Environmental Public Interest Litigation to Strengthen Environmental Justice' (2012) 7 *Flor A & M L R* 225, 254-258 and 259-260.

²¹⁶ Alex L Wang, 'Environmental Courts and Public Interest Litigation in China' (2010) 43 *Chin L & Gov* 4, 12-13.

²¹⁷ *ibid* 13.

²¹⁸ *ibid*.

²¹⁹ *ibid*.

jurisdictions that have not yet implemented an ECT can also learn from the best practices identified in this article.

Even for those ECTs that have enjoyed much success and already display many, if not all, of the characteristics, 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 set for itself. Excellence is more of a journey than a static destination”.²²⁰ 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.

²²⁰ Michael Gething, ‘A Pathway to Excellence for a Court – Part 1: Defining the Pathway’ (2008) 17 J Jud Admin 237, 242.