ARTICLE

Judging the Jurisdictions: Where Should Environmental Disputes Be Resolved

Judge Christine L. Trenorden
Environment, Resources and Development Court
of South Australia

1 Introduction

Where should environmental disputes be resolved? That depends, in part, at least, on the nature of the dispute, and its context. The dispute may be about the policies the community is to adopt for dealing with issues affecting the environment. Once policy considerations have been dealt with and resolved, the policy has to be implemented, and often is implemented, in legislation. Legislation then contains the basis for assessing or measuring proposals or operations against the defined and accepted criteria. Disputes occur as to whether an operation or proposal is in conformity with this criteria. These are the kinds of disputes which this paper will address, and some attention will be given to the analysis of the nature of these disputes.

I should also make it clear at the outset that I will be including planning *"disputes"* and their resolution under the umbrella of environmental disputes.

The paper will then consider some of the various options that have been put forward in the search for the most appropriate means of resolution of environmental disputes. They range from the Courts in their supervisory role, monitoring the decision making of the administrators, through to Tribunals composed of scientists and/or planners, an environmental ombudsman and mechanisms known generally as alternative dispute resolution.

I will distil the desirable features of a dispute resolution system for environmental disputes. With this in mind, consideration will be given to the models adopted in Australia. This part of the paper will be descriptive only.

An approach different from that adopted in other parts of Australia has been adopted recently in South Australia. I will describe that model, together with the history of its development. No system is likely to remain acceptable unless it is flexible and adaptable to change, and able to retain highly motivated, experienced and open-minded personnel for the implementation thereof. Attention will be given to the ongoing requirements to maintain the best possible structure for environmental dispute resolution.

Inevitably, conclusions can be drawn about the consequences of what is proposed, and they will undoubtedly provide at least food for thought, and more likely matters for debate.

2. The Nature of Environmental Disputes.

It has been said that there are six major categories of environmental issues; land use, natural resource management and public lands, water resources, energy, air quality, and toxics[11].

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Environmental disputes arise when there are competing and conflicting claim regarding the use of a resource which cannot be satisfactorily be resolved by other means. Disputes usually involve the owner or potential user of a resource; and the government or a public authority, if not as owner or manager of the resource, as the body controlling its use or licensing the use proposed, and the public. As the Joint Discussion Paper on Public Issue Dispute Resolution[12] stated:

> *"... Disputes arise because people have different views about what constitutes good policy for the environment and what constitutes the optimal balance between environment and development"*[13]

This paper will concern itself with those environmental disputes which occur at the point or following assessment by government agency of an activity, operation or land use, or proposal for any of those, against criteria established by legislation. Thus, in this paper, *"environmental disputes"* encompasses appeals from, or review of decisions by, public authorities, proceedings in the nature of applications for enforcement of legislation and summary enforcement or proceedings by way of complaint, in both the environmental and planning areas. I have included planning because most of the mechanisms for dealing with environmental dispute resolution in Australia developed out of the existing mechanisms dealing with planning, and the characteristics of the disputes in these two areas are similar.

Of course an environmental dispute is different from a *lis inter partes* which brings a litigant to the traditional courts. A *lis* involves a dispute between two or more parties, or proceedings whereby a claim is made by one party against, and refuted by, the other. The Court is called upon to decide the issues between the parties. On the other hand, in environmental disputes, there are often merits arguments which are not so easy to deal with because they may involve questions of design, pollution potential and a contamination issues, by way of example. There are many differing values but few objective standards by which to measure the effect of any activity on the environment, and the ultimate question is whether, having regard to the guidelines that do exist (which are often vague and general) what is proposed or presently occurring is in accordance with the public interest. Even where there are objective standards the interpretation and application of those standards is likely to be the subject of much debate; the decision maker may be subjected to scientific, design or other expert evidence which is opinion evidence, based on inferences drawn from facts. Disagreements may not be about the facts, but about the nature of the inferences that can be drawn and the conclusions that follow.

The public interest factor is significant in environmental disputes and is probably the most significant distinction between disputes of this nature and others, particularly those that are resolved by the traditional courts.

Sandford warns[14] that a danger is that mechanisms to deal with environmental disputes often do not resolve, let alone address, the substantive issues, because the emphasis tends to be on legal and procedural matters.

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11 Bingham G (1986) "Resolving Environmental Disputes: A decade of experience", The Conservation Foundation, Washington.

12 Prepared by the Commissioner of Inquiry Into The Conservation, Management and Use of Fraser Island and the Great Sandy Region and the Cabinet Office of New South Wales, December 1990.

13 Discussion Paper at page 19.

14 Sandford R, "Environmental Dispute Resolution in Tasmania: Alternatives for Appeals Systems" (1990) 7 EPLJ 19.

3. Some suggestions on appropriate means of environmental dispute resolution.

Wide ranging suggestions have been made as to the most appropriate mechanism for the resolution of environmental disputes. Probably all writers are agreed that the traditional court system is not the most appropriate. Even in the United States of America, where there are no merits appeals, but the courts have been given power of judicial review in respect of decisions and regulation making by government agencies, doubt has been cast on the appropriateness of courts, in their traditional mode, to exercise this function, dealing with, as they inevitably have to, significant amounts of scientific evidence from one or more parties.

Writing in 1974, Harold Leventhal, Circuit Judge United States Court of Appeals for the District of Columbia Circuit,[15] recommended that the appellate court have available a scientific expert to advise it, so it could better understand the record. He thought the scientific aide, who would operate in a scientific way in much the same way as a law clerk assists with the law, could provide assistance to the Judge in understanding problems of scientific methodology, assessing the reliability of tests performed and relied on by expert witnesses, and appraise the relative significance of the scientific contentions put forward by the parties.

Sheldon L Trubatch subsequently suggested a different approach to assist Judges to understand the scientific arguments presented and overcome their lack of scientific training. He suggested[16] the establishment of a Judicial Office for Understanding Science and Technology (*"JOUST"*), which would be:

> *"a two tier organisation comprised of a cadre of individuals trained in both law and science or technology, and a group of technical experts. The cadre of lawyer-scientists, or "legal-scientific facilitators" would act as two-way translators between the Courts and JOUST technical experts. A Court would not rely on the facilitators for either legal or technical expertise, but rather for their ability to understand both lawyers and scientists. The Court could communicate with these individuals by using familiar legal terms to explain the significance of the technical information it required."*

And so it would continue until the Judges had the information in a form easily digested by them.

Another Judge of the United States Court of Appeals, Patricia M Wald, saw the answer in alternative dispute resolution and saw opportunities within the Court system to facilitate this approach. She saw a role for the judiciary in encouraging, if not mediating the settlements of environmental dispute, but was concerned that the public interest component be recognised, which she saw could be achieved by settlements being ratified by the Court, at which time the public interest component could be given consideration[17] and safeguarded.

On the other hand, James L Oakes, also a Circuit Judge, United States Court of Appeals, thought it simply untrue that Judges are incapable of mastering scientific concepts and terminology, but he did acknowledge that much depends on the ability and conscientiousness of the individual

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15 Leventhal H, "Environmental Decision Making and the Role of the Courts" (1974) 122 University of Pennsylvania LR 509.

16 Trubatch S L "Informed Judicial Decision Making: A suggestion for a judicial office for understanding science and technology" (1985) 10 Columbia Journal of Environmental Law 255 at 265.

17 Wald P M "Negotiation of Environmental Disputes: A new role for the Courts?" (1985) 10 Columbia Journal of Environmental Law 1.

Judge[18]. He concluded that, despite the difficulties such as the complexity and technicality of the evidence, the different language and differing views of scientists giving evidence, Judges can deal with environmental matters in an active and satisfactory way, provided the Judges are good and there is vigorous public interest advocacy.

Another group of commentators has considered that the appropriate forum for the resolution of environmental disputes is a judicial-type body, namely an environmental court or tribunal, which would include a Judge or legally qualified person together with other members from a variety of disciplines, including scientific. Professor Patrick McAuslan[19] and Sir Harry Woolf, Lord Justice of Appeal, Court of Appeal, England and Wales[20] are two who have recommended such a body for the United Kingdom. The latter summarised his solution thus:

> *"... not just a court under another name, (but) ... a multi-faceted, multi-skilled body which would combine the services provided by existing courts, tribunals and inspectors in the environmental field. It would be a `one stop shop' which would lead to faster, cheaper and the more effective resolution of disputes in the environmental area. ... it could be a forum in which judges could play a different role. A role which enabled them not to examine environmental problems with limited vision."*

The United Kingdom Labour Party Policy Commissioner on the Environment is now advocating such a course, with a specialist court being established as a division of the High Court, to deal with environmental appeals, judicial review cases and criminal prosecutions.[21]

Other approaches have included appeals to the Minister administering environmental legislation. Such a course has operated in Western Australia with respect to appeals under the Environment Protection Act. It has been claimed that this system is of value[22] with some kinds of appeal being dealt with only by the Minister and others being referred by the Minister to an Appeals Committee, which makes a recommendation which the Minister is bound to adopt. One member of the Appeals Committee must have expertise in environmental matters.

Others have seen the solution as being mediation or one or other form of alternative dispute resolution. Sandford[23] has argued that the advantage of alternative dispute resolution in environmental disputes is that the outcome is voluntary and agreed and therefore more likely to be adhered to in the future. She says that a problem with the Courts dealing with environmental disputes is that the result is *"an emotionally charged, adversarial combat"*, and even in an administrative tribunal, the system remains essentially adversarial with all of the inherent disadvantages thereof. She argues that mediation has a potential as a integral part of an entire environmental decision making process, as a strategy in its own right.

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18 Oakes J L "The Judicial Role in Environmental Law" (1977) 52 New York University Law Review 498.

19 McAuslan P "The Role of Courts and Other Judicial Type Bodies in Environmental Management" 3 Journal of Environmental Law 195.

20 Woolf H "Are the Judiciary Environmentally Myopic?" 4 Journal of Environmental Law 1.

21" Labouring Planning Role in Environment Reform" - Article in Planning for the Natural and Built Environment 26 August 1994, 1083.

22 Bailey J M & Brash S "The Environmental Protection Act 1986 (WA): An Experiment in Non-Judicial Appeals" (1989) 6 EPLJ 197.

23 7 EPLJ 19 (above).

On the other hand, Jeffery has argued[24] that mediation opportunities should only be offered as a voluntary complement to the hearing process. His views are that mediated settlements are only possible under certain conditions, namely where the issues are clear, there is a potential for compromise and all parties have the ability to participate effectively, having regard to their resources and access to information and expertise. He has contrasted the mediation process with that of an open public hearing and concluded that the latter has advantages over the former, because mediation is not open, there is too much reliance on the mediator, the process did not allow for vigorous critical evaluation of technical aspects within a framework of rules and procedures, that it does not necessarily include all interested parties and there are no safeguards against abuse.
In fairness to Sandford, it must be said that Jeffery was looking at strict mediation whereas Sandford was talking generally about alternative dispute resolution mechanisms. However Jeffery concluded that:

> *"an open public hearing format wherein positions taken by all parties can be critically examined and tested using adversarial techniques developed over centuries of experience in relation to the judiciary, offer certain advantages over private negotiations/mediation as alternative methods of environmental dispute resolutions."*[25].

Should scientists be the appropriate persons to deal with environmental disputes?
Both Jeffery and Oakes recognised problems. Scientists have different concepts of truth from those of non-scientists, and tend to forget for whom the decision is required, once they get into a debate on scientific methods.[26]. According to Dr Stuart L Smith[27], some scientists conclude that the adversarial method is anti-scientific, because it has a tendency to force simplistic answers when the truth is much more complex and needs a much greater assemblage of facts, testing and analysis.

Among the problems inherent in a panel or tribunal of scientists dealing with environmental disputes are not only the likely personal bias in decision making (in accordance with the particular scientific approach held or favoured by that member of the tribunal/panel), but also that the specialist scientific or technological expertise held by that panel/tribunal member may not be reflective of the societal value judgment necessary to deal with the other issues that may arise in the course of hearing the dispute. (A problem not necessarily limited to scientists!) On the other hand, as Jeffery[28] says, lawyers, because of their advocacy skills and commitment to presenting their client's case rather than arguing their personal views, are good at organising and presenting data, whether it be scientific or other facts and opinion, and the adversarial process itself forces scientists to articulate information in understandable terms for the benefit of those hearing it. The adversarial process also results in peer review of expert witnesses, with the consequence of scientists having to explain and justify, in terms the forum and the public can understand (because the forum will have to convey its decision with reasons to the public) their conclusions and the nature of the scientific approach that led to them. Thus, it is argued that

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24 Jeffery M I QC "Accommodating Negotiation in Environmental Impact Assessment and Project Approval Processes" (1987) 4 EPLJ 244.

25 4 EPLJ at page 249.

26 Jeffery M I QC "The Appropriateness of Dealing With Scientific Evidence in the Adversarial Arena" (1986) 3 EPLJ 313 and Oakes (above).

27 Quoted in Jeffery 3 EPLJ at 316.

28 4 EPLJ 303 (above).

scientists make good witnesses but would not be appropriate as members of a forum adjudicating on environmental disputes.

I return to the Court/Tribunal or similar forum for the adjudication of environmental disputes. Inherently, in our system, these bodies rely on the adversarial process to determine the dispute. Consideration was given to the role of experts in one such forum namely the Land and Environment Court of New South Wales, by Mitchell[29]. Consider the inherent problems of expert witnesses, having regard to their professional responsibilities and their ethical role, and in terms of their duty to the client and to the Court. He saw a substantial and inherent conflict between the various responsibilities which he isolated as that to the client, to the Court, to the public and to the environment; the last two responsibilities being through the witness' professional association membership (such as the Royal Australian Planning Institute) and membership of a multi-disciplinary professional association (such as the Environment Institute of Australia, which has a code of ethics for to members, embracing a duty to the environment). Further, the problem is compounded because as a result of the adversarial process, the solicitor or the client selects an expert, who produces a favourable report or witness statement and whose evidence may omit certain unfavourable aspects. However, safeguards do apply. The Judge or assessor may elicit more from the expert witness upon inquiry, in addition to that elicited through cross-examination. It is argued sometimes that the adversarial system is not conducive to the presentation of the whole picture, unless the Court appoints the experts to investigate and report to it. That course may be desirable and appropriate in certain matters, and it can be a fall-back position when the adversarial/inquiry process fails to produce *"the whole picture"*. Of course, this leaves much to the members of the Court/Tribunal and the issue is whether it is safe to rely on the determination, abilities and thoroughness of the particular members of that body.

There is one other approach that should be canvassed. This relates to environmental dispute avoidance, referred to by a number of commentators as appropriate for consideration, in addition to environmental dispute resolution mechanisms. It has been said that a court/tribunal system *"should be a place of last resort and not the main arbiter of environmental and development disputes. The Courts adversary situation sets up what is largely a win/lose basis and is becoming more time consuming and expensive as the opportunities for legal challenges multiply. It could be argued that planners can hardly be responsible for the system, nevertheless, it seems to me that we must bear some of the responsibility for conniving with the lawyers to generate a mystique and pseudo expertise which is not serving the community well."*[30] As an alternative, Winterbottom suggested that spending time trying to negotiate a form of development acceptable to all concerned parties is well worth the effort, not the least so because it helps to educate and involve an increasingly articulate community in the planning process. Coincidently, this kind of mediation approach saves money for all concerned. A concrete example of this approach (and no doubt there are many in local government) is the City of Heidelberg's comprehensive mediation program.[31] As part of this program the applicants, objectors, councillors and town planning officers of the Council meet on site to consider the issues raised by the proposed development. The primary objective is to obtain an outcome by engaging all parties in resolving objections to a proposed development. The success rate is apparently extremely high and the program has evolved to a point where it is possible to identify a process that offers the best chance of achieving a resolution with which all parties are happy.

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29 Mitchell P A "The Role of Experts in the New South Wales Land and Environment Court" (1991) EPLJ 69.

30 Winterbottom D "Environmental Mediation" in AustPlan (RAPI), February 1991 page 4.

31 See Planning News (RAPI) Victoria, February 1994 and reprinted in 34 Queensland Planner September 1994.

4 Desirable Features of an Environmental Dispute Resolution Mechanism.

Having had objective regard to all that has been put forward by the writers and commentators discussed above and others, I inevitably come to the conclusion that the most appropriate environmental dispute mechanism for the kind of disputes with which this paper is concerned, is a body to which evidence and arguments are presented, which includes a legally trained person. This is largely because the training of lawyers, as professional advocates, makes them eminently suitable for the task of hearing and assessing the merits of a case. The skills thus developed, enable them to marshall the facts and the arguments, to balance one against the other and to determine, in light of the criteria established in the legislation or other document having legislative force or to which the body has to have regard by virtue of legislation, which argument is to be given the greater weight. No other professionals, except those perhaps in marketing and public relations, are specifically trained by practice in these skills. Of course, I recognise that there are many deficiencies in the way lawyers traditionally have approached and presented a case, and the adversarial process is not entirely apt for the determination of environmental disputes. However, it is essential that, where, for example, the overriding objects against which a proposal is to be assessed, are the promotion of the principles of ecologically sustainable development and there are no absolute performance or design standards, that evidence be tested, that experts be drawn out, and not permitted to become advocates for the client's case. Assessing conflicting expert opinion evidence concerning scientific, or planning issues, presents a dilemma for any adjudicator, because there is no ultimate truth.[32] This means that a system utilising lawyers' skills, and akin to a court/tribunal, is likely to be the best available system, provided it is flexible enough to adapt to the needs of environmental dispute resolution and the wide variety of disputes they may come before it, and it has a wide range of expertise on which to draw, embodied in suitably skilled, enthusiastic and able personnel constituting the court/tribunal.

In addition, the court/tribunal should incorporate into its procedures, sufficient flexibility to enable various alternative dispute resolution mechanisms to be utilised to deal with those cases sufficiently able to benefit from other approaches.

The desirable features of an appropriate environmental dispute resolution mechanism are, in my view, as follows:

a court/tribunal comprising members with legal skills in addition to scientific, heritage, planning, environmental management or other appropriate expertise;

articulate, able, enthusiastic and open minded members;

a flexible approach to procedure and processes;

a variety of approaches to dispute resolution, including some or all of, mediation/conference or open forum, written briefs, and a combination of adversarial and inquisitorial/investigative approaches to the hearing and determination of disputes;

sound management that is alert to the need for change;

an interest in *"efficiency with a human face"* having regard to public interest.

One other point needs to be made. Another reason that a legally qualified person should be a member of the court/tribunal is that because such a body will be dealing with criteria established by legislation, or at the very least legislative rights giving rise to the appeal or other proceedings, inevitably from time to time questions of law will arise. These will not arise as a matter of course

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32 Johnston P W "Judges of Fact and Scientific Evidence - Problems of Decision-Making in Environmental Cases" (1983) 15 UWA Law Review 122.

in every proceeding. As Oakes[33] has said:

> *"(Environmental) Cases instead have tended to turn on particular facts and on the subjective attitudes of those making the decisions. The principle for this lack of usable precedent seems to entail the point made above about the nature of environmental problems; the number of factors to be considered is almost infinitely large, and their relationships to each other are, for the most part, unquantifiable and even unarticulatable. Obviously, such a framework gives decision makers a substantial discretion in choosing the relevant factors and in assigning relative weights to each. It should not be surprising, then, that what are called `legal' decisions in the environmental field are often factual decisions and hence unlikely to yield useful precedent."*[34]

These comments of course have to be read in the context of decision making in environmental cases in the United States, which are not *"merits"* decisions but judicial review of decisions made by government agencies. On merits appeals and questions in Australia, questions of law are more likely to arise, and parties are entitled to have the benefit of consideration of such questions by a legally trained person, although having regard to planning appeals, many decisions ultimately turn on the particular facts of the case and hence, they are of little use as precedents for future cases.

5. A Summary of Environmental Dispute Resolution Courts/Tribunals.

In Victoria, the Australian Capital Territory and Tasmania, tribunals hear environmental disputes. In Western Australia, the relevant adjudication is performed by a tribunal or alternatively the Minister, in planning matters, and only the Minister in environmental matters. In New South Wales, Queensland and South Australia, *"disputants"* resort to a Court, but in New South Wales and South Australia the Court is not of the traditional variety. Queensland is presently considering a new approach to environmental dispute resolution.

Some of the common features of the bodies established in the various States and Territories to determine environmental disputes are:

with the exception of the Land and Planning Appeals Board (ACT), all include legally qualified persons as members;

with the exception of the Land and Planning Appeals Board (ACT), and in summary enforcement matters in New South Wales, a person may appear themselves or by any representative;

proceedings are to be conducted with as little formality and technicality as possible and as much expedition as is appropriate;

proceedings are by way of re-hearing or review, with power in all cases to receive fresh evidence;

in the hearing of proceedings, the body is not bound by the rules of evidence but, can inform itself as it thinks fit. In Tasmania there is a specific requirement that the rules of natural justice be observed;

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33 Oakes J L - see above.

34 Oakes at page 504.

hearings are to be in public, generally;

preliminary conferences are to be held automatically or at the direction of the body;

except in ACT, evidence may be required on oath or affirmation;

in Tasmania, ACT and Victoria by statute, parties must be ensured a reasonable opportunity to present their case;

there is power to compel attendance of witnesses and the production of documents;

except in Victoria, there is power to excuse the failure to comply with the relevant law;

power to refer a question of law to a Judge or legally qualified member, or in the case of ACT and Tasmania, to the Supreme Court;

frivolous or vexatious proceedings may be dismissed;

proceedings may be dismissed for failure to attend the conference;

reasons must be in writing, or, in the case of Victoria written reasons can be requested;
each party bears its own costs, but there is a discretion to vary this in certain circumstances, except in ACT.

The above features are generally common to the Court/Tribunals operating in New South Wales, ACT, Tasmania, Victoria and South Australia. With the exception of the ACT body, all bodies either hear or will hear (when environmental legislation comes into operation) appeals and other proceedings under both planning and environmental legislation. The Land and Planning Appeals Board (ACT) is also the only body where there is no requirement for any member of the body to be legally qualified. Editorial comment on this situation, in the Queensland Planner[35] suggests that while so far the Board has only had to deal with design and siting appeals, some Canberra planners have *"understandable misgivings about the capacity of a lay body to handle major planning appeals."*

6. The Development of The Environment Resources and Development Court in South Australia

In 1990, the South Australian Government established the Planning Review to consider a vision for Adelaide's future development and the kind of planning system needed to achieve it. The final report of the Planning Review[36] recommended the establishment of a specialist, integrated Court that would hear both planning and environmental matters. The essential features of the proposed Court were canvassed in an earlier document[37]. They were:

". It must be capable of determining planning, technical and legal issues in appeals and enforcement proceedings;

. It should provide for proper scrutiny and assessment of development proposals;

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35 Volume 34 No 3, September 1994.

36 Planning Review "2020 Vision: The Final Report" July 1992, Government of South Australia.

37 Planning Review "2020 Vision: Ideas for Metropolitan Adelaide" April 1991, Government of South Australia.

- *It should recognise and safeguard the rights of the individual;*
- *It should ensure that its decision is in the public interest;*
- *Its procedures should be inexpensive, expeditious and informal;*
- *Its composition should be specialist and expert;*
- *It should discourage formality;*
- *It should provide for and encourage solution of the issues at a pre-hearing conference of the parties;*
- *There should be limited rights of appeal from its decisions;*
- *It should recognise that parties may prefer to proceed with an appeal by way of written submissions only."*

In addition, it was recommended that the Court, when dealing with appeals, maintain a high degree of informality, encourage rather than discourage lay representation and conduct the hearing partly as an inquiry and without the constraints of a Court which traditionally deals with issues of fact between parties. The Ideas Report also canvassed additional features for the conference, including, in an attempt to achieve a resolution of disputed appeals at an early date, a mini hearing of the cases, with the conference chairman being enabled to give an assessment of the possible outcome (should the matter proceed to an appeal hearing), following which the parties could opt to further negotiate or confer with a view to achieving a settlement. The Report also suggested that in developer appeals there be an option to have the appeal determined on the basis of written submissions only, as an alternative to a full hearing with oral evidence. Neither of these features was included in the final form of the legislation regarding the hearing of appeals by the Court.

The Environment, Resources and Development Court Act 1993, established the Court as a court of record. Its jurisdiction is derived from other legislation. The present jurisdiction of the Court includes appeals and applications under the Development Act 1993, the Heritage Act 1993 and against a notice to ameliorate an unsightly condition of land, structure or object under the Local Government Act. The Environment Protection Act 1993 is not yet in operation but that will confer jurisdiction on the Court. It is also likely that the Court will have jurisdiction with respect to Native Title matters and in relation to proceedings that may be instituted under the Native Vegetation Act 1991.

With respect to Development Act matters, the principal business of the Court to date has been (taking into account the transition from the Planning Act 1982):

Planning Appeals

Appeals against enforcement notices issued by a planning authority.

Applications by planning authorities for orders in the nature of civil enforcement.

Summary Prosecution.

Confirmation of Heritage Act work orders.

Appeals against heritage listing.

The features of the Court not included in the overview of court/tribunal systems above are as follows:

It is a separate, specialist Court, established at District Court level.
Two Judges are appointed to the Court, full time. There are four full time Commissioners and ten part-time Commissioners appointed.
Commissioners are non legally qualified persons who sit either alone or with a Judge to hear and determine matters. Decisions, except on matters of procedure, are by majority of those persons hearing the matter.
The Presiding Member organises the work of the Court and determines the constitution of the Court for the hearing of each matter.
Conferences are convened between the parties in all matters, except in Building Referee matters.
The Court can require a witness to answer relevant questions and a failure to do so will constitute a contempt of the Court.
The Court may refer a question of a technical nature to an expert for investigation and report.
The Court has power to grant injunctions and interlocutory orders.
The Court may punish a person for contempt either in the face of the Court or arising from non compliance with an order, or other process of the Court.
The Court may require security for costs.
It has a general power to cure irregularities.
Costs generally are a matter for each party except where the proceedings are frivolous or vexatious, or have been instituted or prosecuted for the purposes of delay or obstruction, but the Court has power to disallow costs between a representative and his or her client and make other orders where proceedings have been delayed through the neglect or incompetence of a representative.
The Court has power to dismiss or determine proceedings that appear to be frivolous or vexatious, give summary judgment against a party who obstructs or delays proceedings and find in favour of the respondent without hearing the respondent, having heard the applicant.
There is no robing in the Court.

A large number of proceedings instituted in the Court are brought and presented by unrepresented persons. The experience of the Planning Appeal Tribunal, the predecessor to the Court, (in respect of planning appeals), was that some 45% of parties were not represented. I am unable to say whether that figure has been maintained, but many third party appellants and applicants for consent involved in an appeal are unrepresented. Having regard to this, in drafting the Rules, the Judges were concerned to find the balance between generating a flow of paper and formal pre-hearing procedures, and, in the interest of the parties, having the issues defined, through, at least, an exchange of statements of witnesses (especially expert witnesses). This is not an easy task, and while the system is working reasonably well, there is a need to make further refinements. This desire for a lack of formality and a flexible approach is expressed in the following preamble to the Rules:

> *"These Rules are to be construed and applied so as to best ensure the attainment of the following objects:*
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> . *the simplification of practice and procedure;*
> . *the identification of the real issues between the parties prior to the hearing of proceedings;*
> . *the saving of expense; and*
> . *the fair and expeditious disposal of the business of the Court,*
>
> *and to this end it is expected that:*
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> *(a) evidence of any expert witness shall be in the form of a statement which clearly states the opinions of the witness and the basis for those opinions;*
>
> *(b) a statement of an expert witness will be provided in final form, to the Court and all other parties, at least two clear business days prior to the hearing in which such statement is to be tendered;*

(c) oral examination in chief of any witness will not be necessary where the evidence of that witness has been reduced to a statement, or in the case of enforcement applications, is contained in an affidavit;

(d) all plans, diagrams, photographs, specifications and other documents to be relied upon at any hearing will be provided to the Court and all other parties at least two clear business days prior to the hearing;

(e) issues to be argued will have been clearly defined prior to the hearing; and

(f) on the hearing of an appeal by a representor, the applicant for development authorisation will be prepared to inform the Court of the nature of the development proposed, at the commencement of the hearing.

It is acknowledged that the business of the Court will include proceedings involving parties who will not be represented by counsel, solicitor or other qualified representative familiar with these Rules. These Rules are not intended to frustrate the presentation of a case in good faith by a party not so represented, and the Rules are to be construed and applied accordingly, having regard to the duty of the Court, expressed in placitum 21(1)(c) of the Act."

The course of specific types of proceedings in the Court are set out below, to provide an indication of the way in which matters are progressed:

(a) Appeals - Practice of the Court

The following indicates the course of an appeal once it is lodged with the Court. Some of the steps along the path are optional and will not be taken in every case. Some steps, such as applications for discovery, it is expected will rarely be taken by a party to an appeal.

* List for conference - within two to four weeks of the appeal being lodged.
* Conference - mandatory.
* Determination of the composition of the Court to hear the proceedings.
* Application for orders (particulars, discovery or production of documents).
* Listing (single member)/into list for callover (Full Bench).
* Callover and listing (Full Bench).
* Application for summons to issue.
* Directions hearing.
* Hearing by single member (within four weeks of conference closure).
* Hearing by a Full Bench (within eight weeks of matter being called over).
* Hearing of proceedings.
* Decision of Court.

A person appealing against an enforcement notice issued pursuant to Section 84 of the Development Act may apply for the suspension of the operation of the direction contained in the Enforcement Notice, pending the determination of an appeal. Matters coming before the Court seeking a suspension thus far have generally seen the order for suspension made, following agreement between the parties. The Court has then endeavoured to have the appeal listed for hearing at an early date.

(b) Applications for Civil Enforcement Orders - Practice of the Court

The initial application for leave to serve the summons is made ex parte. Interim orders may be sought, on application, supported by affidavit evidence. The Court will endeavour to have these matters listed for an early hearing, especially where interim orders have been made, provided the parties are ready.

(c) Building Disputes

Section 87 of the Development Act and Part 9 of the Rules deal with these matters. There has now been one reference lodged with the Court to date.
These matters will be heard by two Commissioners sitting together at an appropriate location, who will hear and deal with the matter in much the same way as building referees have hitherto dealt with such matters.

(d) Heritage Act - Stop Orders

Section 30 of the Heritage Act provides that a stop or prohibition order made by the Heritage Authority ceases to have effect four working days after service of the notice unless the order has been confirmed by the Court.

In practice it is very difficult for the Court to hear the parties and their evidence and decide whether to confirm the order within four working days. In matters that have come before the Court thus far, the Court has, generally by agreement between the parties, extended the effect of the order pending the final determination by the Court as to whether the order should be confirmed, revoked or any other order made that the Court thinks necessary to protect the place.

(e) Heritage Act - Appeals

The usual process for appeals, set out above in paragraph (a) is followed with regard to Heritage Appeals. In the only Heritage Appeal heard by the Court thus far, the Court, with the consent of the parties, required the Heritage Authority to present its case first. In that matter [38], the appellant was unrepresented.

7. The Present Operation of the Environment Resources and Development Court

I have extracted some statistics in relation to matters lodged, and those dealt with, by the Court since the commencement of operation on 17 January 1994, to the end of August this year.

It is interesting to note that the statistics reveal that only 34% of matters dealt with in that period went to a hearing and final determination. In 41.6% of matters a settlement or compromise was reached, while 24.4% of matters were withdrawn. Of course, some matters are withdrawn as a result of the conference process, either at, or subsequent to the conference. Accordingly it would appear that the conference procedure results in at least 50% of matters not proceeding to a hearing and final determination. The Court will have mediation powers, when the Environment Protection Act 1993 comes into operation. However, it would appear that, at least in respect of planning matters, the conference system works very well. The member of the Court presiding at the conference does have a number of powers, and is urged, under the Act, *"to assist the parties to explore any possible resolution of the matters in dispute without resorting to a formal hearing."*

In its eight months of operation, the Environment Resources and Development Court has instituted some changes to the way in which planning appeals are dealt with, has maintained all the flexibility of the old Planning Appeal Tribunal, has shown flexibility in matters within its jurisdiction previously dealt with in the District Court, and has maintained if not increased the settlement rate for appeals prior to final hearing. However, that is not to say that improvements cannot be made. Our experience has taught us, for example, that although it is necessary and appropriate to consult with the legal and planning professions with respect to the practice and procedure of the Court, there are occasions when it is for the Court to set and firmly insist upon the ground rules being adhered to. Sometimes, professionals need to be pushed towards change! Of course, the Court itself and the individual members have to be ever vigilant to improve the operation and efficacy of the Court, in the interest of the users of the Court and the community generally. Apposite are the words of Brian Hayes QC, the leader of the planning and

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[38] Protopapas Pty Ltd v State Heritage Authority, E.R.D.C. No. 180/94, delivered 2 September 1994.

environment bar in South Australia:

> *"It is the first and at present the only Court of this kind with extensive jurisdiction in Civil and Criminal proceedings combined with the flexibility of procedure to ensure that matters are truly dealt with on their merits.*
>
> *Depending upon the manner in which the Court operates and the quality of the decision and the decision making process, the ERD Court has the potential to be the catalyst for major changes for the better, of the traditional way of resolving disputes. It does however require a change of culture on the part of the legal profession to move away from an attitude of planning to win at all costs, and in doing so using the system to that end, to an attitude of bringing about a resolution of the conflict and applying the system to that end.*
>
> *It also behoves members of the Court both legal and non-legal to ensure that new powers within the legislation are in fact exercised to bring about the necessary change in culture. The Court has just embarked upon its life, and given the sentiments it has expressed as a preamble to its Rules, there is reason to believe that it will achieve the status of being the forerunner of single integrated Courts elsewhere."*[39]

The major benefits of the South Australian Court are its flexibility, and the fact that it is an integrated Court, and its major success is the conference procedure. Although it is hard to gauge, it appears, both from my experience and from the feedback I have obtained, that unrepresented parties walk away from the Court feeling that they have had a fair and reasonable opportunity to present their arguments and be heard. Of course, there is more that could be done to try and ensure that such persons do make the most of the opportunity and do not feel frustrated at the end of the hearing. The availability of information about the nature of the Court and the procedure at, and aims of, a conference and a hearing, would, I am sure, be of use.

It is also my view that additional flexibility in the nature of a second conference or opportunity for the parties together prior to the hearing would be of assistance. It is quite apparent that at the time of the conference parties generally have not put a great deal of effort into preparation of the matter, so that issues can be defined or refined. From one point of view, this would be inappropriate anyway, as the purpose of a conference is to bring the parties together with a view to exploring paths to settlement, at minimum expense to the parties. However, it appears to be necessary, in some cases, to have the issues, from the point of view of the parties, clarified at a point closer to the hearing. It may become apparent that there are a number of issues not in dispute. Then, provided the Court does not wish to go into those issues, in the public interest, expense and time can be saved. It is for the Court to take a lead in this regard.

The success rate of conferences in appeal matters speaks for itself. However that success should not result in the Court failing to consider other approaches to dispute resolution, aside from a full hearing on the merits. The Court must be open to consideration of new ideas for environmental dispute resolution, in the public interest. The Court's charter is in the legislation. Should alternative approaches to dispute resolution be acceptable to the community, these can be provided for in the legislation. It then for the Court and members of the Court to prepare and train themselves for the implementation of the new approaches.

8. Requirements of Members of the Court/Tribunal.

In the past, it has been considered that one's experience was sufficient training for life as a Judge. While those views still abound, some members of the Judiciary, particularly the younger members,

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[39] The text of an address to the United Kingdom Planning and Local Government Bar on 20 January 1994, published in Law Society (SA) Bulletin July 1994, page 15 at 18.

have different views and we are now seeing courses such as those for gender awareness and aboriginal cultural training being conducted for members of various Courts in Australia. I have just attended a Judicial Orientation Course conducted by the Australian Institute of Judicial Administration, which I believe is the first course of its kind in Australia.

It is one thing to find candidates for membership of a Court/Tribunal such as has been discussed here, with the requisite experience and ability, but it is a separate matter for the community to be confident that those persons will have the requisite skills to conduct dispute resolution in any of its forms. Accordingly, it is my view that training by means of courses and workshops, as opposed to on the job training, would be highly desirable for all the members of a Court/Tribunal involved in environmental dispute resolution. Aside from the skills aspect of dealing with disputes, there is also scope for information courses for the members. Members will come from a variety of backgrounds, and they will deal with a variety of matters, some within their range of expertise and others not. While legally trained persons are, as I have summarised earlier, used to gathering and marshalling information on a range of different subjects sufficient to enable them to present evidence and argument, other professionals and persons who might be appointed to a Court/Tribunal might not have had the benefit of such training. In the same way as gender awareness and aboriginal cultural training courses are conducted, I believe that a series of environmental awareness courses would be of benefit to members of the Court/Tribunal. I understand such courses are conducted for the benefit of members of the Judiciary in the United States, by the Environmental Law Institute. It is important, in my view that members of an environmental dispute resolution system maintain not only their dispute resolution skills but are broadly informed with respect to the general nature of matters dealt with by the Court/Tribunal. Presently, as the United States Judges I have referred to above have noted, the way in which a particular case is handled depends on the enthusiasm and ability of the individual Judge. I do not believe that it is in the community interest to leave environmental dispute resolution to chance in this way. It should be noted that I am far from suggesting existing members of such Courts/Tribunals are not enthusiastic, able, and competent to deal with the variety of evidence that is and could be led in proceedings. I simply seek to improve, on the basis that there is always room for improvement.

9. Conclusion

There has been and continues to be justification for the criticism of lawyers and the legal system. Notwithstanding that, I believe that lawyers must be included in any Court or Tribunal established to resolve environmental disputes. However, it is essential that the legally trained person have the assistance of non-legally trained persons with environmental science/management or planning or other expertise, depending on the nature of the matter.

It is also my view that lawyers are best qualified to present a party's case, should that party wish to be represented. That is my experience. However, lawyers must adapt to the changed and changing requirements of practice in the environmental law area and particularly in regard to the resolution of environmental disputes. Old habits must be discarded. Environmental law dispute resolution cannot involve an approach of *"winning at all costs"*.

In my view, a Court, with all the flexibility and informality that is appropriate and necessary for alternative approaches to environmental dispute resolution, in addition to the combined adversarial/inquisitorial approach, is the best mechanism for the resolution of environmental disputes. The Environment Resources and Development Court in South Australia has the potential, in my view, to successfully deal with and resolve environmental dispute, but its success will depend on the attitude, skills and ability of members of the Court, the attitude of the professionals who regularly appear in the Court and the confidence engendered in the community by the Court. Of course, it also depends on the resources available to it, and the powers it is given by the legislature, which will bear on its flexibility and approach.