

Pace Environmental Law Review

Volume 29

Issue 2 Winter 2012

*Environmental Courts and Tribunals: Improving
Access to Justice and Protection of the Environment
Around the World*

Article 10

January 2012

Judicial Specialization Through Environment Courts: A Case Study of the Land and Environment Court of New South Wales

Brian J. Preston

Land and Environment Court of New South Wales, Australia

Follow this and additional works at: <http://digitalcommons.pace.edu/pelr>

Recommended Citation

Brian J. Preston, *Judicial Specialization Through Environment Courts: A Case Study of the Land and Environment Court of New South Wales*, 29 Pace Env'tl. L. Rev. 602 (2012)

Available at: <http://digitalcommons.pace.edu/pelr/vol29/iss2/10>

This Conference Proceeding is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

SPEECH AND CONFERENCE PROCEEDING

Judicial Specialization Through Environment Courts: A Case Study of the Land and Environment Court of New South Wales

HONORABLE JUSTICE BRIAN J. PRESTON*

It was so pleasing to see the coming of age of courts dealing particularly with environmental matters. What I intend to do is to break my speech into two parts. The first is to give you an outline of the Land and Environment Court [of New South Wales], to set the basis for those of you who don't know the court and what it does. Secondly, I want to reflect upon what we have learned over the last thirty years, and I've picked, for want of a better number, a dozen benefits. Those of you who have been around for a while in environmental law, you might remember a campaign in America where the EPA targeted the dirty dozen. [I've chosen] the desirable dozen, so twelve benefits.

I. OUTLINE OF THE LAND AND ENVIRONMENT COURT

Australia is a federal system; we have a number of states. New South Wales is the most populous and economically important state in Australia, although not necessarily the largest in land mass, and the Land and Environment Court is a state court within it. It's important to understand in Australia that the

* Chief Judge of the Land and Environment Court of New South Wales, Australia. B.A., LLB Macquarie University (1982); Solicitor (1982 to 1987); Barrister (1987-2005). Appointed Senior Counsel of the Land and Environment Court in 1999; appointed Chief Judge in 2005. [Editor's Note: This is the text of a speech given at the International Symposium on Environmental Courts and Tribunals, hosted by Pace Law School and the International Judicial Institute for Environmental Adjudication (IJIEA), on April 1, 2011].

federal powers in relation to environmental law are reasonably restricted, more so than in the United States. There is an overarching Environmental Protection and Biodiversity Conservation Act, which gives the federal government power to implement, for example, international treaties and other matters of national environmental significance. But overwhelmingly, it is at the state level where the environment needs to be regulated. So the state courts are the most important courts dealing with environmental matters.

The Land and Environment Court is a specialist statutory court. It has a very wide jurisdiction in environmental and planning, land law, mining, and natural resource matters. What's important to understand about the Land and Environment Court – and this makes it unique in the world – is that it is established as a superior court of record. The Land and Environment Court judges have the same rank, title, status and precedence as a judge of the Supreme Court of New South Wales, which is our highest [state] court. Furthermore, not only is that a recognition of the importance of the Court – which I think thirty years ago was a really big step to be done, because no other court had ever been established at that level – but in the last few years the reputation of the court is such that [it has received] a few more accolades. One is that the Chief Judge of the Court, and I am the present incumbent of that office, is also an additional judge of our Court of Appeal and our Court of Criminal Appeal; and I sit on those bodies. [The Court's reputation is] also such that [judges of the Court] are now able to, with the consent of the Chief Justice of New South Wales and the Chief Judge of the Land and Environment Court, sit as Supreme Court judges in Supreme Court matters. So it shows the coming of age of the Court and its judges.

[Let me now] explain the judicial hierarchy in Australia. Our state courts have a state system. Going from the lowest level, we have the Local Court, or the magistrate level. The next level up is the District Court. Both the District Court and Local Court are classified as inferior courts. From there, you go up to the Supreme Court of New South Wales and the Land and Environment Court, which are [at] the same level, and there is also a division within the Supreme Court for the Court of Appeal

and the Court of Criminal Appeal, and that's the end of the state level.

From there, there is by special leave an appeal to what we call our High Court of Australia. [T]he reason it's called [the] High Court of Australia is because we federated rather late in life, and the words Supreme Court had already been taken by each of the state's courts. So our Constitution says there shall be a Supreme Court in Australia, but we'll call it the High Court of Australia. There are very few cases, only about seventy a year, that go up there. They're very selective as to which cases go up. Some environmental cases go up, but for the most part, it is the Court of Appeal which will decide the fate of environmental litigation.

Now, the Land and Environment Court was set up, as I said, by statute. It is the Land and Environment Court Act 1979. It was assented to by the governor on December 21, 1979, but it didn't come into force until the first of September 1980, and that's why [on the] first of September last year, we had our thirtieth anniversary. Importantly, it was part of a package of environmental law reform. One of the critical acts was called the Environmental Planning and Assessment Act 1979. [It] implemented, for the first time, statutory EIA [(Environmental Impact Assessment)]. Part 5 of that act was based on NEPA [(the National Environmental Policy Act)], in America. The open standing provisions were based on the Michigan Environment Protection Act, Professor Sax's work, which allowed any person to bring proceedings to remedy breaches of the law. There was a lot of innovation [in the new environmental law], and that's quite important to understanding why it is that the Parliament thought that they needed the specialist environmental court.

Let me come to that. It's always complex to try to look at what drove the parliamentarians at the time, but I think we can identify two main objectives. One is rationalization and the second is specialization. [P]articularly, there was a desire to have, to use a colloquial expression, a "one-stop shop" for environmental, planning, and land matters. Now, dealing with rationalization, the problem – and I think you probably can recognize this in your own systems if you don't have a specialist court – is that you have environmental matters, viewed broadly,

dealt with by a range of different courts, tribunals or boards, and you can never get the whole of an environmental dispute resolved in one place. And that certainly was the position in the 1970s in Australia. Importantly also, what we think of today as environmental law hadn't really been developed. One of the catalysts was that Act I talked about, the Environmental Planning and Assessment Act, which brought EIA in, and public interest litigation, but a lot of other Acts didn't then exist, such as a Threatened Species Act, [or] Biodiversity Act. More modern pollution Acts, implementing the polluter pays principle, also did not exist. [They came] at a later point. In the early days, the Acts were more focused on media-specific pollution, planning, some valuation matters, and land matters, and these were spread amongst a variety of courts. The establishment of the Land and Environment Court allowed all of these diverse jurisdictions to be rationalized into one court. Subsequently, as I said, the legislature has added jurisdiction to the Land and Environment Court.

The other objective of setting up the court was specialization. It was to be given this wide environmental planning and land jurisdiction. This jurisdiction was to be exclusive, so no other court or tribunal could deal with it. The court personnel, the judges, and assessors who were to be appointed to the Court, needed to have knowledge and expertise in the jurisdiction. In some of the early days some of the judges didn't have that, but they certainly developed it. These days, people who are appointed as judges normally have expertise in that area.

Now, specialization was not seen to be an end in itself. It was a means to an end. The belief was that a specialist court would better understand the science and the environmentally relevant knowledge, and ensure that decisions are scientifically and environmentally literate. It was thought that the Court would be more able to deliver consistency in decision making; that there would be a decrease in the delays because of a better understanding of the characteristics of environmental disputes, and the urgency in which they need to be treated; and also, and very importantly, it would facilitate the development of environmental law policies and principles. It was felt that traditional courts were not going to be able to do that. They

hadn't in the past, and with these new environmental laws that parliament was passing, they didn't want to vest them in an unknowing and unsympathetic traditional court system. And I think that has proved to be correct, that the Land and Environment Court, certainly through its thirty years, has developed environmental law in a way which wouldn't have been done if it had been left with the traditional courts.

[By way of further] background, let me just quickly give you an overview of the range of jurisdiction. One thing I think you'll find with the Land and Environment Court is that it has the widest jurisdiction of any specialist environment court in the world. We not only have a tribunal type function, where we are able to review on the merits the decisions of government in relation to environmental matters and make a fresh decision, but we also have a civil jurisdiction to deal with a range of different civil disputes concerning trees and mining. We have the equitable jurisdiction of a court of chancery. We can issue equitable injunctions and declarations in civil enforcement actions. That's where any person can enforce the law civilly. We have the prerogative powers of a superior court, so we are able to judicially review government action and subordinate legislation. We have a powerful criminal enforcement jurisdiction, and can impose very important criminal penalties of up to seven years imprisonment, five million dollar fines, plus many other orders. We have an appellate jurisdiction. Appeals from the Local Court in relation to environmental crime come through to the Land and Environment Court. Because we also have these lay commissioners or assessors, we also have an appellate function, where their decisions can be reviewed on questions of law by the judges of the Court, instead of going to the Court of Appeal.

[T]o give a few illustrations of our tribunal-type function, where we do merits review, the ones that you would probably be familiar with are anything to do with development control, where there are decisions of local government or state government about whether a development should be allowed to proceed or not, and on what conditions. Those appeals can come to the Court. Similarly, in relation to a pollution license, any type of license under pollution laws can be appealed to the Court, and the Court can make a fresh decision.

I just want to talk a little bit about the civil enforcement and judicial review functions of the Court. It is a very wide jurisdiction that we have. One of the key features of the Court, and the legislation that the Court administers, is the ability of the public to participate and have access to justice. We have open standing provisions so that any person can bring proceedings; they don't even need to be an Australian citizen to come and remedy a breach of the statutes. So if you're passing by Sydney one day, and haven't got anything to do, you can, by all means, come to the Court and commence proceedings for the greater good. And we have taken that seriously; we've come up with a lot of practice and procedure, which tries to facilitate public interest litigation.

The other aspect I think is unique for a specialist environment court around the world is that we have a very significant criminal enforcement jurisdiction. We don't sit with juries, so it's summary proceedings. We're both judge and jury for those matters. [There is a] recognition that environmental crime has its own unique characteristics that demands special consideration. By reason of having a specialist environment court, the Court is better able to achieve principled sentencing for environmental crime, and we've published a lot on this. [O]ne of the things we've done is establish the world's first sentencing database for environmental crime. You're able to search through all different types of environmental crime and run the crime, select a crime, see what sentences have been imposed, go to the actual remarks upon sentencing, and see what innovative penalties have been imposed. Also, because we have a criminal appellate function, we're able to make a difference to sentencing by the Local Court. We've noticed, since we've been publishing materials on principled sentencing, the factors to take into account, and how to analyze environmental crime, that by having the environmental crime sentencing database, the sentences from the Local Court have gone up between ten and twenty times what they used to be. If you look at some of the literature around the world, one of the recurring themes is that environmental crime is not taken seriously, and the penalties have been far too low. This problem is being remedied by the Court's work.

We also have that ability to have appellate review of commissioner decisions, and that's important to keeping our lay commissioners on the straight and narrow as far as the aspects of law.

I will now turn to discuss the Courts' personnel. We have six judges, including myself. We have nine permanent commissioners, and we have sixteen part-time commissioners. We have two registrars both legally trained, and we have about twenty registry staff. The judges are all very experienced lawyers. Three of us are Queen's Counsel, which is the highest rank you can be at the bar in New South Wales. We have another barrister as well as two solicitors.

The lay commissioners must have to have knowledge and experience in environmental matters. They don't need a master's degree, as I noted for the Indian Green Tribunal, but in fact many do, and we put up their qualifications on the website. [T]hey are from local government, town, country and environmental planning, environmental science, arboriculture, horticulture, land valuation, architecture, engineering, surveying, management of natural resources, aboriginal land rights and disputes involving aborigines, which is one of our jurisdictions, urban design and heritage and law. So it's a huge range of different areas. And by having [both] permanent and part-time members, we're able to cover all of those relevant disciplines. We're able to put together panels which will deal with all the different issues in a case. When we allocate matters for hearing, we try to match the issues involved with the skill sets of the decision makers. So if we have biodiversity issues, we'll pick up one of the environmental science commissioners; with heritage matters, somebody with heritage background. So we match them together.

Now, coming to how we resolve disputes, one of the ways in which the Court approaches this is to think of itself as a "multi-door courthouse." This is a dispute resolution center. We have our main court office in Sydney, but our circuit court will go anywhere in New South Wales, into other courtrooms, or we'll actually conduct matters in the field. We don't need to go to a courthouse. But if you think of it figuratively, as a dispute resolution center, a matter comes through, we diagnose that particular dispute, and we then try to match the particular

dispute resolution service to the particular dispute. We offer a whole variety of dispute resolution processes. We obviously have adjudication, the traditional one that courts do in all matters. We offer conciliation, and that is particularly used in all of our tribunal functions, those merits review functions. We offer mediation in all classes of civil matters. We offer early neutral evaluation, where there's an evaluation of the strengths and weaknesses of a particular case and advice given to the parties, and they can see if they can settle it in the light of that advice. So there's a variety of different mechanisms that we offer.

We try to encourage these alternative dispute resolution mechanisms through both pre-action protocols, where before commencing proceedings there are various things that parties have to do, or post-action protocols, where immediately after they commence proceedings, and before they have their first return before the Court, they have to fill in certain forms and talk about and turn their minds to the different dispute resolution mechanisms that may be appropriate for their dispute. That is now supported by some statutory ADR protocols, which have been formulated in consultation with us and partly because of the experience that we have had with pre-action protocols.

All courts these days manage their case flow. We're no different, but perhaps we take it a little higher. There's a duty on all courts to facilitate the just, quick, and cheap resolution of the real issues in the matters. And the Land and Environment Court actively case manages every matter in the Court. We have differential case management in recognition not only of the different types of jurisdiction we have that I've outlined, but also the different nature of matters within any particular class of jurisdiction. We produce practice notes that are organized not by a particular event in the case management of a dispute, but by the particular type of dispute. So if it's a mining matter, a tree matter, or a planning matter, we have a particular practice note. It's a one-stop shop for people looking at the case management for that particular type of dispute.

Now, in those practice notes, there is a template litigation plan that we give to tell people what we expect to happen to make sure that the matter moves through quickly, and we help them as

to what those steps are going to be. What we're trying to do is ensure proportionality to the importance of the case and costs.

We've been quite innovative in the way in which we do hearings, both at the prehearing stage and at the hearing stage.

For prehearings, we can have in-court directions hearings, where people come to the Court, but increasingly, we are using other mechanisms. One is a telephone directions hearing in a specially equipped court, which does conference calls throughout anywhere in New South Wales, and these days, with the advent of the mobile phone, that means people don't even have to be in the office. They can be anywhere at all in order to participate. We also have pioneered "eCourt," where, if you're familiar with chat rooms and other things, people post various entries and communicate with the registrar and other court officers.

For the hearings, we have court hearings that can be in the courtrooms in Sydney or in any other courtroom around New South Wales. We also have on-site hearings. That is where the whole hearing is conducted on the site of the dispute. We take evidence there and look at the site, and local people give their evidence on site. If experiments need to be undertaken, they are done there as well, and often a judgment is given there as well. Or we can mix and match. We can have partially on-site hearings, which normally start the proceedings on site, and then adjourn to a courtroom afterwards. We also use video conferencing extensively, and we take evidence from all over the world from experts through video conferencing.

All courts have to implement the objectives of court administration. In basic terms, they are equity, effectiveness, and efficiency. We take those very seriously, and we analyze what it means for a court to deliver equity, effectiveness and efficiency. We have a mission to achieve best practice worldwide. In fact, we seek to exceed that. We've adopted many quantitative and qualitative performance indicators to measure our achievement, and we report on that. We benchmark ourselves against comparable courts in New South Wales nationally and internationally. Online, if you look at our website, all of our annual reports are there. They are the most extensive reports of any court, where we try to analyze such critical aspects as what it means to give access to justice and how effectively has the court

delivered access to justice at the end of the year as compared to previous years. We do that through quantitative and qualitative measures. One of the innovations that the Court has done is that we are the first court in the world to implement the International Framework for Court Excellence. We've published on what we've done in that respect, and we've become a bit of a model for other courts, not just environment courts, but for other courts to come and see what we're doing. Now, as I said, we publicly report on our performance in our annual review, and that ensures transparency and accountability.

II. "THE DESIRABLE DOZEN"

With that overview of the Court, let me come to look at the desirable dozen, and I'll give you my twelve headings as I run through. The first, which you'll recall was one of the objectives of establishing the Court, was the rationalization of the jurisdiction. Rationalization and centralization of jurisdiction has resulted in an integrated and coherent environmental jurisdiction. It also results in a critical mass of cases, and that's really important. In some of the environment courts I look at around the world, they do not have that critical mass of cases, and it has meant that they are foundering, because they haven't got the critical mass. It's very important to get that integrated, coherent mass of cases.

The next, of course, is that you get economic efficiencies for users and public resources in having this one-stop shop. You lower transaction costs by not having to go to all the different courts to try and deal with all the different aspects of the environmental disputes. It also results in better quality and innovative decision-making in both substance and procedure by cross-fertilization between the different classes of jurisdiction. More generally, the court becomes a focus of environmental legal decision-making. This leads to increased awareness of environmental law, policy and issues, by users, government, environmental NGOs, civil society, legal and other professions, and educational institutions. Now, once you increase the awareness that flows through to increasing enforcement of environmental law, and if you increase the enforcement, then that's a critical aspect of improving good governance, which is a

critical element in achieving ecologically sustainable development.

A second benefit is specialization. Environmental issues and legal and policy responses demand special knowledge and expertise. We have judicial education. The judges need to be educated about and attuned to environmental issues and the legal and policy responses. We are unique in having a compulsory continuing professional development program for all of the judges and commissioners of the Court. They have to do five days of continuing education, and we provide that not only with a court conference, but we have a twilight seminar series which updates all of the judges and commissioners. We also require them to continue their education in specialist areas. Specialization also involves technical expertise. Decision-making quality, the effectiveness, and efficiency are enhanced by the availability within the Court of technical experts. These technical experts can undertake the role of an assessor, who advises and assists judges in matters. In certain cases, they can determine the case themselves, or they can also be used in the ADR processes, particularly conciliation, where having technical expertise [is] advantageous. The other aspect about specialization is that we all know that you don't get good at something unless you continue practicing it. The problem with traditional courts is that environmental matters become dissipated amongst the judges of the court. The judges may only deal with a few matters a year. Therefore, they don't build up the expertise. We have about 2,000 matters going through the Court. And so if all you do is environmental law, you get very good at it – one of the advertisements in Australia says that about conveyancing. Practice does make perfect. The other aspect is that specialization leads to the decisions of the Court being scientifically and environmentally literate, which is important.

The third benefit is the multi-door courthouse. Rationalization, specialization, and the availability of a range of technical experts facilitates alternative dispute resolution. The rationalization aspect means that the Court has jurisdiction to deal with multiple facets of an environmental dispute. And that, of course, enhances the remedies that are going to be available. The more options available – the larger the cake, so to speak.

Specialization facilitates a better appreciation of the nature and characteristics of environmental disputes, and the selection of the right dispute resolution mechanism for each dispute. The availability of technical experts within the Court enables their use in conciliation and neutral evaluation as well as improving the quality, effectiveness, and efficiency of adjudication. It also results in the Court being able to resolve a whole dispute much quicker and at a lower cost.

My fourth benefit is being a superior court of record. By being a superior court of record, we have an enlarged jurisdiction, and that means that we can deal with all of the different aspects of a dispute, and we have much larger remedies. So, for example, as a superior court of record, we have judicial review, all the equitable remedies, criminal matters, and appellate review, as well as the traditional merits review that comes from being a tribunal. But being a superior court of record also leads to a high status and reputation, and that is greater than it would be if it was an inferior court, or a tribunal. There's a public acknowledgment, by setting the Court up as a superior court of record, of the importance of environmental issues and environmental law. There's also a public pronouncement of the importance of the Court and its decisions. It also, and we shouldn't forget this, leads to better quality judicial appointments. A superior court is better able to attract and keep high caliber persons for judicial appointments.

My fifth benefit is independence from government. Establishing an environment court as a court, rather than as an organ of the executive arm of government, and as a superior court of record, rather than an inferior court or tribunal, enhances independence.

The sixth benefit is responsiveness to environmental problems. An environment court is better able to address the pressing, pervasive, and pernicious environmental problems that confront society, such as climate change and loss of biodiversity. New institutions and creative attitudes are required to deal with these environmental problems. Specialization enables use of special knowledge and expertise of both the process and the substance of resolution of these problems. Rationalization

enlarges the remedies that are available to respond to those problems.

The seventh benefit is that it facilitates access to justice, and access to justice, of course, includes access to environmental justice. Now, a court can facilitate access to justice by its substantive decisions, its practice and procedure, and addressing inequality of alms. Let me just deal with each of those and try to show you just some of the benefits that have come from the Court. The first is dealing with substantive decisions. The Court's substantive decisions can uphold fundamental, constitutional, statutory, and human rights of access to justice. The Land and Environment Court, through its decisions, has upheld statutory rights of public access to information, rights to public participation in legislative and administrative decision making, including requirements for public notification, exhibition and submission, and requirements for environmental impact assessment. The Court has upheld public rights to review and appeal of legislative and administrative decisions and conduct. Through its substantive decisions, the Court has upheld the rule of law, and that, in turn, promotes public trust and confidence in the rule of law and in the court system. Next, the Court's practice and procedure can facilitate access to justice by removing barriers to public interest litigation, allowing parties to appear by various means, and not only by legal representation but also by agent, in writing or in person. The Court has facilitated access to information, for example, by requiring discovery of documents, and the provision of reasons for decisions by government agencies to produce documents to people litigating in court. We also facilitate the just, quick, and cheap resolution of proceedings, and thereby ensure that the rights of citizens to review and appeal decisions relating to environmental matters are not merely theoretically, but are actually available. The Court can also address inequality of alms between parties.

Specialization and the availability of technical experts redresses, in part, the inequality of resources and access to expert assistance in evidence. It can ensure access for persons with disabilities. It can assure access to help and information. For example, the Land and Environment Court works very hard, through its website, to provide a whole variety of information for

people. We have specialist webpages on areas of environmental law like biodiversity, heritage, and mining, for example. We also facilitate access to the Court's decisions. Every court decision is published on the website. We also are innovative in that we now produce a quarterly judicial newsletter, which is about fifty pages of summaries of cases, not only in the Court, but in the Court of Appeal, the High Court, and internationally. They are all hyperlinked, so you get full text retrieval if you want to. The summaries are there, along with access to all the legislation, as well as other things. No court in Australia, or that I know of in the world, produces such a newsletter. We provide access for unrepresented litigants with special fact sheets, as well as other sources of self-help. We ensure geographic accessibility by use of eCourt, telephone conferences, video conferencing, country hearings, on-site hearings and taking evidence on site. We facilitate access to alternative dispute resolution to reduce cost and make the Court more accessible to parties than the formal adversarial trial.

My eighth benefit is the development of environmental jurisprudence. The Land and Environment Court has shown that an environment court of the requisite status has more specialized knowledge, has more cases and, therefore, opportunity, and is more likely to develop environmental jurisprudence. The Court's decisions have developed aspects of substantive, procedural, restorative, therapeutic, and distributive justice. I can't go through all of those, but I'll just give you some headlines.

For substantive justice, the Court has given decisions in relation to ecologically sustainable development, the integration principle, the precautionary principle, inter- and intra-generational equity, conservation of biological diversity and ecological integrity, and the internalization of external environmental cost, including the polluter pays principle. I don't think there's a court in the world that has led the way as much as the Land and Environment Court on these matters. There are other decisions in relation to environmental impact assessment, the concept of the public trust, and, as I've said, sentencing for environmental crime. In relation to procedural justice, access to justice includes removing barriers to public interest litigation. The Court has done that in relation to its decisions on standing,

interlocutory injunctions, security for costs, laches and cost of litigation. Turning to some other aspects of justice, for distributive justice, the Court has given decisions in relation to inter- and intra-generational equity, the polluter pays principle, and the balancing of public and private rights and responsibilities. For restorative justice, the Court has led the way in Australia in relation to victim offender mediation or conferencing in environmental crime, and also in the polluter pays principle. For therapeutic justice, the Court adopts practice and procedures to try and improve the welfare of litigants and improve accessibility.

My ninth benefit is better court administration. The Land and Environment Court model has facilitated the better achievement of the objectives of court administration, equity, effectiveness, and efficiency. The Land and Environment Court has, relative to other courts in New South Wales, or indeed Australia, minimal delay in backlog, and high clearance rates and productivity. For example, in some of our jurisdictions in relation to tree disputes and the smaller residential appeals, we have targets and we achieve them, from filing to finalization, and that means orders of the Court, within three months. No court can better that. You've all heard the maxim that "justice delayed is justice denied," and environmental justice depends upon having an equitable, effective and efficient court, and the Land and Environment Court aims to be such a court.

My tenth benefit is having a unifying ethos and mission. Rationalization and specialization gives an organic coherence to the Court and its work. The nature of environmental law itself also gives a unifying ethos and mission. There is an *esprit de corps* of an environmental court. The Land and Environment Court personnel believe the Court and its work are important and are making a difference to the world. They view themselves as part of a team, not as individuals working independently. [T]his has an effect, so that users, legal representatives, and experts who come through the Court also share in this spirit and this mission.

My eleventh benefit is the value-adding function of the Court's work. The Land and Environment Court's decisions have generated value apart from the particular case or task involved.

There is as I've said, an upholding, interpreting, and explicating of environmental law and values. And that is an important aspect. When we think of many environmental statutes, they are skeletal. What the Court can do through its decisions is add flesh to that skeleton, and that's a very important function. In our merits review appeals, our tribunal function, the Court's decisions add value to administrative decision-making. The Court extrapolates principles from its decisions and publicizes them. The principles can be used and are used by government agencies in future decision-making. In fact, many government agencies now bookmark the Court's principles and incorporate them into their policy documents and decision-making. The Land and Environment Court has also been an innovator and a national leader in court practices and procedures. We have been an innovator in eCourt case management. We've been an innovator in dealing with expert evidence, including court-directed joint conferencing and report, the requirement for experts to give their evidence concurrently in court, and the use of single experts by the parties. The Court has been an innovator in the use of on-site hearings and taking evidence on-site – taking the Court to the people. As I've said, the Court is the first court in the world to implement the International Framework for Court Excellence. And the Court has established the world's first environmental crimes sentencing database.

And my last benefit, the twelfth one, is flexibility and innovation. Large, established courts can be conservative and have inertia. Change is slow and resisted. The fact that the Land and Environment Court is a separate court has enabled flexibility and innovation. Changes to practice and procedure can be and have been achieved quickly, and with wide support within the institution.

So, in conclusion, the Land and Environment Court is undoubtedly a model of a successful environment court. It's now long established over thirty years. It has a preeminent international and national reputation. It has received many favorable reviews and has been a basis for recommendations for environment courts in other jurisdictions. It has a very high standard for judicial adjudication. However, the Land and Environment Court or, indeed, any court, can't rest on its laurels.

An excellent organization is one that is continuously 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. The Court recognizes this need for adaptive management. It continues to monitor its performance against objectives of court administration of equity, efficiency, and effectiveness. It adjusts its procedural and substantive goals and performance in response to the monitoring data. It is continuing to adapt to meet the environmental challenges of the future.

Thank you.

III. **QUESTIONS AND ANSWERS**

PROFESSOR NICHOLAS ROBINSON:

Well, thank you for an extraordinary introduction to the long-time success of the Land and Environment Court of New South Wales, and on behalf of all of us at the conference, I want to also provide you with Oliver Houck's book and the case studies he has presented therein. And thank you so much. We'll be glad to now take questions. I'm sure a number of you have questions. Part of the brilliance of what you've just heard is that you can always go online to this Court and get answers to all your questions, because they have been anticipated, and they are there, waiting for you to log on and do your own reading. But while we have Justice Preston here, I'm sure a number of you will have thoughts that you want to inquire.

One of the interesting things that has come, in the United Nations Stockholm conference in 1972, for instance, was the beginning of articulating of principles of environmental protection. We had the polluter pays principle in the 1970s get its development, and become well established, and then in 1992, among the other principles that Rio de Janeiro put in place, we have the precautionary principle. No one would doubt the polluter pays principle anymore, but it's not observed universally. There are still some who doubt the precautionary principle, and it is observed in a number of places, but, again, not universally. And now we have, coming up to the Rio+20, principles like the

non-regression principle that Justice Benjamin spoke about. And, for these principles to have meaning, they have to have utility in the adjudication process for actual disputes. And as I've read the cases from New South Wales, one of the things that really is a great thing for a law professor to study and learn from, is how those principles are not abstract. They're not just soft law in some U.N. declarations. They're actually used and become rules of decision. And that progression toward rules of decision is very important. And I thought, just to start the questions, I'd ask, how do you view the development of principles in that way, the elaboration, if you will, from the skeletal to the embodied?

JUSTICE PRESTON:

Well, I think that's a central part of a specialist environment court. If it's not bringing these principles from being grand strategy to landing them on the ground, then I don't think it's achieving its charter. So we try to do that. It's not easy to take some of these abstract principles and apply them, but it's an essential part of what the court should be doing.

PROF. NICHOLAS ROBINSON:

Okay. We have several questions now that have come up. "How does the alternative dispute resolution function as part of your multi-door or courthouse?"

JUSTICE PRESTON:

I mentioned the different ways we can refer matters, and it will depend on the type of dispute as to which matter resolution process we send it to. But, for example, conciliation – it's a hybrid scheme. It's part conciliation, part adjudication. The first phase is for the parties, with the assistance of an expert commissioner – expert in the nature of the issues that are the subject of the dispute – to sit down and try to negotiate an outcome. If they reach agreement on the outcome, the terms of the decision, because the conciliator is also a member of the Court, then a decision can be made to implement the parties' agreement. However, there is a check there. It must be one

which is lawful, and that is within power, and so if the parties were to, unfortunately, agree to something that is outside the environmental statutes, then that can't be implemented. But if it's within power, then that can be implemented. If the parties don't agree, they can, however, move to the next phase and ask for adjudication. And that can either be done by the particular conciliator, and in some cases, it has to be done by that person, but other times it can be returned to the hub, the central registry for reallocation to a new person, who can make that decision, and that can be done very shortly thereafter. So that would be conciliation. And that's used very extensively now. We also have mediation. In certainly all the judicial functions, we can use mediation and that's done. All of the persons who act as mediators have to be nationally accredited mediators, the highest standard that you can have. They've got to go through a long course, and have their mediation assessed. That's a quality control aspect that we ensure. We also use neutral evaluation, although that's not used that extensively. The consequence of this alternative dispute resolution program is that, depending on the class of jurisdiction, but it's up to about 75 percent of matters, will be able to be resolved without adjudication through using some of these alternative mechanisms. That also improves access, because it reduces delay, reduces cost, and, therefore, improves access to justice.

PROF. NICHOLAS ROBINSON:

Question about the appointment of judges to the court. "Is the appointment more political than the appointment of judges to courts of general jurisdiction?"

JUSTICE PRESTON: The Court has been around thirty years, so we've gone through a few governments in that time. There have been concerns that certain of the appointments have been of persons who would not otherwise have been appointed, for example, to the Supreme Court. That's not true today, and hasn't been true since at least seven years ago. I was appointed five years ago. And so the government has been very mindful of making sure that the persons who are appointed are of very high

caliber, and are persons who would have been appointed to the Supreme Court.

But it is a risk that if you marginalize the Court, then there is a risk that politics will intervene and you get appointments that you should not otherwise have. We try to ensure, by living up to the status and reputation that we have, that we keep being seen to be a mainstream and a professional court, so that acts as a bit of a restraint on politicians appointing those with political favors.

PROF. NICHOLAS ROBINSON:

What is the relationship of the Court with the administrative agencies?

JUSTICE PRESTON:

The Court is entirely independent, and I think that's very important. I know there are models, including the EPA board here [the EPA Environmental Appeals Board], which is part of the executive arm of government. That's not a model I favor. I think it's very important that it be independent from the executive arm of government, and we make sure that's so. They are just one of the litigants in court. They are represented on our court user group, but they are just one of many stakeholders in the system. They don't have any priority or status. Indeed, the Court often clashes with the government, because we set aside their decisions reasonably regularly, and that leads to some good political coverage.

PROF. NICHOLAS ROBINSON:

Related questions that have come in. "What standard of review do you use in reviewing land use decisions, and what is the backlash when you reverse or revise local approvals?"

JUSTICE PRESTON:

We have two types of review. I'm using this reference to a tribunal-type function, where we re-exercise the administrative power of the executive government. Then our decision becomes

final and binding on the government. Now, that type of review is not available to all persons. [Some] don't have the right to come up that way. It's mainly for the developer, and for objectors to certain larger developments, who can come up through that review mechanism. Otherwise, it's judicial review, and you're familiar with that through all the different countries around the world. So that's the standard that we use. Yes, there is backlash. The state government, which has just changed last weekend, didn't fare very well with the Court. A number of decisions they made have been set aside with regularity. The consequence is that Parliament is sovereign. If the government doesn't like our decision, they can appeal, of course, to the Court of Appeal, but if that doesn't work, they can pass legislation, and they have in the past passed legislation to overturn the Court's decisions.

Very occasionally, they pass legislation to actually stop the proceedings, but I'm pretty philosophical about that. I believe that Parliament is sovereign. It can do that. And as Joseph Sax said in his book from 1970, *Defending the Environment*, having this litigation through the courts is actually an essential part of the democratic process, and it puts matters onto the agenda of the legislature, and if the legislature then decides to pass legislation overturning court decisions, it has to be debated in Parliament, it's open to scrutiny, and they're answerable, ultimately, at the ballot box for their decisions. And, indeed, one of the reasons for the government changing last weekend was the fact that the public got actually very tired of the government's decisions in relation to environmental and planning matters.

PROF. NICHOLAS ROBINSON:

You've mentioned Professor Joseph Sax is one of the inspirations for the Court. There's a broad question. "Where else have you gotten your guidance, inspiration, and motivation for these reforms?"

JUSTICE PRESTON:

From a personal basis, I taught and practiced environmental law for very many decades. I think keeping up to date with what's happening in environmental law, and seeing and

reflectively thinking about how developments in environmental law could be used, how we can make a principle such as access to justice real, is very important. So, you can get inspiration from a whole variety of different places. We try and benchmark ourselves by looking at what other courts have done, whether it be the Vermont Environmental Court or the New Zealand Environment Court or England's courts. Where I find an idea, I'll take it back. I don't think I ever come back from any of these conferences without any ideas. I always come up with one, and I see how I might implement it. So, it's that continual sort of reflection which gives rise to innovation. But you've got to keep your information base large to keep yourself educated.

PROF. NICHOLAS ROBINSON:

A technical question. "How much have average litigation costs of parties dropped over time with your reforms?"

JUSTICE PRESTON:

That would be a good question. One of our projects that we're working on is to get quantitative data in relation to costs. All courts have talked about the problem of the cost of litigation, and they are all trying to reduce the cost of litigation, and we are no exception. However, what I've found is that no court has ever done a quantitative analysis to see whether any particular innovation in practice, procedure, or case management has actually reduced the cost of litigation. That is a current project that we've got, where we're going to look at the cost of different types of litigation. We're going to break it up by stages within the litigation. We're going to get information from the cost assessors. These are people who when there's an order for costs, assess the costs. We'll publish this, by the way, which won't improve our standing with the lawyers. We're also going to look at the cost to the public resources – what is the cost of allocation of judges and commissioners to particular steps. That will give us base data from which we can then measure the changes; we're hoping that will help us. But even without that data, we can know that there are certain things that you can do to improve efficiency without sacrificing justice. And we certainly have been doing that. So in

a qualitative and intuitive way, we know, but I can't give you the quantitative data, and I think that would be necessary.

PROF. NICHOLAS ROBINSON:

Two final questions before our next speaker. "Can courts like yours and national or state courts adequately address global problems like climate change, or do we need an international court for the environment? And how would you envision that?"

JUSTICE PRESTON:

Starting with the second, I think it would be a good move to have an international court for the environment, where you could consolidate many of the adjudicative functions that other bodies have. For example, the WTO has a certain adjudicative body; obviously, the ICJ has one. And under conventions where there are adjudicative mechanisms, perhaps jurisdiction could be given to an international court for the environment.

There's been work originally by Justice Amadeo Postiglione from Italy who did a lot of work, more than ten years ago or so, pushing for that. More recently, Stephen Hockman, a Queen's Counsel from the English bar, has been writing and pushing in relation to [an] international court for the environment. So I think it's a good move.

Can a national court do something, or can a state court? Yes. But we have to recognize our limitations. We are not able to make decisions of grand policy as to what should be done. Nevertheless, and I'm going to return to what Joseph Sax said, courts can be a catalyst for thinking and action by other arms of government, the executive and the legislature.

So, for example, the Land and Environment Court gave a decision in relation to the requirement in environmental impact assessment for the executive arm of government to take into account scope 3 greenhouse gas emissions. That is the downstream effects of burning coal, for example. So with a coal mine, you could have scope 1 and 2 emissions, which are the actual emissions that come from mining the coal, but scope 3 is where the coal is exported and burned in a power station. That

will be the emissions that happen there. And the Land and Environment Court said that scope 3 emissions were an impact that needed to be evaluated by the decision maker. Consequently, the executive arm of government responded by coming up with particular subordinate legislation dealing with mining, actually requiring that future decision makers take into account scope 3 emissions. Another decision of the Land and Environment Court said that climate change induced sea level rise and storm events and flooding needed to be taken into account when determining the environmental impact of approving a coastal residential development. Although the government initially appealed that decision, they subsequently have enacted subordinate legislation which requires all decision makers at both state level and local government level to take into account the very things that the Land and Environment Court said should be done. So in this way it can be a catalyst. Individually, it's only one decision, but what it can do is open up what could be done. One more example. We talked about the precautionary principle. I gave a decision in 2006 on the precautionary principle, and also elucidated and explicated the other aspects of sustainable development principles. What we see in subsequent judicial review cases is that government has taken those decisions and implemented them in their decision-making. So we're actually seeing government use our explanation of those principles in future decision-making. And so it's an iterative process. We inform and improve the quality of the administrative decision-making.

PROF. NICHOLAS ROBINSON:

Well, thank you very much. Let me ask you to join me in congratulating Justice Preston for the depth and scope of his marvelous presentation.