CONDUCTING PLANNING APPEALS IN NSW

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Changes in the processes and procedures for civil dispute resolution by the Land and Environment Court

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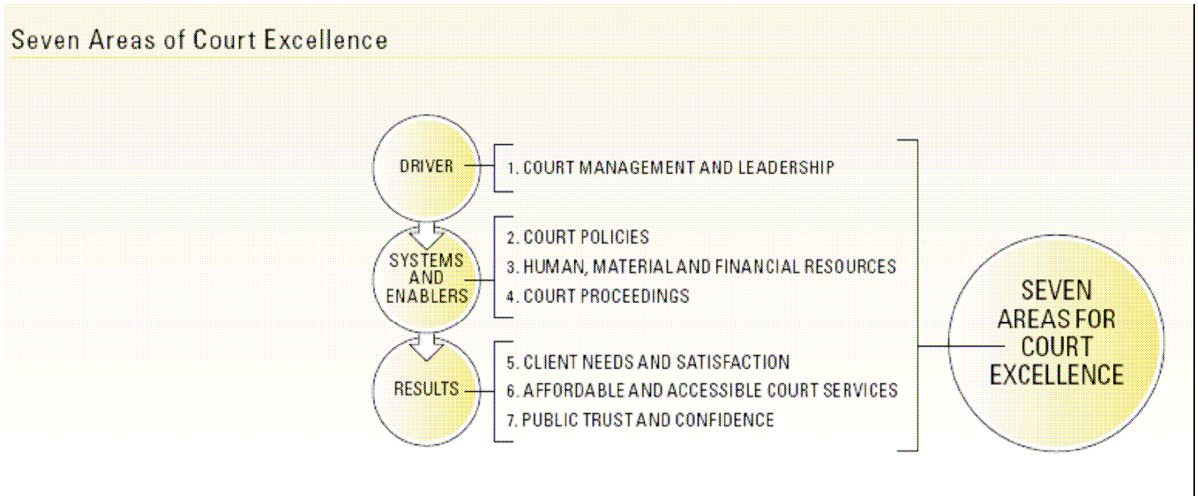
Introduction

There are a number of ways that the processes of the Court for dealing with many aspects of the Court's civil dispute resolution jurisdictions (including planning appeals) may change over the next 12 months or so.

Some of these changes, as they occur, will be comparatively subtle ones of emphasis but others, if the opportunity arises to take advantage of them, may encompass more significant alterations.

The context within which this will occur is created by two separate but complementary factors. The first is an ongoing influence – it is the pursuit of the Chief Judge's objective that we provide what he describes as a multi-door courthouse, a concept to which I will return.

The second significant development is the pursuit by the Court of the seven areas of Court Excellence set by the International Framework for Court Excellence.



In this latter regard, the Land and Environment Court is being used as a pilot project for the International Framework, also a topic to which I will return.

The multi-door courthouse – the initial steps

Adopting the concept of a multi-door courthouse assists the Court fulfil the three principal objectives for courts involved in civil litigation in New South Wales. These are set by s 56 of the *Civil Procedure Act* 2005 (the Civil Procedure Act). The relevant portions of this section read:

1) *The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.*

2) *The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.*

In pursuit of these objectives, ones that were well understood by the Court even before the passage of the Civil Procedure Act, a series of reforms were undertaken under the former Chief Judge, Justice McClellan and continued and accelerated under the present Chief Judge, Justice Preston.

There have been two dominant objectives to these reforms. The first has been to save the parties (and taxpayers) significant amounts of money by reducing the time and procedural steps between commencing proceedings and their final determination and, at the same time, seeking to shorten the number of days that the hearing, in itself, would take.

It is the Court's experience, over the last 4 years or so, that the simple initiative (applying to virtually all merit appeals) of commencing on site rather than with formal openings in the courtroom has meant that those matters that, in the past, would have involved a two-day hearing now are usually completed in one day and matters that would have been set down for three days or more are usually completed with a saving of at least one hearing day.

However, these changes, although perceived as radical by many at the time they were introduced, merely provided a starting point on the path to a truly multi-door courthouse.

The second aspect was the pursuit of what McClellan CJ described as "the best community outcome". This involves, during a merit hearing process, the presiding Commissioner considering what I describe as the "amber light" in the decision making process. I recently described this concept in *Ali v Liverpool City Council* [2009] NSWLEC 1327 where I said:

> *120. During the course of proceedings, I raised with Mr Ayling SC, counsel for the applicant, the approach now taken by the Court over recent years (which*

> *approach I liken to the amber light in a set of traffic lights). This approach says that, if a proposal is not appropriate to be given approval in the form being considered but, with minor and identifiable amendments consistent with the application before the Court, it would be capable of approval, the Court should make a determination:*
>
> - *setting out the changes that are required to render the proposal acceptable;*
> - *requiring the applicant to make those changes, whether by preparation of amended plans or by Court imposed conditions settled between the parties; and*
> - *when such modifications are incorporated (thus rendering the proposal acceptable), approval should be given to the amended proposal.*

The Commissioners of the Court warmly embraced adoption of this approach when McClellan CJ introduced it, as it provided a significant opportunity for us to exercise our problem-solving skills derived from the range of professional competencies held across the spectrum of Commissioners.

Re-emphasis of conciliation conferences

This "best community outcome" approach was built upon, significantly, by Preston CJ's re-emphasising the conciliation conference process. The parties in a conciliation conference process are required *to participate, in good faith, in the conciliation conference* [s 34(1A) of the *Land and Environment Court Act* 1979 (the Court Act)].

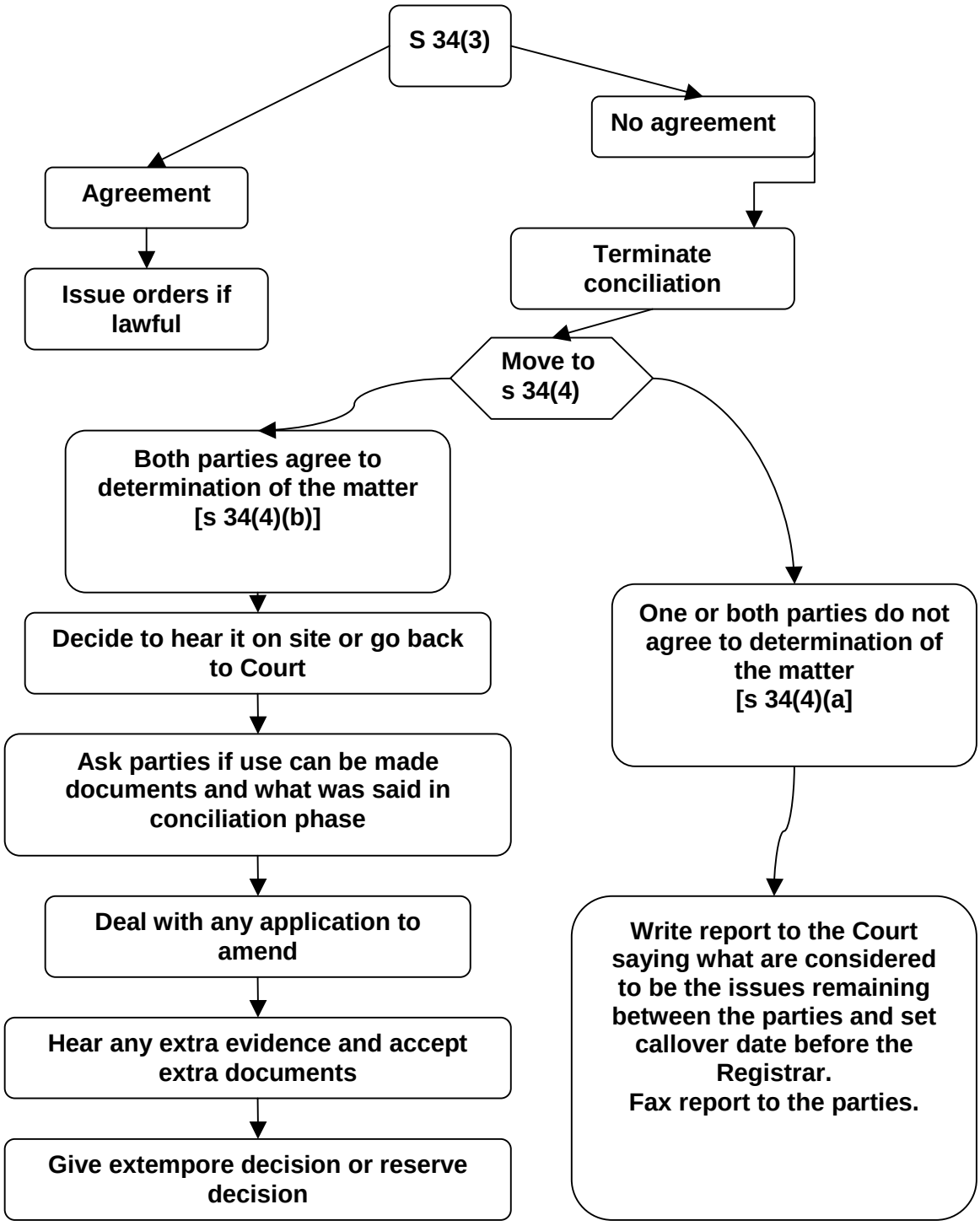
There are a number of things about the conciliation conference process that are, perhaps, not readily understood. The first is that it is entirely under the seal of the confessional, as it were.

Anything said and any documents that are provided by the parties, including any alternative plans, are not to be filed, formally, with the Court and will be returned to the parties at the conclusion of the conciliation phase if they are not carried forward, by consent into a determinative phase [s 34(11) and (12) of the Court Act].

Second, it is not, perhaps, readily appreciated that the exclusive role of the conciliating Commissioner is to assist the parties to reach agreement whatever the Commissioner's own view might be about the desirability of the agreed outcome.

It is an unusual experience for a person acting as a conciliator (who regularly also has a decision-maker's role) to assist the parties reach agreement on a lawful outcome with the obligation to give effect to it [s 34(3) of the Court Act] when the outcome is one which, although lawful, you would not have approved, on the merits, in the same form as it has been agreed or, indeed, at all!

The s 34 conciliation model can be set out as a flowchart as follows:



Conciliation beyond traditional planning appeals

Conciliation conferences are now, following their being re-emphasised by Preston CJ, a commonplace element in the Court's procedural armoury. For example, one of my colleagues has undertaken a conciliation conference process dealing with encroachments on neighbouring properties [*Encroachment of Buildings Act* 1922] – a matter falling within Class 3 of the Court's jurisdictions.

I should also note, at this point, although not in the Courts planning jurisdiction, the conciliation process is also amenable to use in other Class 3 matters – the range of valuation matters the Court regularly deals with. These are matters not only concerning statutory valuations but also in compensation claims after compulsory acquisition. The Court has two Acting Commissioners who are qualified valuers who regularly undertake this conciliation process (as do a number of the full-time Commissioners who have had experience in valuation cases in the past).

What, perhaps, is not widely understood is that a conciliation conference can be used in processes where the presiding Commissioner cannot personally make the orders if a successful outcome is reached but can fulfil the statutory obligation to give effect to the conciliation agreement in another fashion.

Let me explain using an example where I have successfully assisted the parties to reach an outcome but where finalisation of the proceedings required judicial assistance.

The Chief Judge appointed me to undertake a conciliation process concerning an application made to the Court under the *Access to Neighbouring Land Act* 2000. The applicant, a developer seeking to build a significant commercial/retail development in suburban Sydney, needed access to a number of neighbouring properties. Some of that access was temporary (in that there was a necessity to swing the boom of a lofty crane over a neighbouring commercial property and another neighbouring strata title residential property during the construction phase of the project).

However, in the longer term, to facilitate the development of the project's basement car parking, the developer also needed to be able to install rock bolts into the sandstone strata below the residential property.

Commissioners of the Court do not have power to exercise jurisdiction under the Access to Neighbouring Land Act. As a result of quite complex commercial negotiations during the conciliation conference I conducted, over several meetings, the parties reached agreement on the terms of the number of commercial deeds that could form the basis of consent orders under the Act. This, obviously, reflected the desired outcome of the conciliation process.

However, as I could not make those orders, I arranged for the matter to be listed before the Duty Judge together with a short note from me on the file outlining what had occurred. After the Duty Judge satisfied himself, in a brief hearing, that the

orders could be made and that the parties consented to them being made, he made consent orders giving effect to the conciliated outcome.

Similar conciliation processes have also been undertaken, using this methodology, in applications for the compulsory acquisition of an easement [s40 of the Court Act]. In such instances, although the Commissioner can undertake the conciliation process, giving effect to any conciliated agreement will require recourse to a Judge of the Court for the power to make the relevant implementing orders. It is likely that this approach of using the conciliating skills of Commissioners in appropriate cases rather than the cost and loss of judge time in litigating these matters will continue when appropriate opportunities arise.

A defect in the conciliation conference process

There is, at the present time, one significant defect in the conciliation conference process.

This defect arises because, not infrequently, those attending on behalf of a council do not have sufficient authority to reach agreement on an outcome leading to s 34(3) consent orders nor do they have timely access to an appropriately authorised more senior person within the Council who does have such authority. This matter may require government policy consideration of whether there needs be a statutory or policy requirement for those participating being vested with adequate authority or easy access to someone so vested – such a step would have the potential to increase, significantly, the effectiveness of reconciliation process.

The other doors in a multi-door courthouse

These earlier procedural and operational reforms have provided the starting point for the multi-door courthouse approach. Having a multi-door courthouse, fully functional, involves embracing and utilising the full range of alternative dispute resolution mechanisms (including interventions before a hearing) and not merely the present dominant model where the principal significant alternative to a straight arbitration model is the s 34 conciliation process.

The full range of alternative dispute resolution encompasses mediation, conciliation and neutral evaluation and combinations of the first two with an arbitral function. All these are, in a statutory sense, available to parties in proceedings before the Court. There is also a significant role for case management intervention, significantly before a hearing, in complex matters.

<u>The difference between conciliation and mediation</u>

In although it is, perhaps, unnecessary to explain it, there is a significant difference between conciliation and mediation. For those who preside over or guide both

processes, conscious adoption of entirely different intellectual frameworks is necessary for each process.

In a pure mediation model, the mediator plays no role in providing input to (or guidance about) the merits of the matters that are in dispute between the parties. The mediator merely conducts a process to assist the parties to discuss the matters that are in dispute – aiming to assist the parties to reach an agreement about the resolution of the issues and the giving effect to that resolution.

In a conciliation process, on the other hand, a conciliator is expected to play a more interventionist (but not dominant) role in the proceedings and to assist the parties by proposing matters for discussion or questioning the parties on matters of merit in the dispute. A conciliator, on appropriate occasions, can suggest outcome options for discussion by the parties if the parties themselves have not canvassed a particular option. However, a conciliator needs to be careful not to seek to dominate the process or to push a particular outcome (if he or she considers that that would be the desirable outcome)). This approach is significantly different to that of a mediator.

Indeed, when I undertook in an intensive mediation training course in early 2008, conducted by the Institute of Mediators and Arbitrators, those conducting the course expressed a personal view that, for the most part, a mediator did not need to have any understanding of the technical complexities of the issues that were the subject of the dispute. What a mediator needed to understand, they said, was precisely how to conduct a mediation process that enabled the parties, by being guided through the process rather than assisted with the merits, to resolve their differences.

On the other hand, for a successful conciliation process, it is obvious that a conciliator needs to have at least some degree of understanding of the technical issues underpinning a dispute in order to play a constructive role in this more interventionist process.

Case management

Although part of the conciliation process can also have a valuable effect in narrowing the issues between the parties even if the totality of the issues are not able to be resolved, conciliation is not a process to be regarded as some form of statutorily derived alternative to case management.

The objectives of the two are significantly different. Conciliation is a process where the desired end is the resolution of the dispute and the entry of orders to give effect to such agreement.

Case management is designed to identify and prioritise issues in a dispute; eliminate those issues that are initially pleaded but are not genuinely in dispute; and to set a framework for the preparation and presentation of evidence, including issues of timetabling during a hearing, so that the hearing and determination of a

matter can be conducted in a fashion that satisfies the objectives of *the just, quick and cheap resolution of the real issues in the proceedings.*

Case management is, primarily, about efficiency and timeliness – any issue resolution achieved by it is a bonus rather than an underlying objective.

Mediation and neutral evaluation

Mediation and neutral evaluation were formerly provided for in the Court Act in Part 5A. These provisions were repealed in 2007 as a consequence of the coming to effect of the Civil Procedure Act.

The repealed s 61B of the Court Act provided:

> ***61B Meaning of "mediation" and "neutral evaluation"***
>
> *(1) For the purposes of this Part, **mediation** means a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.*
>
> (2) *For the purposes of this Part, **neutral evaluation** means a process of evaluation of a dispute in which the evaluator seeks to identify and reduce the issues of fact and law in dispute. The evaluator's role includes assessing the relative strengths and weaknesses of each party's case and offering an opinion as to the likely outcome of the proceedings, including any likely findings of liability or the award of damages.*

Within Part 5A, s 61E imposed *the duty of each party to proceedings the subject of a referral to mediation or neutral evaluation to participate, in good faith, in the mediation or neutral evaluation.*

However, Commissioners were not able to exercise the mediation functions under Part 5A – although these functions could be (and were) exercised by the Registrar.

The Civil Procedure Act now provides, by s 26(1), that:

> *(1) If it considers the circumstances appropriate, the court may, by order, refer any proceedings before it, or part of any such proceedings, for mediation by a mediator, and may do so either with or without the consent of the parties to the proceedings concerned.*

The Civil Procedure Act defines ***mediation*** in the same terms as had appeared in the repealed s 61B [s 25 of the Civil Procedure Act] and a similar *good faith* obligation is placed on the parties [s 27 of the Civil Procedure Act].

However, there are two major and fundamental differences between the old Part 5A regime and that under the Civil Procedure Act. These relate to:

- the range of persons who are able to be appointed to undertake mediations; and
- access to neutral evaluation

The first is a beneficial change. This means that, in appropriate civil matters, the power of the Chief Judge of the Court to refer matters that are in dispute between the parties to an appropriately qualified mediator is now unconstrained.

At the time that I undertook mediation training in 2008, my colleague, Commissioner Dixon, then the Registrar of the Court, also undertook that training. As a consequence, we are eligible for accreditation as mediators under the national mediator accreditation scheme overseen by the National Alternative Dispute Resolution Advisory Council (NADRAC) and are in the process of becoming so accredited.

NADRAC mediator accreditation scheme, as I understand it, is one that is likely, eventually, to be a mandatory pre-requisite for persons undertaking mediations through the justice system.

The Land and Environment Court has recently had the other seven full-time Commissioners undertake mediation training leading to NADRAC accreditation. As a consequence, all the Commissioners of the Court will become nationally accredited mediators and, as new Commissioners are appointed, if they are not already so accredited, they will be expected to undergo such training and become accredited.

The consequence of accreditation will be that matters will be potentially able to be referred to Commissioners to act as mediators in areas where, in the past, Commissioners have not been involved but where there is potential for mediated outcomes. Obviously, any such mediations will be subject to the Chief Judge considering that a mediation process is potentially capable of resolving the matters in dispute and, second, that undertaking such a mediation process would also act in furtherance of the objective of the just, quick and cheap resolution of the real issues in dispute between the parties.

In particular, it is possible that, in appropriate cases, the Chief Judge may refer to mediation, by a Commissioner, matters in Class 4 of the Court's jurisdiction, the civil enforcement jurisdiction. A case where such a mediation approach might have succeeded is *Walsh v Parramatta City Council and Alam* [2007] NSWLEC 255; (2007) 161 LGERA 118 where a Class 4 challenge to the validity of a dwelling development consent was taken by a neighbour who claimed he was adversely impacted by the approved dwelling's design. In that case, the applicant failed – however, it is possible to conclude, from the tenor of Preston CJ's decision, that many (if not all) of Mr Walsh's objections may have been amenable to negotiated compromise with his neighbour through a conciliated or mediated dispute resolution process.

In a determinative sense, judicial members of the Court only can exercise this jurisdiction. In the past, although some matters have been dealt with by reference to mediators who were not Commissioners, the breadth of the mediation reference power in s 26 of the Civil Procedure Act and coupled with NADRAC mediator accreditation for Commissioners will now make this possibility for this to be an added doorway in the multi-door courthouse.

Neutral evaluation

Over recent years, neutral evaluation has been little used by parties to proceedings in the Court. Although the 2007 amendments removed neutral evaluation from the Court Act, it remains an option available in Classes 1, 2, 3 and 8 within the Court's processes by virtue of its retention in Part 6 rule 6.2 of the *Land and Environment Court Rules* 2007.

The relevantly defining provisions read:

> **6.2 Neutral evaluation**
>
> (1) In this rule:
>
> ***evaluator*** means a person to whom the Court refers a matter for neutral evaluation under this rule.
>
> ***neutral evaluation*** means a process of evaluation of a dispute in which the evaluator seeks to identify and reduce the issues of fact and law in dispute, including by assessing the relative strengths and weaknesses of each party's case and offering an opinion as to the likely outcome of the proceedings (including any likely findings of liability or the award of damages).

As the Court continues to evolve as a multi-door courthouse, the extent of use of neutral evaluation as part of the suite of dispute resolution processes available may need to be revisited.

Hybrid processes

The conciliation conference process pursuant to s 34 of the Court Act is, in reality, a hybrid process in that, with the concurrence of the parties, the conciliation phase can transmute into a determinative proceeding. This is what is known as a blended "con/arb" process.

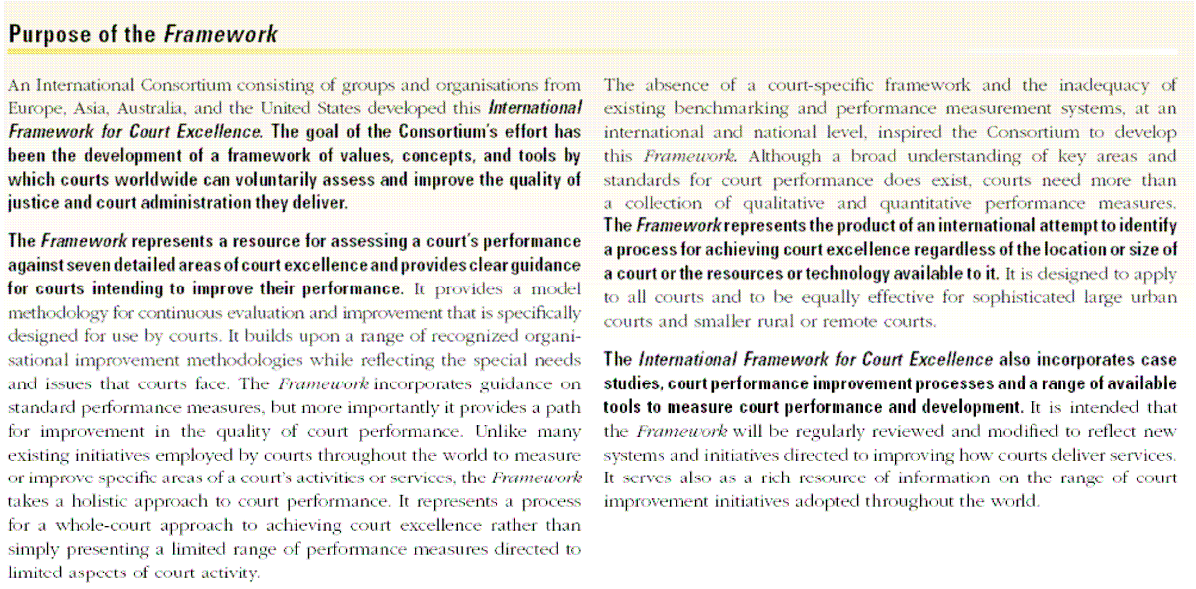
Similarly, it is possible to have a blended "med/arb" process provided that there is a legislative framework to enable it. At present, this is not the case but it is also another potential future door for the multi-door courthouse.

Class 8 – the Court's mining jurisdiction

All the opportunities for the multi-door courthouse approach are equally applicable to many of the matters falling within Class 8, the Court's mining jurisdiction – exploration access arrangements being an immediate and obvious example – where alternative dispute resolution is potentially highly appropriate.

The International Framework for Court Excellence

The International Framework for Court Excellence describes the purpose of the Framework as follows:



Purpose of the *Framework*

An International Consortium consisting of groups and organisations from Europe, Asia, Australia, and the United States developed this ***International Framework for Court Excellence***. **The goal of the Consortium's effort has been the development of a framework of values, concepts, and tools by which courts worldwide can voluntarily assess and improve the quality of justice and court administration they deliver.**

The *Framework* represents a resource for assessing a court's performance against seven detailed areas of court excellence and provides clear guidance for courts intending to improve their performance. It provides a model methodology for continuous evaluation and improvement that is specifically designed for use by courts. It builds upon a range of recognized organisational improvement methodologies while reflecting the special needs and issues that courts face. The *Framework* incorporates guidance on standard performance measures, but more importantly it provides a path for improvement in the quality of court performance. Unlike many existing initiatives employed by courts throughout the world to measure or improve specific areas of a court's activities or services, the *Framework* takes a holistic approach to court performance. It represents a process for a whole-court approach to achieving court excellence rather than simply presenting a limited range of performance measures directed to limited aspects of court activity.

The absence of a court-specific framework and the inadequacy of existing benchmarking and performance measurement systems, at an international and national level, inspired the Consortium to develop this *Framework*. Although a broad understanding of key areas and standards for court performance does exist, courts need more than a collection of qualitative and quantitative performance measures. **The *Framework* represents the product of an international attempt to identify a process for achieving court excellence regardless of the location or size of a court or the resources or technology available to it.** It is designed to apply to all courts and to be equally effective for sophisticated large urban courts and smaller rural or remote courts.

The *International Framework for Court Excellence* also incorporates case studies, court performance improvement processes and a range of available tools to measure court performance and development. It is intended that the *Framework* will be regularly reviewed and modified to reflect new systems and initiatives directed to improving how courts deliver services. It serves also as a rich resource of information on the range of court improvement initiatives adopted throughout the world.

The Framework is a project by four bodies. These are:

- The National Centre for State Courts (USA);
- The Federal Judicial Centre (USA);
- The Australasian Institute of Judicial Administration; and
- The Subordinate Courts of Singapore

The Land and Environment Court of New South Wales is the first court (in the world) to implement the Framework's processes.

On 28 September 2009, the Court adopted a Statement of Purpose as a first step in implementation of a wide range of matters pursuant to the Framework.

> ***Statement of Purpose***
>
> *The Land and Environment Court of New South Wales is a specialist superior court of record. Its jurisdiction includes merits review, judicial*

review, civil enforcement, criminal prosecution, criminal appeals and civil claims about planning, environmental, land, mining and other legislation.

The Court's purpose is to safeguard and maintain

- *the rule of law*
- *equality of all before the law*
- *access to justice*
- *fairness, impartiality and independence in decision making*
- *processes that are consistently transparent, timely and certain*
- *accountability in its conduct and its use of public resources*
- *the highest standards of competency and personal integrity of its judges, commissioners and support staff.*

To assist in fulfilling its purpose, the Court aims to achieve excellence in seven areas:

- ***Court leadership and management**: To provide organisational leadership that promotes a proactive and professional management culture, pursues innovation and is accountable and open.*
- ***Court planning and policies**: To formulate, implement and review plans and policies that focus on fulfilling the Court's purpose and improving the quality of its performance.*
- ***Court proceedings**: To ensure the Court's proceedings and dispute resolution services are fair, effective and efficient.*
- ***Public trust and confidence**: To maintain and reinforce public trust and confidence in the Court and the administration of justice.*
- ***User satisfaction**: To understand and take into account the needs and perceptions of its users relating to the Court's purpose.*
- ***Court resources**: To manage the Court's human, material and financial resources properly, effectively and with the aim of gaining the best value.*
- ***Affordable and accessible court services**: To provide practical and affordable access to information, court processes and services.*

One of the critical elements in the Court's approach to implementation of the Framework is to reinforce the approach we have taken over the past several years concerning access to information through the Court's website. Significant efforts have been made to provide material in plain English to ensure that the Court's processes are able to be understood by as wide a range of people, whether non-legal practitioners or self represented litigants, who might come in contact with the court's processes.

As part of the actions to be undertaken through the Framework process, this information base will be significantly extended and made available through simple printed leaflets in addition to electronic material on the Court's website.

Conclusion

Through the Framework processes, we will provide the widest possible range of plain English language material, electronic and in printed form. An increasing range of dispute resolution options will be available through our continuing expansion of the multi-door courthouse process.

Both these measures will ensure the widest possible accessibility to the Court and our continuing implementation of the overriding objective of the Civil Procedure Act *to facilitate the just, quick and cheap resolution of the real issues in the proceedings*.

Tim Moore
Senior Commissioner

28 October 2009