

**Practice and Procedure in the
Land and Environment Court of New South Wales**

by
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This paper addresses practice and procedure in the Land and Environment Court of New South Wales. It is not concerned with substantive law. The difference is succinctly summarised by Salmond as:

“Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of courts and litigants in respect of the litigation itself. The former determines their conduct and relations in respect of the matters litigated.”¹

The means and instruments by which substantive law is to be attained (the procedural law) are to be found in the *Land and Environment Court Act 1979*, the *Land and Environment Court Rules 1996* and the incorporated rules of the *Supreme Court Rules 1970*, the various practice directions of the Court and the case management directions and orders made by the Court.

Overriding purpose: just, quick and cheap resolution

Governing this body of practice and procedure is the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings in the Court.² The Court is obliged to give effect to the overriding purpose when it exercises any power in relation to practice and procedure of the Court or when interpreting any such statutory provision bestowing such power³. Attainment of the overriding purpose necessitates active case management⁴. In order to further the overriding purpose, proceedings are to be managed by the court having regard to the following objects:

- “(a) the just determination of the proceedings,
- (b) the efficient disposal of the business of the court,
- (c) the efficient use of available judicial and administrative resources,
- (d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.”⁵

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

Just resolution

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

¹ *Salmond on Jurisprudence*, 10th edition, Sweet & Maxwell, London, 1947 p 476 cited with approval by the High Court in *Adam P Brown Male Fashions Pty Limited v Philip Morris Inc* (1981) 148 CLR 170 at 176-177.

² s 56 of the *Civil Procedure Act 2005* and Pt 1 r 5A of the *Land and Environment Court Rules 1996*.

³ s 56(2) of the *Civil Procedure Act 2005* and Pt 1 r 5A(2) of the *Land and Environment Court Rules 1996*.

⁴ s 57(1) and (2) of the *Civil Procedure Act 2005* and Pt 1 r 5B(1) of the *Land and Environment Court Rules 1996*.

⁵ s 57 of the *Civil Procedure Act 2005*.

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

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

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

Similarly, the United Kingdom Civil Procedure Rules 1998 are a procedural code with the overriding objective of enabling the court to deal with cases justly⁶. Dealing with cases justly includes, so far as is practicable:

- “(a) ensuring the parties are on equal footing;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate:
 - (i) to the amount of money involved,

⁶ *UK Civil Procedure Rules* 1998, r. 1.1.

- (ii) to the importance of the case,
- (iii) to the complexity of the issue, and
- (iv) to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly; and
- (e) allotting to it an appropriate share of the Court's resources while taking into account the need to allot resources to other cases."⁷

The United Kingdom Civil Procedure Rules 1998 also impose a duty on the Court to further the overriding objective by actively managing cases. Active case management is stated to include:

- “(a) encouraging the parties to cooperate with each other in the conduct of the proceedings;
- (b) identifying the issues at an early stage;
- (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
- (d) deciding the order in which issues are to be resolved;
- (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
- (f) helping the parties to settle the whole or part of the case;
- (g) fixing timetables or otherwise controlling the progress of the case;
- (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
- (i) dealing with as many aspects of the case as it can on the same occasion;
- (j) dealing with a case without the parties needing to attend at court;
- (k) making use of technology; and
- (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently”.⁸

Quick resolution

The goal of ensuring the “quick” resolution of the real issues of proceedings involves eliminating delay. “The delay of justice is a denial of justice” pronounced Lord Denning MR⁹. Lord Denning continued:

⁷ *UK Civil Procedure Rules 1998*, r 1.1(2).

⁸ *UK Civil Procedure Rules 1998*, r 1.4(2). See also *Christofi v Barclays Bank P/L* [1999] TLR 487 and *Stephenson (SBJ) Ltd v Mandy* [1999] TLR 550

“All through the years men have protested at the law’s delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time [Hamlet Act III, sc 1]. Dickens tells how it exhausts finances, patience, courage, hope [Bleak House, ch 1].”¹⁰

Delay is interrelated with cost. The longer the period between lodgment and finalisation of proceedings, the greater the cost. This is a result of many factors but the increased number of attendances and adjournments are critical causes. As the Chief Justice of NSW has noted, litigation is a field in which Parkinson’s law operates: “work expands to fill the time set aside for it.”¹¹ Case management must attempt to minimise the number of attendances in court and restrict adjournments¹².

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

The Court has an obligation to monitor and ensure that public resources are applied in the best and most efficient means possible¹³.

Cheap resolution

The goal of the “cheap” resolution of the real issues in the proceedings involves the concept of proportionality of costs. The cases need to be managed and resolved in such a way that the cost to the parties is proportionate to the importance and complexity of the subject matter in dispute¹⁴. The criteria of proportionality include the amount in issue in the proceedings and relative importance of the subject matter of the proceedings (to be determined having regard to such factors such as the status of the parties and the nature of the proceedings).

Means to achieve just, quick and cheap resolution

In order to serve the overriding purpose, the Court is given a comprehensive range of powers. These are in the *Land and Environment Court Act 1979* and *Land and Environment Court Rules 1996*. The exercise of these powers are guided by the Court’s practice directions. The Court will adopt this year much of the *Civil Procedure Act 2005* and *Uniform Civil Procedure Rules 2005*, although the unique, merits review jurisdiction of the Court will require the continuation of some parts of the *Land and Environment Court Act 1979* and of the *Land and Environment Court Rules 1996* as local rules to prevail in the event of inconsistency.

To achieve the overriding purpose the Court has power:

- (a) to direct parties to take specified steps and to comply with timetables and otherwise to conduct proceedings as directed;¹⁵

⁹ In *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] QB 229 at 245.

¹⁰ [1968] 2 QB 229 at 245.

¹¹ The Hon. JJ Spigelman, “Just, Quick and Cheap – A Standard for Civil Justice”, Address to the Opening of Law Term, 31 January 2000, p. 2.

¹² The Hon. JJ Spigelman, “Case Management in New South Wales”, an address to the Malaysian Annual Judges Conference, Kuala Lumpur, 22 August 2006, p. 4.

¹³ *Christmas Island Resort v Geraldton Building Co Pty Ltd* (No 5) (1997) 18 AWAR 334 at 345; 140 FLR 452 at 462.

¹⁴ s 60 of the *Civil Procedure Act 2005*.

¹⁵ s 61(1) and (2) of *Civil Procedure Act 2005* and Pt 1 r 5B (1) and (2) of the *Land and Environment Court Rules 1996*.

- (b) to regulate the conduct of the hearing including limiting the time that may be taken in cross-examination, limiting the number of witnesses, limiting the number of documents that may be tendered, and limiting the time that may be taken by a party in presenting its case or in making submissions;¹⁶
- (c) to take into account in deciding whether to make a direction as to the conduct of the hearing, not only the requirements of procedural fairness but also a range of relevant matters including the subject matter, complexity or simplicity of the case, the efficient administration of court lists, the interests of parties to other proceedings before the Court and the costs of the proceedings;¹⁷ and
- (d) to direct at any time a solicitor or barrister for a party to provide to his or her client a memorandum stating the estimated length of the hearing and estimated costs of legal representation including costs payable to the other party if the client was unsuccessful.¹⁸

The concern to achieve the overriding purpose of facilitating the just, quick and cheap resolution of the real issue of the proceedings is reflected in the legislative amendments to the *Land and Environment Court Act* 1989 and the *Land and Environment Court Rules* 1996 and to the Court's various practice directions.

The legislative amendments include the amendments made in 2002 to the *Land and Environment Court Act* subsequent to the report of the Land and Environment Court Working Party in September 2001. The amendments were effected by the *Land and Environment Court Amendment Act* 2002, Act No 76 of 2002, which commenced on 10 February 2003.

Amongst the amendments was the introduction of on-site hearings for proceedings in Class 1 of the Court's jurisdiction brought under s 97 of the *Environmental Planning and Assessment Act* 1979. These proceedings involve the Court exercising the function of the consent authority whose decision is the subject of the appeal, to determine whether and if so on what conditions development consent for a proposed development ought to be granted.

On-site hearings involve a conference presided over by a single Commissioner on the site of the development which is the subject of the appeal. They are designed to be quicker and cheaper than traditional court hearings. In accordance with the principle of proportionality of costs, on-site hearings are required for proceedings involving proposed development that:

- “(a) has an estimated value that is less than half the median sale price for the previous quarter of all dwellings in the local government area in which the development is proposed to be carried out,¹⁹
- (b) if it is carried out, would have little or no impact beyond neighbouring properties, and;

¹⁶ s 62(3) of the *Civil Procedure Act* 2005 and Pt 1 r 5B(2)(j) and r 5C(1) of the *Land and Environment Court Rules* 1996.

¹⁷ s 62(4) and (5) of the *Civil Procedure Act* 2005 and Pt 1 r 5C(2) and (3) of the *Land and Environment Court Rules* 1996.

¹⁸ s 62(6) of the *Civil Procedure Act* 2005 and Pt 1 r 5C(4) of the *Land and Environment Court Rules* 1996.

¹⁹ The Court publishes on its website each quarter the median sale prices.

- (c) does not involve any significant issue of public interest beyond any impact on neighbouring properties.²⁰

The facility of an on-site hearing has recently been extended to proceedings under ss 96, 96AA, 121ZK and 149F of the *Environmental Planning and Assessment Act 1979*.²¹

The *Land and Environment Court Act* has also recently been amended again to reintroduce the facility of a conciliation conference for all proceedings in classes 1, 2 and 3 of the Court's jurisdiction²².

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

If the parties are able to reach agreement, the conciliator, being a Commissioner of the Court, is able to dispose of the proceedings in accordance with the parties' agreement.²³ Alternatively, even if the parties are not able to decide the substantive outcome of the dispute, they can nevertheless agree to the Commissioner adjudicating and disposing of the proceedings.²⁴ If the parties are not able to agree either about the substantive outcome or that the Commissioner should dispose of the proceedings, the proceedings are referred back to the Court for the purpose of being fixed for a hearing before another Commissioner.²⁵ In that event, the conciliation Commissioner makes a written report to the Court setting out that fact and as well as stating the Commissioner's views as to the issues in dispute between the parties to the proceedings.²⁶ This is still a useful outcome, as it scopes the issues and often will result in the proceedings being able to be heard and determined expeditiously, in less time and with less cost.

The *Land and Environment Court Rules 1996* were also amended in response to the report of the Land and Environment Court Working Party in September 2001. Part 13, Division 6, 7 and 8, for example, came into force on 2 February 2004. They prescribe in detail the practice and procedure for proceedings in Classes 1 - 3 of the Court's jurisdiction. These rules are designed to give effect to the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings.

The Court has issued numerous practice directions. They include practice directions dealing with:

- (a) General matters of practice and procedure in classes 1-4: Practice Directions Nos 1 – 15 (amended last on 7 May 1999);

²⁰ s 34A(2) of the *Land and Environment Court Act 1979*.

²¹ *Crimes and Courts Legislation Amendment Act 2006*, Act No 107 of 2006, Sched 1, cl 1.19[5] and [7], commenced on 29 November 2006.

²² *Crimes and Courts Legislation Amendment Act 2006*, Act No. 107 of 2006, Sched 1, cl 1.19 [1] and [2], commenced on 29 November 2006.

²³ s 34(3)(a) of the *Land and Environment Court Act 1979*.

²⁴ s 34(3)(b)(ii) of the *Land and Environment Court Act 1979*.

²⁵ s 34(8) of the *Land and Environment Court Act 1979* disqualifies the conciliation Commissioner from further participation in the proceedings, unless the parties otherwise agree.

²⁶ s 34(3)(b)(i) of the *Land and Environment Court Act 1979*.

- (b) Pre-hearing practice and procedure in classes 1, 2 and 4: Practice Direction No 17 – Pre-hearing Practice Direction (commenced 1 March 2004);
- (c) Practice and procedure for compensation claims in class 3: Practice Direction No 1 of 2006 – Class 3 Compensation Claims (commenced 31 March 2006); and
- (d) Practice and procedure for valuation objections in class 3: Practice Direction No 2 of 2005 – Class 3 Valuation Objections (commenced 8 May 2006).

These practice directions are also designed to facilitate the just, quick and cheap resolution of the real issues in the proceedings. There is a need for these practice directions to be consolidated and the Court will address this in the next few months.

One of the largest costs in proceedings in the Court is expert evidence. With few exceptions, proceedings in the Court depend on expert evidence, often from multiple experts in different disciplines. The rules make special provision for expert evidence in an endeavour to control the costs of expert evidence and to regulate the delay caused by unnecessary disputation on such matters.²⁷

These have been supplemented by practice directions dealing specifically with expert evidence. The first is Practice Direction No 22 – Expert Witness Practice Direction 2003 which replaced the former 1999 practice direction relating to expert witnesses. This practice direction requires expert witnesses to acknowledge and agree to be bound by a code of conduct for expert witnesses. The code provides that an expert witness's paramount duty is to the Court. It requires full disclosure of relevant matters in reports. It requires expert witnesses to participate when directed by the Court in joint conferencing to identify areas of agreement and disagreement and to prepare a joint report setting out these matters. Such joint conferencing may be directed to occur in the absence of the legal representatives of the parties.

The second is Practice Direction No 1 of 2005 – Court Appointed Experts Practice Direction. This practice direction encourages parties to agree on the appointment of a single expert, rather than engage their own experts. The appointment of a single expert does have advantages. It may reduce costs and ensure the Court has the benefit of evidence from a person who is not engaged by only one party. The elimination of possible adversarial bias and the consequent neutrality, as between the parties, of the expert evidence of a single expert may give greater confidence to the court in relying on the evidence of the single expert.²⁸

A number of techniques have been adopted to ensure that expert evidence is given more efficiently. One is the appointment of a single expert. Another is the use of joint conferencing between the parties' experts and the production of a joint report of

²⁷ See, in the *Land and Environment Court Rules* 1996, Pt 1 r 5B(2)(f), and r 5C(1), Pt 6 r 1(1) (adopting Pt 39 of the Supreme Court Rules dealing with Court Appointed Experts and Pt 72 dealing with reference by the Court to a referee), Pt 13 rr 16, 21 and 24, and Pt 14 r 4.

²⁸ See *Port Securities Pty Ltd v Wollongong City Council* (2006) 145 LGERA 285 at 289[11], *Vigor Master Pty Ltd v Warringah Council* [2006] NSWLEC 140 (29 March 2006) at [48]-[49], *Pyramid Pacific Pty Ltd v Ku-ring-gai Council* [2006] NSWLEC 522 (17 August 2006) at [74] and the articles and speeches by Davies J and McClellan J cited therein.

the experts. This sets the stage for the technique of having the parties' experts give their evidence concurrently under the direction of the judge.²⁹

Another means of facilitating the overriding purpose of the just, quick cheap resolution of the real issues in proceedings is to use alternative dispute resolution. The ADR mechanisms available include conciliation, mediation, neutral evaluation and reference to independent referees.

Conciliation is now available for all class 1-3 proceedings by means a conciliation conference presided over by a Commissioner of the Court³⁰.

Mediation is available in all proceedings in classes 1-4.³¹ Mediation can be in or outside the Court. The Registrar of the Court is a trained mediator. Some of the Acting Commissioners of the Court shortly to be appointed are also trained mediators. The Court can also refer the whole or part of proceedings to external mediators.³²

Neutral evaluation enables a neutral or independent person to evaluate the proceedings. The evaluator seeks to identify and reduce the issues of fact and law in dispute. The evaluator assesses the relative strengths and weaknesses of each party's case and offers an opinion as to the likely outcome of the proceedings.³³ The Court can refer the whole or part of proceedings in classes 1-4 to neutral evaluation.

The Court has also adopted the Supreme Court's power to refer proceedings in classes 1-4 to an independent referee with particular knowledge or skills³⁴. The referee, after hearing from the parties, reports to the Court. The referee's report usually adopts the referee's report. The report will only be rejected or modified for very good reason.

Co-operation between the Court, practitioners and parties

The Court has an obligation to ensure the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in proceedings in the Court is achieved. However, the obligation does not reside in the Court alone. The parties to civil proceedings in the Court and their legal representatives are also under such an obligation. Each party is under a duty to assist the Court to further the overriding purpose and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.³⁵ A solicitor or barrister must not, by his or her conduct, cause his or her client to be put in breach of the client's duty to assist the Court to further the overriding purpose.³⁶ A breach by either a party or its legal

²⁹ The Judicial Commission of NSW and the Australian Institute of Judicial Administration have produced an excellent DVD, "Concurrent evidence: New methods with experts", 2005, which explains and re-enacts the giving of concurrent evidence in a hearing.

³⁰ s 34 (1) and (2) of the *Land and Environment Court Act 1979*.

³¹ s 61 D(1) of the *Land and Environment Court Act 1979* and Pt 18 r 1(1) of the *Land and Environment Court Rules 1996*.

³² s 61 D(2) of the *Land and Environment Court Act 1979* and Pt 18 r 1(2) of the *Land and Environment Court Rules 1996*.

³³ s 61 B(2) of the *Land and Environment Court Act 1979*.

³⁴ Pt 6 r 1(1) and (2) of the *Land and Environment Court Rules 1996* adopting Pt 72 of the *Supreme Court Rules*

³⁵ s 56(3) of the *Civil Procedure Act 2005* and Pt 1 r 5A(3) of the *Land and Environment Court Rules 1996*.

³⁶ s 56(4) of the *Civil Procedure Act 2005* and Pt 1 r 5A(4) of the *Land and Environment Court Rules 1996*.

representative can be taken into account by the Court in exercising its discretion with respect to costs³⁷.

The Supreme Court has issued a practice note in relation to cost orders against practitioners³⁸. The purpose of the practice note is to ensure compliance with directions and the rules of the Court. The requirement that parties and legal practitioners comply with directions and rules will be confirmed by the use of costs sanctions in appropriate cases, including costs orders against practitioners personally and costs ordered on a payable forthwith basis³⁹.

Legal practitioners owe a duty to the Court to ensure the efficient and expeditious conduct of proceedings⁴⁰. This duty requires legal practitioners to:

- (a) not permit the commencement or continuance of a claim in proceedings or to maintain a defence to proceedings, which does not have reasonable prospects of success⁴¹;
- (b) to identify the issues genuinely in dispute⁴²;
- (c) be satisfied that there is a reasonable basis for alleging, denying or not admitting facts in pleadings⁴³;
- (d) either directly or by giving appropriate advice to a client, to observe listing procedures, rules and court directions⁴⁴;
- (e) have the case ready for hearing as soon as practicable⁴⁵;
- (f) provide reasonable estimates of the length of hearings⁴⁶;
- (g) to present written submissions and other documents directed by the Court on time⁴⁷;
- (h) present the identified issues in dispute clearly and succinctly⁴⁸;
- (i) limit evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interests which are at stake in the case⁴⁹;

³⁷ s 56(5) of the *Civil Procedure Act* 2005 and Pt 1 r 5A(5) of the *Land and Environment Court Rules* 1996.

³⁸ Practice Note No 108 published (1999) 47 NSWLR 629.

³⁹ Paragraph 1 of Practice Note No. 108.

⁴⁰ *Giannarelli v Wraith* (1988) 165 CLR 543 at 556, *Whyte v Brosch* (1998) 45 NSWLR 354 at 355 and paragraphs 1 and 2 of Practice Note No. 108.

⁴¹ s 347 of the *Legal Profession Act* 2004 which reinforces the traditional obligation of legal practitioners: see the Hon JJ Spigelman, "Case Management in New South Wales", an address to the Malaysian Annual Judges Conference, Kuala Lumpur, 22 August 2006, p. 7.

⁴² Paragraph 3 of Practice Direction No. 108, Rule 42 (a) of the NSW Barristers' Rules and paragraph 6(g) of the Land and Environment Court Practice Direction No. 17 – Pre-Hearing Practice Direction.

⁴³ Paragraph 3 of Practice Note No. 108.

⁴⁴ Paragraph 3 of Practice Note No. 108

⁴⁵ Paragraph 3 of Practice Note No. 108 and rule 42(b) of the NSW Barristers' Rules.

⁴⁶ Paragraph 3 of Practice Note No. 108.

⁴⁷ Paragraph 3 of Practice Note No. 108, *Whyte v Brosch* (1998) 45 NSWLR 354 at 355, paragraph 41 of the Land and Environment Court Practice Direction No 17 – Pre-Hearing Practice Direction and paragraph 10 of Annexure 3 to the Court's Practice Direction No. 1 of 2006 – Class 3 Compensation Claims.

⁴⁸ Rule 42(c) of the NSW Barristers' Rules.

- (j) occupy as short a time in Court as is reasonably necessary to advance and protect the client's interests which are at stake in the case⁵⁰; and
- (k) give the earliest practicable notice of an adjournment application⁵¹.

Failure of a legal practitioner to comply with these duties may be taken into account in exercising the jurisdiction to order costs against practitioners personally⁵².

Legal practitioners who fail to efficiently and expeditiously conduct cases not only delay and increase the cost to their clients in those cases, they also deny or delay access to others who are prepared to be reasonable⁵³. There is also an effect on the public resources associated with judicial administration. It also affects the public perception of the judicial process. Swift resolution of proceedings enhance public perceptions of the judicial process whilst dilatory resolution undermines public perception⁵⁴.

Summary of requirements for court administration

The essential requirements for the efficient and expeditious administration of justice were recently summarised by the Chief Justice of NSW as follows:

- “(1) A court must monitor and manage both its caseload and individual cases.
- (2) Management cannot be successful without judicial leadership and commitment.
- (3) Procedures must be clearly established in legislation, court rules and written practices.
- (4) Cases must be brought under court management soon after their commencement.
- (5) Different kinds of cases require different kinds of management.
- (6) The degree and intensity of management must be proportionate to what is in dispute and to the complexity of the matter.
- (7) The number of court appearances must be minimised.
- (8) Realistic but expeditious timetables must be set and, unless there is good reason, must be adhered to.
- (9) A key objective is to identify the issues really in dispute early in the proceedings.

⁴⁹ Rule 42(d) of the NSW Barristers' Rules.

⁵⁰ Rule 42(e) of the NSW Barristers' Rules.

⁵¹ Paragraph 3 of Practice Note No. 108 and Rule 42A of the NSW Barristers' Rules.

⁵² S 56(5) of *Civil Procedure Act 2005* Pt 1 r 5A(5) of *Land and Environment Court Rules 1996* and paragraph 3 of Supreme Court Practice Note No. 108.

⁵³ R Smellie, "Case Management – Some Recent Observations" (1998) 3 *The Judicial Review* 271 at 272 and *Idoport Pty Ltd v National Australian Bank* (2000) 49 NSWLR 51 at 60.

⁵⁴ *Idoport Pty Ltd v National Australia Bank* (2000) 49 NSWLR 51 at 60.

- (10) Trial dates must be established as soon as practicable and must be definite, so as to ensure compliance with timetables.
- (11) Alternative dispute resolution should be encouraged and sometimes mandated.
- (12) Monitoring of the caseload must provide timely and comprehensive information to judges and court officers involved in management. Time standards may be useful in focusing the attention of all those involved.
- (13) Communication and consultation within the court and with others involved in the litigation process is an ongoing process.⁵⁵

The Chief Justice added that:

“Of all the requirements, one is overriding. Unless there is judicial commitment to the process, it will not work.”⁵⁶

Monitoring the effectiveness of the Court’s practice and procedure

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

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

The Productivity Commission in its report on Government Services 2007 suggests the following objectives for Court administration:

- To be open and accessible;
- To process matters in an expeditious and timely manner;
- To provide due process and equal protection before the law;
- To be independent yet publicly accountable for performance; and
- To provide court administration services in an efficient manner.⁵⁷

Performance indicators

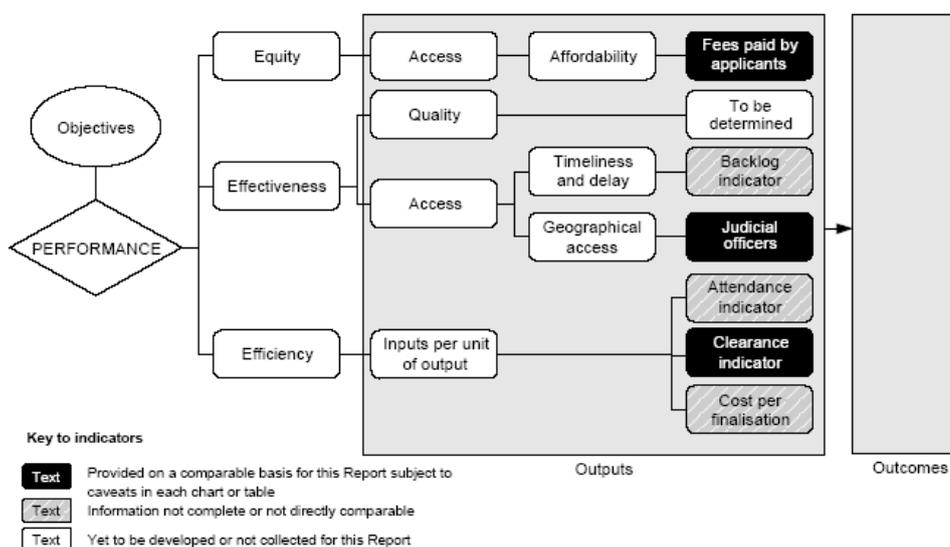
The Productivity Commission suggests a performance indicator framework for Court administration as follows⁵⁸:

⁵⁵ The Hon. JJ Spigelman, “Case Management in New South Wales”, an address to the Malaysian Annual Judges Conference, Kuala Lumpur, 22 August 2006, pp. 14-15.

⁵⁶ Ibid.

⁵⁷ Australian Government Productivity Commission, *Report on Government Services 2007*, p 6.20, Box 6.5.

Figure 6.3 Performance indicator framework for court administration



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

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

- “(a) be *just* in the results it delivers;
- (b) be *fair* in the way it treats litigants;
- (c) offer appropriate procedures at a reasonable *cost*;
- (d) deal with cases with reasonable *speed*;
- (e) be *understandable* to those who use it;
- (f) be *responsive* to the needs of those who use it;
- (g) provide as much *certainty* as the nature of particular cases allows; and
- (h) be *effective*: adequately resourced and organised”.⁵⁹

⁵⁸ Australian Government Productivity Commission, *Report on Government Services 2007*, Figure 6.3, p 6.21

⁵⁹ Lord Woolf, *Access to Justice: Final Report*, HMSO, 1996, p 2.

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

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

Quality of outcomes

Ensuring the just resolution of proceedings involves examining the quality of outcome of a case, whether the result is just and reached by fair means. However, there are no accepted outcome indicators for measuring the quality of court administration⁶⁰. Indeed, there are serious reservations about the appropriateness of measuring the quality of judicial decisions⁶¹.

Measuring the number of appeals from a court's decision and their success is not an appropriate or useful quality indicator⁶².

The Chief Justice of Canada has suggested that quality is more likely to result if the Court, and its judges and officers, retain certain virtues. They must be knowledgeable, independent, impartial, connected to society, possess absolute integrity, be more diverse reflecting our society, more efficient, better at communicating with the public, better educated and possess conscience and courage⁶³. The Land and Environment Court continues to strive to uphold these virtues.

Output indicators of access to justice

Access to justice is able to be evaluated by reference to various outputs. These evaluate the accessibility of the Court, by reference to various criteria, both quantitative and qualitative. These include affordability, responsiveness to the needs of users and facilitation of public participation.

Affordability

The first output is the affordability of litigation in the Court. One indicator of affordability is the fees paid by applicants. Lower court fees help keep courts accessible to those with less financial means. However, ensuring a high standard of court administration service quality (so as to achieve the objective of effectiveness) requires financial resources. These days, the primary source of revenue to fund court administration is court fees. The Land and Environment Court is no exception. It was necessary last year to increase court fees to be able to balance the Court's budget and ensure a high standard of court administration service quality. Nevertheless, the increased court fees still meet criteria of equity.

⁶⁰ Australian Government Productivity Commission, *Report on Government Services 2007*, p 6.21.

⁶¹ See the Hon J J Spigelman, "The 'New Public Management' and the Courts", (2001) 75 ALJ 748 at 753 and the Hon J J Spigelman, "Measuring Court Performance", an address to the Annual Conference of the Australian Institute of Judicial Administration, Adelaide, 16 September 2006.

⁶² The Hon JJ Spigelman, "Measuring Court Performance", an address to the Annual Conference of the Australian Institute of Judicial Administration, Adelaide, 16 September 2006, p. 9.

⁶³ The Right Hon B McLachlin P C, "The 21st Century Courts: Old Challenges and New", the 14th AIJA Oration in Judicial Administration, Melbourne, 28 April 2006, p. 14 (summarising discussion at pp 6-13).

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

Secondly, the court fees vary depending on the nature of the proceedings. For example, the court fees for proceedings concerning a dispute over trees under the *Trees (Disputes Between Neighbours) Act 2006* which came into force on 2 February 2007 have been set low, equivalent to Local Court fees, reflecting the fact that that proceedings are likely to be between individual neighbours.

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

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

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

It is also important to note that court fees are only part of the costs faced by litigants (with legal fees and experts' fees being far more significant).

Responsiveness to the needs of users

Access to justice can also be facilitated by the Court taking a more consumer orientated approach. The justice system should be more responsive to the needs and expectations of people who come into contact with the system. The principle of consumer orientation implies that "special steps must be taken to ensure that courts and tribunals take (or continue to take) specific measures both to assist people to understand the way those institutions work and to improve the facilities and services available to members of the public. These steps require sensitivity to the needs of particular groups..."⁶⁴

The Court has implemented a number of measures to be more responsive to the needs and expectations of people who come into contact with the Court. They include ensuring geographical accessibility, access for people with disabilities, access to help and information, and access to alternative dispute resolution mechanisms and the maintenance of a Court Users Group. I will briefly explain these measures.

Geographical accountability

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

⁶⁴ Access to Justice Advisory Committee, *Access to Justice Report*, 1994, para 1.22.

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

First, the Court regularly holds hearings in country locations. The following table shows the country hearings from the period 1 July 2005 to 30 December 2006.

Country Hearings

Courthouse	No. of Matters			
	Class 1	Class 3	Class 4	Class 5
Albury	4	1	1	
Armidale	2			
Ballina	2	1	1	
Bathurst	3			
Bega	1			
Bellingen	2			
Belmont		1		
Broken Hill				1
Byron	2	1		
Casino	1			
Cessnock	1			
Coffs Harbour	4			
Dubbo	1			
East Maitland	4			
Forster	2			
Gosford	1	1		
Goulburn	1			
Grafton	1			
Katoomba	3			
Kempsey	1			
Kiama	3			
Kurri Kurri	3			
Lismore	1	2		
Maitland	6			
Moruya	1			
Moss Vale	3			
Mullumbimby	1			
Murwillumbah	2	1		
Newcastle	3			
Nowra	1	1		
Port Macquarie	2	1		
Queanbeyan	2			
Raymond Terrace		1		
Richmond	1			
Taree	2	1		
Toronto	2			
Tumut		1		
Tweed Heads	4	1		
Wagga Wagga	2			
Wollongong	2			
Wyong	1			
TOTAL	78	14	2	1

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

Thirdly, the Court pioneered the use of e-Court callovers. This involves the parties or their representatives posting electronic requests to the Registrar using the internet and the Registrar responding. This also mitigates the tyranny of distance.

Fourthly, conduct of the whole or part of a hearing on the site of the dispute also means that the Court comes to the litigants. An official on-site hearing involves conducting the whole hearing on-site. This type of hearing is required where there has been a direction that an appeal under s 97 of the *Environmental Planning and Assessment Act 1979* be conducted as an on-site hearing. The hearing is conducted as a conference presided over by a Commissioner on the site of the development⁶⁵.

However, even for other hearings which may be conducted as a court hearing, it is the Court's standard practice that the hearing commence at 9.30am on site⁶⁶. This enables not only a view of the site and surrounds but also the taking of evidence from residents and other persons on the site. This facilitates participation in the proceedings by witnesses and avoids the necessity for their attendance in the Court in Sydney.

Access for persons with disabilities

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

Access to help and information

The Court facilitates access to help and provides information to parties about the Court and its organisation, resources and services, the Court's practices and procedures, its forms and fees, court lists and judgments, publications, speeches and media releases, and self-help information, amongst other information. Primarily it does this by its website. However, it also has guides and other information available at the counter. The Local Courts throughout New South Wales also have information on the Land and Environment Court and documents are able to be filed in those Courts, which are passed on to the Land and Environment Court.

The provision of such help and information facilitates access to justice and the understandability of the judicial system to those who use it.

Access to alternative dispute resolution

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

⁶⁵ s 34 B(1) of the *Land and Environment Court Act 1979*.

⁶⁶ Paragraph 25 of the Practice Direction No. 17 – Pre-Hearing Practice Direction.

When the Land and Environment Court was established in 1980 there was the facility for conciliation conferences under s 34 of the *Land and Environment Court Act*. As I have noted, these were curtailed in 2002 when on-site hearings were provided for but recently the facility of conciliation conferences has been reinstated and indeed extended to all matters in Classes 1, 2 and 3⁶⁷.

The Court provides mediation services. Currently, the Registrar of the Court is an accredited mediator and can provide in-house mediation for parties. In addition, the Court encourages and will make appropriate arrangements for mediation by external mediators. Informal mechanisms such as case management conferences also encourage negotiation and settlement of matters. The Court's website contains a page explaining the alternative dispute resolution mechanisms and providing links to other sites explaining ADR methods include mediation.

Court Users Group

The Court has a Court Users Group to maintain communication with and feedback from users as to the practice and procedure and the administration of the Court. This assists the Court to be responsive to the needs of those who use it. Amongst the members of the Group are:

- Australian Institute of Building Surveyors
- Australian Institute of Environmental Health
- Australian Institute of Landscape Architects
- Australian Property Institute Inc
- Department of Natural Resources
- Environment and Planning Law Association
- Environment Protection Authority
- Environmental Defenders' Officer
- Ethnic Communities' Council
- Housing Industry Association
- Institute of Arbitrators and Mediators
- Institution of Surveyors NSW
- Local Government Association of NSW
- Local Government Lawyers Group
- Local Government Representatives
- Nature Conservation Council of NSW
- NSW Urban Taskforce
- Planning Institute of Australia
- Planning NSW
- Property Council of Australia
- Royal Australian Institute of Architects
- The Bar Association of New South Wales
- The Institute of Engineers
- The Law Society of New South Wales
- Urban Development Institute of Australia

The Group meets four times a year.

⁶⁷ *Crimes and Courts Legislation Amendment Act 2006*, Act No. 107 of 2006, Sched 1, cl 1.19 [1] and [2].

Facilitating public participation

Access to justice can also be facilitated by the Court ensuring that its practice and procedure promotes and does not impede access by all. This involves careful identification and removal of barriers to participation, including by the public. Procedural law dealing with standing to sue, interlocutory injunctions (particularly undertaking for damages), security for costs, laches and costs of proceedings, to give some examples, can either impede or facilitate public access to justice. The Court's decisions in these matters have generally been to facilitate public access to the courts⁶⁸.

Output indicators of effectiveness and efficiency

The effectiveness and efficiency of the Court is able to be measured by reference to the output indicators of backlog indicator, clearance rate and attendance indicator. I will explain each of these indicators.

Backlog indicator

The backlog indicator is an output indicator of case processing timeliness. It is derived by comparing the age (in elapsed time from lodgement) of the Court's caseload against time standards. The Court adopted back in 1996 its own time standards for the different classes of its jurisdiction. These are:

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

These standards are far stricter than those adopted for other Courts in Australia. The national standards for the Supreme Courts, Federal Court, District Court, Family Court and Coroners' Court and all appeals in courts are:

- no more than 10% of lodgments pending completion are to be more than 12 months old.
- no lodgments pending completion are to be more than 24 months old.⁶⁹

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

Time taken to process cases is not necessarily court administration delay. Some delays are caused by factors other than those related to the workload of the Court. These include the unavailability of a witness, other litigation taking precedence and appeals on interim rulings.⁷⁰

⁶⁸ See B J Preston, "Judicial Review in Environmental Cases" (1993) 10 *Australian Bar Review* 147 at 165-174, P.L. Stein, "The Role of the Land and Environment Court in the Emergence of Public Interest Law" (1996) 13 *EPLJ* 179 and B J Preston, "The role of public interest environmental litigation" (2006) 23 *EPLJ* 337.

⁶⁹ Australian Government Productivity Commission, *Report on Government Services 2007*, p 6.25.

⁷⁰ Australian Government Productivity Commission, *Report on Government Services 2007*, p 6.27, Box 6.9.

The results of the backlog indicator measured against the Land and Environment Court time standards for 2006 are:

Table 2: Backlog Indicator (LEC time standards)

		2002	2003	2004	2005	2006
	Unit					
Class 1						
Pending caseload	no.	637	593	611	653	457
Cases > 6 months	%	22.0	15.5	12.8	29.1	22.8
Cases > 12 months	%	7.0	6.9	5.4	9.6	10.1
Class 2						
Pending caseload	no.	116	5	23	11	7
Cases > 6 months	%	84.5	20.0	82.1	45.5	28.6
Cases > 12 months	%	79.3	20.0	25.0	36.3	14.3
Class 3						
Pending caseload	no.	90	147	204	319	165
Cases > 6 months	%	42.0	34.7	32.0	44.8	55.2
Cases > 12 months	%	26.0	16.3	17.9	25.1	38.8
Class 4						
Pending caseload	no.	153	142	109	142	164
Cases > 8 months	%	27.0	26.1	35.0	28.8	19.5
Cases > 16 months	%	9.2	14.1	19.7	16.4	12.2
Class 5						
Pending caseload	no.	94	81	66	81	63
Cases > 8 months	%	30.9	30.9	52.1	29.1	55.5
Cases > 16 months	%	6.4	14.8	26.1	18.9	11.1
Class 6						
Pending caseload	no.	0	1	2	8	2
Cases > 8 months	%	0	0	0	0	0
Cases > 16 months	%	0	0	0	0	0
Class 1- 3						
Pending caseload	no.	843	861	838	983	629
Cases > 6 months	%	32.7	31.8	25.8	34.6	31.3
Cases > 12 months	%	19	19.5	11.1	15	17.6

Class 4 - 7

Pending caseload	no.	247	224	177	231	229
Cases > 8 months	%	28.5	27.6	44.0	27.9	29.3
Cases > 16 months	%	8.1	14.2	22.6	16.7	11.8

These backlog figures, need some explanation:

- (a) Class 1: The decrease in the backlog figure in 2006 does not truly reflect the reduction in the number of older cases before the Court. Over 2006 the actual number of matters pending for more than 6 months was almost halved (down 46%). The backlog figure did not fall by the corresponding 46% to 16% as the actual number of pending matters has fallen by 30% (less registrations), so the less than 'actual' reduction is due to the fact that the total pending caseload has fallen as well.
- (b) Class 3: The 2006 backlog figures are higher than for 2005, however, the actual number of files exceeding the 6 months standard decreased by 36% in 2006. The figure is 'higher' as the total pending caseload fell by 48% so that the older files represent proportionately more of the pending caseload.
- (c) Class 4: The decrease in the 8 months backlog figure for 2006 is due to a combination of a slight increase (15%) in the total pending caseload and a decrease in the number (25%) of older files.
- (d) Class 5: The increase in the 8 months backlog figure for 2006 is due to both an increase in the number of older files and a decrease in the total number of matters pending before the Court.

If the national time standards are used, the results of the backlog indicator for the Court in 2006 would be:

Table 3: Backlog indicator (national time standards)

	2002	2003	2004	2005	2006
Classes 1, 2 and 3					
Pending caseload	843	861	838	983	629
% of cases > 12 months	19	19.5	11.1	15	17.6
% of cases > 24 months	9.8	13.2	2.3	3.1	3.9
	2002	2003	2004	2005	2006
Classes 4, 5, 6 and 7					
Pending caseload	247	224	117	231	229
% of cases > 12 months	15.9	21.8	30.9	19.7	24.2
% of cases > 24 months	2.4	7.4	8.0	9.8	6.2

Compliance with time standards

The Court's compliance with its time standards is presented as follows:

Table 4: Finalisation of cases - Compliance with time standards by Class

	2002	2003	2004	2005	2006
Class 1					
No. of matters	1224	1340	1316	1143	1199
% < 6 months	57	63	75	66	61
% < 12 months	89	94	95	93	89
95% completed within (months)	17	13	13	14	16
Class 2					
No. of matters	26	19	17	29	15
% < 6 months	62	74	76	38	60
% < 12 months	85	95	100	97	73
95% completed within (months)	27	11	9	10	16
Class 3					
No. of matters	130	136	225	194	327
% < 6 months	45	49	67	51	32
% < 12 months	65	80	87	74	57
95% completed within (months)	28	25	19	19	33
Class 4					
No. of matters	326	291	273	203	267
% < 8 months	69	75	77	75	73
% < 16 months	91	93	93	92	91
95% completed within (months)	22	20	21	20	20
Class 5					
No. of matters	154	141	93	74	68
% < 8 months	58	62	53	47	28
% < 16 months	88	91	80	72	75
95% completed within (months)	18	20	42	28	34

Class 6					
No. of matters	2	5	7	9	18
% < 8 months	100	100	100	100	100
% < 16 months	100	100	100	100	100
95% completed within (months)	N/A	7	7	7	6

These time standards are not only measurements of the Court's delivery of justice. Rather, they measure the delivery of justice by all those associated with the process including legal practitioners⁷¹. Hence, a failure to achieve the time standards reflects on all concerned in the process.

Clearance rates

The clearance rate is an output indicator of efficiency. It shows whether the volume of finalisations match the value of lodgments in the same reporting period. It indicates whether a court's pending caseload has increased or decreased over that period. The clearance rate is derived by dividing the number of finalisations in the reporting period, by the number of lodgements in the same period. The result is multiplied by 100 to convert it to a percentage.

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

The clearance rate can be affected by external factors (such as those causing changes in lodgment rates) as well as by changes in the Court's case management practices.⁷²

The results of the clearance rates for the Land and Environment Court in each of its classes are as follows:

Table 5: Clearance Rate

	2002	2003	2004	2005	2006
Class 1	101.0	103.8	98.6	96.4	119.3
Class 2	75.7	66.7	45.5	181.3	115.4
Class 3	111.8	70.5	79.8	63.5	192.4
Class 4	112.2	103.9	113.8	88.7	94.3

⁷¹ The Hon. JJ Spigelman "Just, Quick and Cheap – A Standard for Civil Justice", an address to the Opening of Law Term, 31 January 2000, p. 6.

⁷² Australian Government Productivity Commission, *Report on Government Services 2007*, p 6.34, Box 6.13.

Class 5	117.2	110.3	119.2	83.9	125.9
Class 6	100.0	100.0	100.0	60.0	150.0
Classes 1, 2 & 3	101.0	98.9	94.3	90.7	129.7
Classes 4, 5, 6 & 7	113.7	105.9	114.8	86.1	101.1
Total	103.9	100.6	97.7	89.8	123.4

These figures show that the clearance rate in 2006 has dramatically improved. This is a direct consequence of concerted case management cases adopted by the Court in 2006. These include:

- (a) For proceedings in class 3, the issuing of two new practice directions, one dealing with compensation claims⁷³ and another with valuation objections⁷⁴, and the establishment of a Class 3 List presided over by a Class 3 List Judge. The combined effect of these initiatives has been to actively case manage proceedings in Class 3, focusing on reducing the number of pre-hearing attendances, making each pre-hearing attendance result in an outcome that progresses the matter to hearing, fuller and earlier disclosure of evidence between parties, better managing expert evidence preparation before and presentation at the hearing, facilitating alternative dispute resolution, and ensuring readiness for trial. The result has been a clearance rate of 192.4%, the highest in five years in the Court.
- (b) For proceedings in classes 3-7, of a List, a List Judge and a dedicated date for conducting the List (Friday), the establishment for proceedings in these classes. This ensures specific judicial attention is given to case management of these proceedings. Again, the result has been to improve the clearance rate for all classes 3-7 compared to the previous year (2005) and indeed, other than for class 4, for the previous four years.
- (c) The re-activation of the use of a duty Commissioner on Fridays. This facility had been available⁷⁵. However, it had fallen into disuse. The re-activation of this facility enables the Registrar conducting callovers and the Class 3 List Judge on Fridays to refer matters to the Duty Commissioner for case management or, if short, for hearing and disposal,
- (d) For proceedings in Class 1, the re-activation of the requirement for amendments to the development application the subject of the appeal to be by notice of motion with supporting affidavit⁷⁶. Amendments to the development application are frequently made in response to the preliminary report of a court appointed expert. Amendments to the Court's Court Appointed Expert Standard Direction No. 1 requires an applicant to seek leave, within 10 days of receipt of the preliminary report, by notice of motion and supporting affidavit. The affidavit is to identify, amongst other matters, how granting leave to rely on amended plans would promote the just, quick

⁷³ Practice Direction No. 1 of 2006 – Class 3 Compensation Claims.

⁷⁴ Practice Direction No. 2 of 2006 – Class 3 Valuation Objections.

⁷⁵ See Practice Directions 1-15, paragraph 1.

⁷⁶ See *Land and Environment Court Rules* 1996, Pt 10 r 1 and Pt 13 r 16(61) concerning application for amendments and Pt 9 rr 2 and 6 requiring applications to be by motion supported by affidavit.

and cheap resolution of the proceedings⁷⁷. The formality of a motion and affidavit forces parties to carefully consider the amendments and to consolidate amendments (and thereby avoid repetitive applications to amend). It also allows the Court to better control the process and, through its decisions, give guidance on the circumstances in which amendments will and will not be permitted⁷⁸.

- (e) The production for internal court administration purposes of quarterly results for various performance indicators. As the old adage says, “What gets measured, gets managed”. However, active management depends on timely feedback of monitoring results. Quarterly results enable prompt management attention to impediments to efficient and effective caseload.

The Court’s clearance rates can be benchmarked against the clearance rates of other courts in New South Wales for 2006. The Productivity Commission records the clearance rate for all matters in New South Wales courts as follows⁷⁹:

Table 6: Clearance rates for NSW Courts in 2006

Supreme Court	
Criminal	102.9
Civil	103.5
TOTAL	103.4
District Court	
Criminal	95.5
Civil	110.4
TOTAL	101.9
Local Court	
Criminal	101.1
Civil	93.2
TOTAL	96.8

Attendance indicator

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

⁷⁷ See paragraph 3 of the Court’s Court Appointed Expert Standard Direction as amended 2 June 2006.

⁷⁸ See, for example, *Maxnox Pty Ltd v Hurstville City Council* (2006) 145 LGERA 373 at 384-385, *Marinkovic v Rockdale City Council* [2006] NSWLEC 601 (19 September 2006) and *Hakim v Canada Bay City Council* [2006] NSWLEC 746 (11 October 2006).

⁷⁹ Australian Government Productivity Commission, *Report on Government Services 2007*, p 6.36, Table 6.15

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

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

Prior to 2006, the Court did keep a record of attendance data for proceedings in each class of jurisdiction in the Court. However, it did not identify the timing of the attendances, such as whether before a hearing or after a hearing. As a result of concern expressed that changes in 2004 and 2005 to the case management of appeals in Class 1 of the Court's jurisdiction (particularly changes relating to more liberal allowance of multiple amendments to development applications, the provision of interim judgments facilitating further amendments, and more liberal granting of adjournments), the Court directed the collection of additional data as to the timing of the attendances in Class 1 proceedings completed in 2006. This was done to assess the effects of the changes to the case management practices of the Court.

The data set was interrogated by reference to whether there was an attendance after the first hearing of the appeal. Two groups of appeals were identified: first, matters which were not finalised as a result of the first hearing and where there was a need for one or more subsequent attendances (including a further hearing) and secondly, appeals which were finalised after the first hearing (in that judgment was delivered at the conclusion of the hearing or on a subsequent date if a judgment had been reserved). The data for the two groups differ significantly in terms of the number of attendances and the length of hearing days.

Table 7: Attendances and hearing days in Class 1

	Group 1 (attendance after first hearing)	Group 2 (no attendance after first hearing)
Average number of pre-hearing attendances	11.4	6.5
Average number of hearing days	2.8	1.4

The two groups have been analysed for other variables that may affect completion times. These are listed in the following table. The figures are the percentage of matters in each group that have the variable:

Table 8: Characteristics of Class 1 appeals

	Group 1	Group 2
Vacate hearing dates	30%	15%
Case management	24%	13%
Court appointed expert (CAE)	57%	40%
Amended plans	79%	45%

The two groups also differ in the extent to which they comply with the Court's time standards.

Table 9: Compliance with time standards

	Group 1	Group 2
% completed < 6 mths	21	64
% completed < 12 mths	68	92

These figures indicate that a failure to finalise a matter at the first hearing date (primarily because of a request by the application to amend the application the subject of the appeal) increases the time taken to finalise a matter and, it would be expected, the costs of the appeal.

Attendance data has also been collected for proceedings in Classes 3, 4 and 5 that were completed in 2006. The results are as follows:

Table 10: Average number of pre-hearing attendances in Classes 3-5

Class 3	
• compensation	6
• valuation	5
• other matters	3
Class 4	5
Class 5	7

The Court adopted in the first half of 2006 practice directions for compensation matters⁸⁰ and valuations objections⁸¹. These practice directions set targets of the number of pre-hearing court attendances. These targets are three for compensation matters and two for valuation objections. This reform was coupled with the establishment of a List Judge to manage Class 3 matters. The vast majority of matters finalised in 2006 were lodged prior to these practice directions coming into force. Accordingly, it is too early to determine the effect the practice directions are having on reducing the number of pre-hearing attendances and reducing the overall time taken to finalise the matters.

Conclusion

The Court, as with all courts in Australia has accepted a considerably expanded role in the management of the administration of justice in the Court. This role is both with respect to the overall caseload of the Court and in the management of individual proceedings. Management includes the Court actively revising procedures and administration processes in order to achieve defined objectives.

The role the Court plays can be aptly described as “managing justice”. This expression conveys three meanings.⁸²

First, it conveys the idea that “our civil justice system works best when judicial officers take an active role in *managing* proceedings from an early stage”.⁸³

Secondly, the expression can be used in an inspirational sense, conveying the hope that the Court and its practices and procedures will “assist in *managing to achieve*” a justice system of the highest order”.⁸⁴

Thirdly, the expression encapsulates the idea that the Court “should accept responsibility not merely for managing the conduct of litigation, but for a wider range of activities designed to enhance the responsiveness and accountability of the legal system to the community, but in ways that are consistent with judicial independence”.⁸⁵ Sackville suggests these functions of the courts should include “formulating and reporting on appropriate performance standards, initiating and supporting the objective evaluations of procedural and managerial reforms and improving the quality of published statistical information about the judicial system”.⁸⁶

The Court has played and will continue to play a more active role in the attainment of each of these three aspects of managing justice in the Court.

⁸⁰ Practice Direction No. 1 of 2006 – Class 3 Compensation Claims.

⁸¹ Practice Direction No. 2 of 2006 – Class 3 Valuation Objections

⁸² R Sackville, “From Access to Justice to Managing Justice: The Transformation of the Judicial Role” (2002) 12 *Journal of Judicial Administration* 5 at 19.

⁸³ Australian Law Reform Commission, *Managing Justice*, 2000, para 1.14.

⁸⁴ Australian Law Reform Commission, *Managing Justice*, 2000, para 1.15.

⁸⁵ R Sackville, “From Access to Justice to Managing Justice: The Transformation of the Judicial Role” (2002) 12 *Journal of Judicial Administration* 5 at 19.

⁸⁶ *Ibid.*