The Land and Environment Court of New South Wales: Moving Towards a Multi-Door Courthouse

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Causes of dissatisfaction with the administration of justice

Just over 101 years ago, on 29 August 1906, Roscoe Pound, then Dean at the University of Nebraska and later Dean of the Harvard Law School, delivered an address to the American Bar Association on "The Causes of Popular Dissatisfaction with the Administration of Justice".[1] With the skill that came from his training in botany and taxonomy,[2] Pound grouped the causes of dissatisfaction under four main headings: "(1) Causes for dissatisfaction with any legal system, (2) causes lying in the particularities of our Anglo-American legal system, (3) causes lying in our American judicial organisation and procedure and, (4) causes lying in the environment of our judicial administration".[3] Pound then subdivided each of these main headings.

Under the first heading, the causes of dissatisfaction with any system of law, Pound identified "(1) The necessarily mechanical operation of rules, and hence of laws; (2) the inevitable difference in rate of progress between law and public opinion; (3) the general popular assumption that the administration of justice is an easy task, to which anyone is competent, and (4) popular impatience of restraint."[4] Of these causes, Pound identified the first as "the most important and most constant cause of dissatisfaction with all law at all times".[5] Uniformity and certainty are desirable goals of the law but over zealous pursuit of these goals can lead to rigidity and mechanical operation of the law, insensitive to the moral, social and political conditions of the time[6]. Conversely, over zealous pursuit of justice without law can result in "uncertainty and an intolerable scope for the personal equation of the magistrate"[7]. Hence, Pound observes, "the law has always ended in a compromise, in a middle course between wide discretion and over-minute legislation. In reaching this middle ground, some sacrifice of flexibility of application to particular cases is inevitable. In consequence, the adjustment of the relations of man and man according to these rules will of necessity appear more or less arbitrary and more or less in conflict with the ethical notions of individuals".[8]

This compromise can be perceived to be more unjust in an age of social and industrial transition, because public opinion may develop faster than the law, "The law does not respond quickly to new conditions. It does not change until ill effects are felt; often not until they are felt acutely. The moral or intellectual or economic change must come first. While it is coming, and until it is so complete as to affect the law and formulate itself therein, friction must ensue. In an age of rapid moral, intellectual and economic changes, often crossing one another and producing numerous minor resultants, this friction cannot fail to be in excess".[9]

Under the second main heading, causes lying in the peculiar Anglo-American system, Pound enumerated five causes: "(1) The individualist spirit of our common law, which agrees ill with a collectivist age; (2) the common law doctrine of contentious procedure, which turns litigation into a game; (3) political jealousy, due to the strain put upon our legal system by the doctrine of supremacy of law; (4) the lack of general ideas or legal philosophy, so characteristic of Anglo-American law, which

[1] Reproduced in 35 FRD 241 at 273-291
[2] Pound earned a PhD in Botany: see B Friedman, "Popular dissatisfaction with the administration of justice: a retrospective (and a look ahead)", (2007) 82 *Ind L J* 1193 at 1195-1198
[3] Pound, note 1 at 275
[4] Pound, note 1 at 275
[5] Pound, note 1 at 275
[6] The inflexibility and consequential harshness in an individual case of the common law led to parties seeking relief from the courts of equity. In this way, equity was a means of achieving individualised justice: see R Pound, "The Decadence of Equity", (1905) 5 *Colum L Rev* 20 at 21 and J M Nolan-Henry, "The Merger of Law and Mediation: Lessons from Equity, Jurisprudence and Roscoe Pound", (2004) 6 *Cardozo J Conflict Resol* 57 at 60-61, 64-65
[7] Pound, note 1 at 276
[8] Pound, note 1 at 276
[9] Pound, note 1 at 277-278

gives us petty tinkering where comprehensive reform is needed; and (5) defects of form due to the circumstance that the bulk of our legal system is still case law".[10]

As to the first of these causes, Pound, notes that the common law essentially developed to protect every individual's private rights. However, "today[11], we look to society for protection against individuals, natural or artificial, and we resent doctrines that protect these individuals against society for fear society will oppress us".[12] The result is a conflict between the individualist spirit of the common law and the collectivist spirit of the present age.

This echoes comments Pound made in an earlier article published in the Columbia Law Review where he said, "No amount of admiration for our traditional system should blind us to the obvious fact that it exhibits too great a respect for the individual, and for the intrenched position in which our legal and political history has put him, and too little respect for the needs of society, when they come in conflict with the individual, to be in touch with the present age".[13]

The second cause, under the second main heading, is the common law doctrine of contentious procedure. This doctrine also arises from the common law's respect for the individual.[14] Pound describes it as "the sporting theory of justice" and says that most take it for a fundamental legal tenet, although it is peculiar to Anglo-American law. Pound criticises it as disfiguring judicial administration at every level. Pound's criticism, although of the system in America a century ago, resonates with the current adversarial system in courts in Australia today. It is worth for this reason setting out Pound's comments in a fuller quote:

> "...we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interest of justice. The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. It leaves the most conscientious judge to feel that he is merely to decide the contest, as counsel present it, according to the rules of the game, not to search independently for truth and justice. It leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as a professional football coach with the rules of the sport. It leads to exertion to 'get error into the record' rather than to dispose of the controversy finally and upon its merits. It turns witnesses, and especially expert witnesses, into partisans pure and simple. It leads to sensational cross-examinations 'to affect credit', which have made the witness stand 'the slaughter house of reputations'. It prevents the trial court from restraining the bullying of witnesses and creates a general dislike, if not fear, of the witness function, which impairs the administration of justice...The inquiry is not, What do substantive law and justice require? Instead, the inquiry is, Have the rules of the game been carried out strictly? If any material infraction is discovered, just as the football rules put back the offending team five, or ten or fifteen yards, as the case may be, our sporting theory of justice awards new trials, or reverses judgments, or sustains demurrers in the interest of regular play.

[10] Pound, note 1 at 279
[11] Pound of course was talking in 1906 but his words are as fresh today as they were then
[12] Pound, note 1 at 280-281. Similar criticisms of the adversarial litigation system and its treatment of expert evidence at the time were made by Justice Learned Hand in "Historical and practical considerations regarding expert testimony", (1901) 15 *Harv L Rev* 40
[13] R Pound, "Do we need a philosophy of law?", (1905) 5 *Colum L Rev* 339 at 344
[14] See Pound (1905), note 13 at 347

> The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it, can be expected to yield to its spirit when their interests are served by evading it. And this is doubly true in a time which requires all institutions to be economically efficient and socially useful. We need not wonder that one part of the community strain their oaths in the jury box and find verdicts against unpopular litigants in the teeth of law and evidence, while another part retain lawyers by the year to advise how to evade what to them are unintelligent and unreasonable restrictions upon necessary modes of doing business. Thus the courts, instituted to administer justice according to law, are made agents or abetters of lawlessness."[15]

Under the third main heading, causes lying in the judicial organisation and procedure, Pound pronounces the system of courts to be "archaic" and their procedures "behind the times". "Uncertainty, delay and expense, and above all, the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organisation of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right of wrong, on the part of every sensible businessman in the community".[16] Pound observed the system of courts to be archaic in three respects, "(1) in its multiplicity of courts, (2) in preserving concurrent jurisdictions, (3) in the waste of judicial power which it involves".[17] He recommended rationalisation and creating a unified system of courts.

Under the fourth main heading, issues lying in the environment of judicial administration, Pound distinguished six causes: "(1) Popular lack of interest in justice, which makes jury service a bore and the vindication of right and law secondary to the trouble and expense involved; (2) the strain put upon law in that it has today to do the work of morals also; (3) the effect of transition to a period of legislation; (4) the putting of our courts into politics; (5) the making of the legal profession into a trade which has superseded the relation of attorney and client by that of employer and employee, and (6) public ignorance of the real workings of courts due to ignorant and sensational reports in the press".[18]

In relation to the second of these causes, Pound explained: "Law is the skeleton of social order. It must be 'clothed upon by the flesh and blood of morality'. The present is a time of transition in the very foundations of belief and of conduct. Absolute theories of morals and supernatural sanctions have lost their hold. Conscience and individual responsibility are relaxed. In other words the law is strained to do double duty, and more is expected of it than in a time when morals as a regulating agency are more efficacious".[19]

Two themes can be seen to flow through Pound's causes of dissatisfaction with the administration of justice I have selected: first, the quest for individualised justice can lead to conflict with the law and the administration of justice and, secondly, the system of courts is archaic, in both structure and procedure, and in need of reform.

Let me now leap forward almost 70 years to 7-9 April 1976. At a national conference in honour of Roscoe Pound, on the causes of popular dissatisfaction with the administration of justice, Professor Frank Sander, also of Harvard Law School,

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[15] Pound, note 1 at 281-282
[16] Pound, note 1 at 284
[17] Pound, note 1 at 284
[18] Pound, note 1 at 289
[19] Pound, note 1 at 289 citing Sidgwick, *Methods of Ethics*, 6 Ed, 456

delivered an address on the "Varieties of Dispute Processing".[20] Sander did not, in direct terms, discuss the individual causes of dissatisfaction with the administration of justice identified by Pound. Nevertheless, Sander's proposed solution of a dispute resolution centre offering a panoply of dispute resolution services addressed the two themes of concern underlying Pound's causes of dissatisfaction by, first, matching dispute resolution mechanisms to the individual characteristics of disputes and, secondly, by reforming the system of courts and their procedures.

The catalyst for Sander's thinking was an article by Professor John Barton[21] that predicted an exponential growth in appellate cases in the federal courts. Sander extrapolated from Barton's projections to the trial level. The resultant number of cases would be immense and result in a crisis in the administration of justice. The courts could no longer continue to effectively resolve disputes in that number. Such a crisis prompted Sander to ask "how we might escape from the specter projected by Professor Barton".[22] The answers Sander gave to this question were to stimulate a rethink of the way courts administer justice.

Sander's initial suggestions were external to the court system. He suggested we could try to prevent disputes from arising in the first place through appropriate changes in the substantive law. No fault compensation schemes would be an example.[23] Next, Sander suggested minimising disputes through greater emphasis on preventative law. Persons instruct their lawyers to anticipate various eventualities and seek, through skilful drafting and planning, to provide for them in advance.[24] But Sander's fundamental suggestion, and the one that is of lasting importance, was to explore alternative ways of resolving disputes to the traditional, adversarial, litigious procedure so criticised by Pound and to institutionalise these alternative dispute resolution processes in a single dispute resolution centre.

Sander was concerned to develop a system of justice that was most effective in handling the full suite of disputes that come before the courts. This necessitated first, addressing the characteristics of various dispute resolution processes and, secondly, developing criteria for allocating various types of disputes to different dispute resolution processes.[25]

Like Pound before him, Sander noted that the traditional court dispute resolution process of adversarial litigation was increasingly unsuited to the range of disputes the courts were being called upon to resolve but which, in times past, would have been handled by other institutions.[26] Sander identified these alternatives as including mediation, conciliation, arbitration, hybrid processes such as mediation-arbitration, fact finding and ombudsman.[27] He analysed the intrinsic characteristics of these dispute resolution processes, drawing upon earlier work by Professor Lon Fuller.[28]

Sander next evaluated the criteria that may assist in determining how particular types of disputes might best be resolved. He posited five criteria: nature of dispute, relationship between disputants, amount in dispute, cost and speed.[29] Sander discussed how these criteria assist in determining which dispute resolution process might be appropriate for a particular dispute exhibiting these criteria.

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[20] Published in 70 FRD 79 at 111-134
[21] J Barton, "Behind the legal explosion", (1975) 27 *Stanford Law Review* 567
[22] Sander, note 20 at 111
[23] Sander, note 20 at 112
[24] Sander, note 20 at 112
[25] Sander, note 20 at 113
[26] Sander, note 20 at 114
[27] Sander, note 20 at 114-118
[28] L Fuller, "Collective Bargaining and the Arbitrator", (1963) *Wis L Rev* 1; L Fuller, "Mediation – its forms and functions", (1971) 44 *S Cal L Rev* 305, and L Fuller, "The Forms and Limits of Adjudication", (1978) 92 *Harv L Rev* 353
[29] Sander, note 20 at 118-126

Sander then brought this two step analysis together. He advocated "a flexible and diverse panoply of dispute resolution processes, with particular types of cases being assigned to different processes (or combinations of processes), according to some of the criteria previously mentioned".[30] This could be done at a variety of institutions but Sander instead proposed a rationalised, central system, "not simply a court house but a Dispute Resolution Center, were the grievant would first be channelled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case. The room directory in the lobby of such a Center might look as follows:

Screening Clerk	Room 1
Mediation	Room 2
Arbitration	Room 3
Fact Finding	Room 4
Malpractice Screening Panel	Room 5
Superior Court	Room 6
Ombudsman	Room 7"[31]

Sander's idea was a catalyst for what later became known as the "Multi-Door Courthouse". Multi-door courthouses were established, initially experimentally, in Tulsa, Okalahoma; Houston, Texas; and in the Superior Court of the District of Columbia.[32] From experiments, the idea spread to many courts throughout the world.

Let me step forward again, this time a little over 18 years to 28 July 1994. The Honourable Murray Gleeson, then Chief Justice of New South Wales and now Chief Justice of Australia, delivered the Martin Kreiwaldt Memorial Address in Darwin. The address was entitled "Individualised Justice – the Holy Grail".[33] Gleeson analysed the trend in modern law, both judge made and statutory, towards a preference for individualised, discretionary solutions as against the principled application of general rules. He observed this to be largely a function of a societal expectation that looks to the law to provide redress for an increasing number, and an expanding scope, of grievances, in a manner tailored to the justice of a particular case.[34] Gleeson gave examples of this trend from the criminal law, the law of contract, the law of tort and the rules of evidence.[35]

However, this demand for individualised justice comes at a price – to the parties demanding redress tailored to the justice of a particular case, to parties in other disputes who must wait in the queue whilst this occurs, and to the system of administration of justice. A quest for individualised justice, personally tailored and

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[30] Sander, note 20 at 130-131
[31] Sander, note 20 at 131
[32] See L Ray and A L Clare, "The Multi-Door Courthouse idea; building the Courthouse of the future…today", (1985-1986) 1 *Ohio St J on Disp Resol* 7; L J Finkelstein, "The D.C. Multi-Door Courthouse" (1986) 69 *Judicature* 305; G Kessler and L J Finkelstein, "The Evolution of a Multi-Door Courthouse", (1988) 37 *Catholic University Law Review* 577
[33] Subsequently published as A M Gleeson, "Individualised Justice – The Holy Grail", (1995) 69 *Australian Law Journal* 421
[34] Gleeson, note 33 at 421-422
[35] Gleeson, note 33 at 422-430

contentious, is labour intensive and costly.[36] It results in increased delay and cost. The abandonment and modification of principle in favour of individually tailored justice increases inconsistency and uncertainty.[37] To require judges to exercise unprincipled discretion in the resolution of disputes is to erode their legitimacy and independence.[38]

Gleeson considered that if the system of the administration of justice is required to resolve disputes with this close attention to the varying circumstances of individual cases, then either or both of two things will need to occur. First, there will need to be a serious re-examination of the resources which are made available to the system.[39] Sander had earlier expressed a similar concern about the adequacy of the resources of the court system based on the exponential growth in the number of cases. Gleeson's concern is with the increasing time and labour needed for the resolution of this growing number of cases. Either way, the court system cannot resolve disputes at the rate and with the quality that society expects without increased resources.

Secondly, the traditional adjudicative process employed by the current system of administration of justice will require "substantial alteration".[40] Gleeson observed:

> "It is commonly said that we provide litigants with a process of justice that is profligate in its use of time and money. One of the principal reasons for this is that the task which the modern law has set for courts (in which, to an extent they have set for themselves) is one that cannot be achieved, by the traditional techniques of decision-making, except at great cost. The interest that is now being shown throughout Australia, and in England and the United States, in alternative dispute resolution, is a case of invention responding to necessity. Recent experience in New South Wales with court-annexed mediation, and with privately conducted schemes of mediation and conciliation, is that many litigants are willing, and even anxious, to find a means of submitting their disputes for resolution by some reasonably fair and impartial process which does not involve the cost, and in many cases the agony, of a court case. Paradoxically, as our standards for the administration of litigious justice become more demanding, increasing ingenuity is being devoted to ensuring that people do not get caught up in the machinery developed to comply with those standards".[41]

So we have three commentators, spread out over the last century, each learned in the law and with the wisdom of long experience in its practice, offering similar insights into the causes of dissatisfaction with the administration of justice and calling for reform. A recurring cause is the quest for individualised justice; a recurring solution is reform of the system of administration of justice by expanding the range of dispute resolution process offered beyond the traditional, adversarial, litigious process.

Let me now explore this solution of the courthouse of the future meeting the demand for individualised justice by offering a panoply of dispute resolution process, one or more of which may be appropriate to the individualised circumstances of each dispute and the disputants.

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[36] Gleeson, note 33 at 430
[37] Gleeson, note 33 at 431
[38] Gleeson, note 33 at 432
[39] Gleeson, note 33 at 431
[40] Gleeson, note 33 at 431
[41] Gleeson, note 33 at 431

The Multi-Door Courthouse Concept

The concept outlined

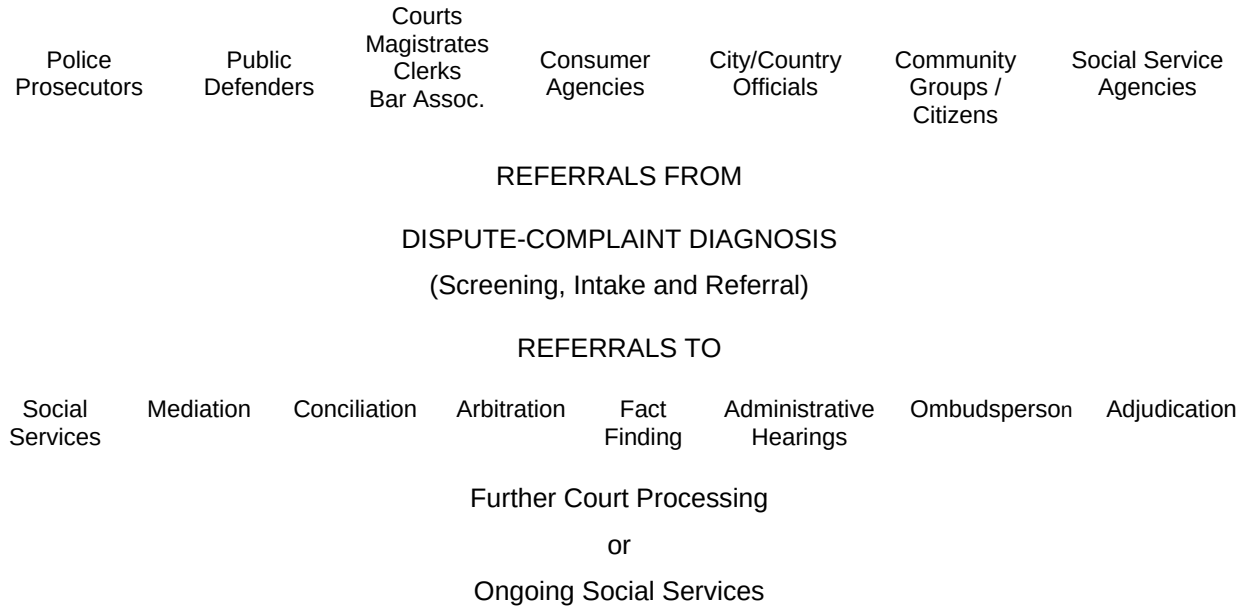
The model proposed by Sander is of a dispute resolution centre offering intake services together with an array of dispute resolution processes under one roof. A screening unit at the centre would "diagnose" disputes, then using specific referral criteria, refer the disputants to the appropriate dispute resolution process, the "door", for handling the dispute. Hence, the title "Multi-Door Courthouse".

The key elements for a multi-door courthouse program are, therefore:

> "1. An intake or diagnosis/problem-solving mechanism which would include specific referral criteria.
>
> 2. A diversity of dispute resolution processes to which cases would be referred once screened.
>
> 3. One centre housing the intake/diagnostic mechanism and the various dispute resolution processes".[42]

The model envisages disputes being referred to the centre, not only by disputants, but also by other agencies, including police, prosecutors' offices, courts, legal services and social services agencies.

The multi-door courthouse concept can be visualised by the following chart.[43]



The goal of the intake diagnosis and referral process is to assist the disputants in resolving the problem in an efficient, satisfactory manner. This goal may be accomplished by matching the dispute with a specific dispute resolution process. The intake process is, therefore, a first step towards resolution of the dispute.

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[42] Australian Law Reform Commission, "Review of the Adversarial System of Litigation, ADR – its role in Federal Dispute Resolution", Issues Paper 25, June 1998, Chapter 5 ADR and Dispute Management, para 5.62

[43] Ray and Clare, note 32 at 10

The dispute resolution processes: "The doors" of the courthouse

The dispute resolution processes that can be offered in a multi-door courthouse are limited only by resources. Typically, they can include mediation; conciliation; fact finding; early neutral evaluation; arbitration; hybrid processes such as mediation-arbitration or concilio-arbitration; administrative hearings (merits review); and adjudication (litigation). Other services can be housed under the one roof such as an ombudsman or social services.

The screening unit

The screening of a dispute may be performed by an intake specialist, by court personnel, by a judge or by a party. The identity of the person who is responsible for screening is a function of the design of the particular multi-door courthouse program.

Except in cases where the parties consent to referral to a particular dispute resolution process, the individual who screens cases should have a relevant background and training. The individual should be competent in screening procedures, able to analyse disputes, be familiar with the local program design and the available dispute resolution options.

The intake process

The intake diagnosis and referral process used in experimental multi-door courthouses for conventional disputes has involved two primary functions, interviewing and counselling, and a series of six steps. Ray and Clare describe the process as follows:

> "Project directors determined that the intake role could be divided into two primary functions: interviewing and counseling. In interviewing, the intake specialist asks many questions. The intake specialist must ascertain the problem, not resolve it during the interview. The interviewing function is completed when the intake specialist can clearly summarize the problem and the complainant agrees with the summary.
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> When the interviewing function is completed, the counseling function begins. Counseling is a process of identifying and then weighing potential solutions, with their probable negative and positive consequences, in order to decide which alternative is most appropriate. The alternative chosen should be the one that is most likely to bring the greatest client satisfaction.
>
> The intake diagnosis and referral process divides into six identifiable steps: Introduction, Complaint, Narration, Problem Identification and Clarification, Problem Summary, Consideration of Options and Consequences, and Option Selection Assistance. These steps emphasize an orderly communication flow beginning with the citizen's complaint, continuing with a discussion of options and consequences, and ending with the selection and testing of one option. The goal of the process is to aid the citizen in resolving the problem in an efficient, satisfactory manner. This intake objective may be accomplished by matching the dispute with a specific dispute resolution process. Based on this comprehensive intake process, a first step towards resolution occurs during the initial meeting.
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> In the intake model the first four stages relate to interviewing, and the last two involve counseling."[44]

[44] Ray and Clare, note 32 at 24-25

Criteria for screening and referral

The criteria used for matching the disputes with the appropriate dispute resolution processes can include the five criteria by Sander (which relate to the characterises of the dispute) but subsequent experimental work suggests further criteria may be useful.[45] Major factors fall into three categories: case characteristics, the dispute resolution options and the desires of the parties.[46]

These criteria have been developed for disputes other than environmental disputes. They will in many instances be also applicable to environmental disputes. However, environmental disputes do have their own characteristics, which demand specific analysis and which can have consequences in relation to selecting the appropriate dispute resolution process. Almost exactly 13 years ago, in 1994, I proffered a preliminary analysis of this kind.[47] I identified the following characteristics of environmental disputes: environmental disputes are grounded in conflict; environmental disputes involve value conflicts; environmental disputes involve uncertainty and irreversible ecological effects; the nature and scope of environmental disputes are difficult to determine because of the large number of issues involved, the nature of the issues may involve the public interest and the issues may be interconnected; cost benefit analysis is difficult to apply to environmental disputes; there is an unquestioning reliance on experts in resolving environmental disputes; and the identity and number of participants may involve difficulties.[48]

I then evaluated the consequences, if these characteristics are present in a particular dispute, in relation to selecting the appropriate dispute resolution process for that dispute. I suggested that the more of these characteristics that are present in a particular dispute, the less appropriate it might be to resolve the dispute by a consensual process. Conversely, the fewer characteristics a particular environmental dispute exhibits the more ready the dispute may be able to be resolved by a consensual process.[49]

In the same year, 1994, Professor Sander revisited the issue of identifying criteria for selecting the appropriate dispute resolution procedure for particular disputes. In an article co-authored with Professor Goldberg, Sander suggested that two basic questions needed to be answered to select the appropriate dispute resolution procedure. First, what are each of the disputants' goals and what dispute resolution procedure is most likely to achieve those goals? Secondly, what are the impediments to settling and what dispute resolution procedure is most likely to overcome those impediments?[50]

Sander and Goldberg identified individual goals or objectives of disputants as including minimising costs; speed; privacy; maintaining or improving relationships; vindication; neutral opinion; precedent; and maximising or minimising recovery.[51]

The different dispute resolution processes have varying abilities to satisfy these objectives. For example, the consensual process of mediation is unlikely to satisfy the objectives of vindication, setting precedents, or maximising recovery for a disputant whilst the adjudicative process of a court determination is able to very

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[45] Ray and Clare, note 32 at 25 (including footnote 52 and Appendix C)
[46] L Ray, "Emerging Options in Dispute Resolution", (1989) 75 *A B A J* 66 at 68
[47] In an address presented to the Environmental Dispute Resolution Workshop organised by the Centre for Conflict Resolution, Macquarie University, 19 November 1994. The address was subsequently published as B J Preston, "Limits of Environmental Dispute Resolution Mechanisms" (1995) 13 *Aust Bar Rev*148
[48] Preston, note 47 at 153-173
[49] Preston, note 47 at 173-174
[50] F E A Sander and S B Goldberg, "Fitting the forum to the fuss: A user-friendly guide to selecting an ADR procedure", *Negotiation Journal* (January 1994) 49 at 50
[51] Sander and Goldberg, note 50 at 51-53

substantially satisfy these objectives. Conversely, the consensual process of mediation is very substantially able to satisfy the objective of maintaining or improving relationships between the disputants whilst the adjudicative process of court determination is unlikely to do so.[52]

Sander and Goldberg identified impediments to settlement as including poor communication; a need to express emotions; different views of facts; different views of legal outcome if settlement is not reached; issues of principle; constituency pressures; linkage to other disputes; multiple parties; different lawyer/client interests; and the 'jackpot syndrome'.[53] The dispute resolution processes have varying abilities of overcoming these impediments to settlement. For example, the consensual process of mediation is unlikely to overcome the jackpot syndrome but it is most likely to overcome the impediments of poor communication and the need to express emotions.[54] Indeed, Sander and Goldberg identified mediation as the preferred procedure for overcoming the impediments to settlement. "It has the greatest likelihood of overcoming all impediments except different views of facts and law and the jackpot syndrome. Furthermore, a skilled mediator can often obtain a settlement without the necessity of resolving disputed questions of fact or law. Thus, there is much to be said for a rule of 'presumptive mediation' – that mediation, if it is a procedure that satisfies the parties' goals, should, absent some compelling indications to the contrary, be the first procedure used".[55]

The analysis so far has involved analysing the particular dispute and disputants and matching the appropriate dispute resolution process to that dispute, an approach Sander and Goldberg colloquially described as "fitting the forum to the fuss". This usually is a preferable method to the alternative of "fitting the fuss to the forum". This alternative method assumes the dispute resolution procedures are fixed and, therefore, prior to knowing the dispute, one can predict what kind of cases should be matched to a certain procedure. This makes no allowance for the individual characteristics of the dispute or of the disputants. Any fitting of the individual dispute to a fixed dispute resolution process could, therefore, only be done by tailoring the dispute, such as by treating as irrelevant certain facts, matters or circumstances or certain issues of the dispute and of the disputants. This, of course, is one of the causes of popular dissatisfaction with the administration of justice identified by Pound, Sander and Gleeson. Adjudication is not capable to resolving all of the disputes, and all of the issues that parties raise in disputes, and if it is forced to, it can only do so by tailoring the dispute to fit the limits of adjudication.[56]

Fitting the dispute resolution process to the dispute (the forum to the fuss) overcomes this cause of dissatisfaction; it better enables individualised justice. Each dispute resolution process can have different forms, that is to say, each can be organised and conducted in different ways adapted to the circumstances of the case. Knowing the dispute and the disputants allows one not only to match it to a known dispute resolution processes but also to adapt the process to best fit the dispute and disputants.[57]

Professor Sander recently reconsidered the issue, this time with Lukasz Rozdeiczer, and combined both perspectives of fitting the fuss to the forum and the forum to the fuss.[58] They propose a three step process to most effectively select (or design) the

[52] Sander and Goldberg, note 50 at 53, Table 1
[53] Sander and Goldberg, note 50 at 54-59
[54] Sander and Goldberg, note 50 at 55, Table 2
[55] Sander and Goldberg, note 50 at 59
[56] See also L Fuller, "The forms and limits of adjudication", (1978) 92 *Harv L Rev* 353; M A Eisenberg, "Participation, Responsiveness and the Consultation Process: An essay for Lon Fuller", (1978) 92 *Harv L Rev* 410 and Preston, note 47 at 159, 167-168
[57] F E A Sander and L Rozdeiczer, "Matching cases and dispute resolution procedures: detailed analysis leading to a mediation-centred approach", (2006) 11 *Harv Negot L Rev* 1 at 7
[58] Sander and Rozdeiczer, note 57

appropriate process for a dispute. They use three lenses to focus the analysis: goals, facilitating features and impediments.

In the first step, the fuss is examined through the lens of the goals of the parties: what are the objectives the parties would like to achieve during or at the end of the dispute resolution process? Where a party has more than one objective, the objectives should be prioritised. This step involves assessing appropriate goals for one party, prioritising and weighting of the goals, and assessing the goals of the other party. The goals of the parties include those that Sander and Goldberg had earlier identified as well as others. Sander and Rozdeiczer's list is: speed, privacy, public vindication, neutral opinion, minimise costs, maintain or improve relationships, precedent, maximise or minimise recovery, create new solutions, party control of process, party control of outcome, shift responsibility for a decision to a third party, court supervision or compulsion, transformation of the parties, provide satisfying process and improve understanding of the dispute.[59]

The second step involves an analysis of the facilitating features of both the dispute and the parties that are likely to facilitate reaching effective resolution of the dispute as well as the individual features of each dispute resolution process that can benefit the parties, such as procedural advantages and disadvantages of various processes.[60]

The third step focuses on the ability of various dispute resolution processes to overcome impediments to effective resolution. This involves a focus on the forum. The impediments include: poor communication, need to express emotions, different view of facts, different view of law, important principle, constituent pressure, linkage to other disputes, multiple parties, different lawyer-client interest, jackpot syndrome, fear of disclosing true interests (negotiator's dilemma), psychological barriers, inability to negotiate effectively, unrealistic expectations and power imbalance.[61]

Sander and Rozdeiczer concluded, as Sander and Goldberg had earlier concluded, that mediation is almost always a superior starting process for overcoming impediments to settlement, unless there are contra indications to mediation in the particular dispute or disputants.[62]

The referral process

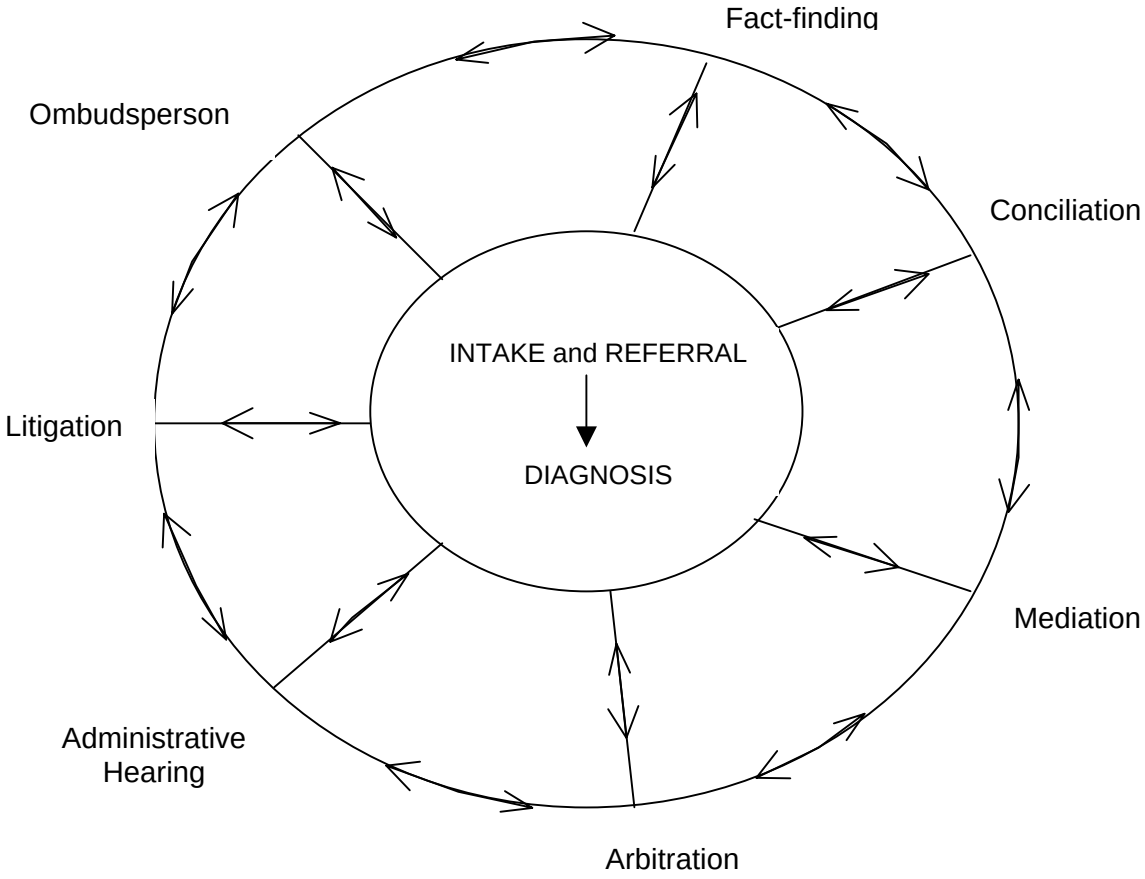
After intake screening and diagnosis, disputes are referred to what is considered by the intake screening unit to be the appropriate dispute resolution process. There can be a re-evaluation of the ongoing appropriateness of the selected dispute resolution process at two junctures. First, where there is a preliminary session (sometimes referred to as a dispute resolution orientation session) held in preparation for the selected dispute resolution process, the parties and the neutral, dispute resolution practitioner can assess the dispute and decide whether to continue with the selected dispute resolution process. Secondly, once the selected dispute resolution process has commenced, there is an opportunity to re-evaluate the appropriateness of the process and refer the dispute to another process perceived to be more appropriate. This can happen not only with hybrid processes, such as mediation-arbitration, but can also occur with other primary processes. The referral is back to the intake screening unit for re-evaluation and referral to another dispute resolution process.

In this way, the multi-door intake referral function can be visualised conceptually as a wheel. At the hub of the wheel is the intake screening and referral unit. At the spokes on the wheel are the dispute resolution processes (the referral options). After

[59] Sander and Rozdeiczer, note 57 at 12, Table 2
[60] Sander and Rozdeiczer, note 57 at 10, 20-27
[61] Sander and Rozdeiczer, note 57 at 28, Table 4
[62] Sander and Rozdeiczer, note 57 at 32-41

intake screening and diagnosis, a dispute is referred to one of the dispute resolution processes (options). If the first option is not successful in resolving the dispute, the dispute travels back to the hub for re-evaluation and referral to another dispute resolution process (option) which appears to be more suitable. This concept can be represented diagrammatically as follows[63].

Organisation of the Multi-Door Intake and Referral Process



The Land and Environment Court Dispute Resolution Processes

The Court outlined

The Land and Environment Court is a specialist statutory court with a wide jurisdiction in environmental, planning and land matters. It is a superior court of record[64]. The judges have the same rank, title and status as a judge of the Supreme Court of New South Wales.[65]

The Court was established by the *Land and Environment Court Act* 1979 and commenced operation on 1 September 1980. The Court was designed to achieve two objectives, rationalisation and specialisation. Establishment of the Court involved the rationalisation of myriad different jurisdictions into one forum to become a "one stop shop" for planning and environmental matters. Specialisation was achieved by the organic coherence of the subject matter of the Court's jurisdiction and by appointment of persons with special knowledge and expertise in professional disciplines relevant to planning and environmental matters.

[63] Adapted from Ray and Clare, note 32 at 51, Appendix E
[64] s 5(1) of the *Land and Environment Court Act* 1979
[65] s 9(2) of the *Land and Environment Court Act* 1979

The jurisdiction of the Court is exclusive in the sense that no other court or tribunal is able to exercise the jurisdiction vested in the Land and Environment Court.[66] The jurisdiction of the Court is divided into seven classes[67]: Class 1 involves environmental planning and protection appeals[68]; Class 2, local government, trees and miscellaneous appeals[69]; Class 3, land tenure, valuation, rating and compensation matters[70]; Class 4, environmental planning and protection (civil enforcement and judicial review)[71]; Class 5, environmental planning and protection (summary criminal enforcement)[72]; Class 6, appeals against convictions or sentences relating to environmental offences (appeals as of right from the Local Court)[73]; and Class 7, appeals against convictions or sentences relating to environmental offences (appeals requiring leave of the Land and Environment Court from the Local Court)[74].

The relevant Court personnel and the current numbers are: Judges, being the Chief Judge and five other Judges; Commissioners, being a Senior Commissioner, eight other full time Commissioners and 16 Acting Commissioners (part time as the occasion demands); Registrars, being the Registrar and Assistant Registrar; and registry staff.

Judges constitute the Court[75] and may exercise all classes of jurisdiction but usually exercise jurisdiction in Classes 3 to 7 and Classes 1 and 2 where legal issues or large or controversial issues are involved. Commissioners exercise jurisdiction by delegation from the Chief Judge in Classes 1 to 3 only[76]. They may exercise the functions of the Court in adjudicating proceedings, or acting as a conciliator, mediator or neutral evaluator. The Registrars undertake case management at call overs and directions hearings and can act as conciliator or mediator.

Dispute resolution processes available

The Court offers, within the courthouse, the following dispute resolution processes: conciliation; mediation; early neutral evaluation; administrative merits review and litigation. The Court also offers reference to an external referee for inquiry and report back to the Court. There are also informal mechanisms such as case management, which may result in negotiated settlement. The availability within the one courthouse of a variety of dispute resolution processes is a necessary feature of a multi-door courthouse programme.

Conciliation

Conciliation "is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make

[66] See for example s 71 of the *Land and Environment Court Act* 1979
[67] s 16(2) of the *Land and Environment Court Act* 1979
[68] s 17 of the *Land and Environment Court Act* 1979
[69] s 18 of the *Land and Environment Court Act* 1979
[70] s 19 of the *Land and Environment Court Act* 1979
[71] s 20 of the *Land and Environment Court Act* 1979
[72] s 21 of the *Land and Environment Court Act* 1979
[73] s 21A of the *Land and Environment Court Act* 1979
[74] s 21B of the *Land and Environment Court Act* 1979
[75] s 6(1) and s 7 of the *Land and Environment Court Act* 1979
[76] s 30 and s 36 of the *Land and Environment Court Act* 1979

suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the parties to reach an agreement".[77]

Conciliation in the Court is undertaken pursuant to s 34 of the *Land and Environment Court Act*. It is available for disputes in Classes 1, 2 and 3 of the Court's jurisdiction. This provides for a combined or hybrid dispute resolution process involving first, conciliation and then, if the parties agree, adjudication.[78]

The conciliation involves a Commissioner with technical expertise on issues relevant to the case acting as a conciliator in a conference between the parties.[79] 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.[80] 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.[81]

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. In that event, the conciliation Commissioner makes a written report to the Court setting out that fact as well as stating the Commissioner's views as to the issues in dispute between the parties to the proceedings.[82] 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.

Mediation

Mediation "is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted".[83]

The Court may, at the request of the parties or of its own volition, refer proceedings in Classes 1, 2, 3 and 4 to mediation.[84] The Court provides a mediation service at no cost to the parties by referral to the Court's mediators. Currently, the Registrar and certain Acting Commissioners are trained mediators. The Court will also refer proceedings for mediation to an external mediator not associated with the Court and agreed to by the parties.

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[77] National Alternative Dispute Resolution Advisory Council (NADRAC), "Dispute Resolution Terms", September 2003 at 5

[78] For a comprehensive explanation of conciliation in the Court, see B J Preston, "Conciliation in the Land and Environment Court of New South Wales: History, nature and benefits", (2007) 13 *L G L J* 110

[79] s 34(1) of the *Land and Environment Court Act* 1979 (s 34(2) after the *Courts Legislation Amendment Act* 2007 comes into force)

[80] s 34(3)(a) of the *Land and Environment Court Act* 1979 (s 34(3) after the *Courts Legislation Amendment Act* 2007 comes into force)

[81] s 34(3)(b)(ii) of the *Land and Environment Court Act* 1979 (s 34(4)(b) after the *Courts Legislation Amendment Act* 2007 comes into force)

[82] s 34(3)(b)(i) of the *Land and Environment Court Act* 1979 s 34(4)(a) after the *Courts Legislation Amendment Act* 2007 comes into force)

[83] NADRAC, note 77 at 9. See also s 61B(1) of the *Land and Environment Court Act* 1979 (and s 25 of the *Civil Procedure Act* 2005 after the *Courts Legislation Amendment Act* 2007 comes into force)

[84] s 61D(1) of the *Land and Environment Court Act* 1979 (and s 26(1) of the *Civil Procedure Act* 2005 after the *Courts Legislation Amendment Act* 2007 comes into force)

Neutral evaluation

Neutral evaluation is a process of evaluation of a dispute in which an impartial 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.[85]

The Court may refer proceedings in Classes 1, 2, 3 and 4 to neutral evaluation with or without the consent of the parties. The Court has referred matters to neutral evaluation by a Commissioner or an external person agreed to by the parties.

Administrative merits review

The Court undertakes, in proceedings in Classes 1, 2 and 3, a form of administrative review on the merits of decisions made by public officials or agencies under statutes. The Court determines what is the correct or preferable decision on the evidence before the Court.

The Court organises and conducts administrative review in different forms. A variety of disputes in Class 1 and Class 2 of the Court's jurisdiction are able to be dealt with by the Court as either an on-site hearing[86] or a court hearing.[87] The Registrar determines at call over the appropriate type of hearing having regard to the value of the proposed development, the nature and extent of the likely impacts, the issues in dispute, any unfairness to the parties and the suitability of the site for an on-site hearing.[88]

An on-site hearing is a final determination of the matter conducted at the site and the subject of the appeal. Apart from a judgment, an onsite hearing is not recorded. A court hearing is a final determination of the appeal, and the hearing is recorded. The decision of the Commissioner is deemed to the decision of the Court.[89]

Litigation

Matters involving the exercise of judicial functions in Classes 4 to 7, as well as questions of law in Classes 1, 2 and 3, are dealt with by a judge in Court.[90] The hearing is a traditional court hearing. Innovations in the receipt of evidence, particularly expert evidence, have been pioneered in the Court. These include the taking of evidence concurrently from experts of the same or similar disciplines and the use of parties' single experts.[91]

Reference to an external referee

The Land and Environment Court has adopted the powers of the Supreme Court to make orders for reference to a referee appointed by the Court for inquiry and report by the referee on the whole of the proceedings or any question or questions arising in the proceedings.[92]

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[85] s 61B(2) of the *Land and Environment Court Act* 1979. See also NADRAC, note 77 at 6
[86] ss 34A and 34B of the *Land and Environment Court Act* 1979
[87] ss 34A and 34C of the *Land and Environment Court Act* 1979
[88] s 34A(2) and (2A) and s 34B(2) of the *Land and Environment Court Act* 1979
[89] s 36(3) of the *Land and Environment Court Act* 1979
[90] s 33(1) and (2) of the *Land and Environment Court Act* 1979
[91] See Justice P D McClellan, "Expert Witnesses – The Recent Experience of the Land and Environment Court", (2005) 17 (10) *Judicial Officers' Bulletin* 83 and Justice P D McClellan, "Expert Evidence: Aces Up Your Sleeve?" (2007) 8(2) *The Judicial Review* 215
[92] See Part 72, rule 2(1) of the former Supreme Court Rules 1970 adopted by Part 6, rule 1(1) of the Land and Environment Court Rules 1996 (and Part 20 rule 20.14 of the Uniform Civil Procedure Rules 2005 when they become applicable to the Land and Environment Court)

Intake process

Intake screening, diagnosis and referral to the appropriate dispute resolution process occurs in a staged process: at the Registry counter, at the first return before the Court of any application commencing proceedings in the Court and at any case management or dispute resolution orientation session that might be directed by the Court. Collectively, these occasions and the persons who preside constitute the intake screening, diagnosis and referral unit of the Court.

The initial screening occurs at the central intake point of the Registry counter. The registry staff include Registry Officers, the Senior Registry Officer and the Client Service Manager, with assistance as needed from the Assistant Registrar and the Registrar.

Most applicants are legally represented and their legal representative will select the appropriate application to and the Class of the Court's jurisdiction in which to commence proceedings in the Court. The initial screening is, therefore, performed by the applicant's legal representative.

A person who is not legally represented, however, may seek the assistance of the Court for the initial screening. A person who wishes to commence proceedings or who has been referred to the Court presents at the Registry counter in the Court building. A Registry Officer ascertains the nature of the dispute. If it appears to be a matter within the jurisdiction of the Court (recognising the Court is a statutory court with exclusive jurisdiction in respect of specified matters), the Registry Officer will provide the appropriate application form to enable the person to commence proceedings in the Court and assist in the completion of the application. If the dispute is not within the jurisdiction of the Court, information may be provided as to the court or tribunal which might have jurisdiction to deal with the dispute or other persons or institutions which might be able to assist the person. This might include agencies such as the Ombudsman, relevant local government agencies such as local councils or State government agencies. If legal assistance is required, the registry officer may provide information to the person about legal aid and pro bono schemes. Information and contact details of the Legal Aid Commission of New South Wales, the New South Wales Bar Association, the Law Society of New South Wales and the Environmental Defenders' Office may be provided.

At the Registry counter, a computer terminal is provided for persons to access information on the Court's website, with its wealth of information on the Court, as well as external links to legislation, policies and information relevant to their dispute. The Registry Officer will refer persons to the computer and the facilities available. The Court has a special fact sheet for "Litigants in person in the Land and Environment Court of New South Wales". The fact sheet contains information on: the Court's jurisdiction; legal advice and assistance; the Court's schedule of fees; how to request a waiver, postponement or remission of fees; the availability of interpreters; disability access information; user feedback – Land and Environment Court Services; information about the Court's website; and Land and Environment Court contact information. The Court's website also has a special page on "self-help". The page provides links to other web pages and to external links dealing with: alternative dispute resolution, information sheets on each of the types of proceedings in the Court; contacts in the Court; frequently asked questions; a guide to the Court; interpreters and their availability; judgments of the Court; the jurisdiction of the Court; languages and translation services; legal advice and assistance; legal research links; litigants in person; planning principles and tree dispute applications.

The role of the Registry staff in this initial screening is limited. Whilst Registry staff proffer assistance on the jurisdiction of the Court to deal with a particular dispute,

which assistance may cause a person voluntarily to go elsewhere for resolution of the dispute (such as to another court or tribunal or to the Ombudsman), they do not formally refer the person or dispute to any other person or institution and do not prevent the person from lodging an application in the Court commencing proceedings if the person so desires. Furthermore, the Registry staff do not refer any application, once lodged, to any of the dispute resolution processes in the Court. Such referral comes at the next stage in the intake process and is done by a judicial officer. The limitation on the Registry staff's powers to screen disputes avoids the criticism that is made of some multi-door courtroom programmes which place great authority in a screening clerk.[93]

All applications once lodged in the Court are given a return date before the Court. The type of appearance before the Court and the presiding judicial officer will depend on the nature of the application. All matters in Class 1, Class 2 except for applications under the *Trees (Disputes Between Neighbours) Act* 2006, and Class 3 except for valuation objections and claims for compensation for the compulsory acquisition of land, are returnable at a call over before the Registrar or Assistant Registrar of the Court. Class 2 applications under the *Trees (Disputes Between Neighbours) Act* 2006 are returnable before the List Commissioner responsible for the Tree Disputes List. Class 3 valuation objections and claims for compensation are returnable before the List Judge responsible for these classes of matters. All proceedings involving the exercise of judicial power, in Classes 4 to 7, are also returnable before the List Judge responsible for these matters.

The judicial officers involved at this stage of the intake process have the requisite education, training and expertise. They have "a better feel for the substantive, procedural, tactical and professional issues at work in various disputes".[94] They also are full time employees of the Court system and are not volunteers.[95] Nevertheless, further training may be of assistance in the diagnosis of disputes and the attributes of the different dispute resolution processes.[96]

The judicial officer presiding on the return of the application diagnoses the dispute and the appropriateness of the various dispute resolution processes for resolving the dispute. Screening, diagnosis and referral is assisted by certain presumptions and protocols adopted by the Court and discussed below.

The judicial officer then refers the dispute to the appropriate dispute resolution process (the doors in the multi-door courthouse) and makes directions to enable the preparation for and conduct of the selected dispute resolution process. This can include a preliminary session or dispute resolution orientation session.

Further screening and re-evaluation can occur at a preliminary session or, indeed, in the conduct of the dispute resolution process. The dispute can be referred back to the intake unit, effectively the Registrar, for re-evaluation and referral to another dispute resolution process considered to be more appropriate.

Criteria for screening and referral

The Court has not, as yet, adopted criteria or a manual for diagnosis, selection and referral to the appropriate dispute resolution process. This is a task that needs to be undertaken. The Court uses, in an informal and intuitive rather than formal and express manner, criteria based on the parties' desires, the nature of the dispute and the attributes of the various dispute resolution processes.

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[93] J W Stempel, "Reflections of Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture or Fledgling Adulthood?", (1996) 11 *Ohio St J on Disp Resol* 297 at 332, 369-372

[94] Stempel, note 93 at 370

[95] Stempel, note 93 at 373

[96] Ray and Clare, note 32 at 26

If the parties express a desire to be referred to conciliation, mediation or neutral evaluation, the Court would, except in an exceptional case, refer the dispute to the parties preferred dispute resolution process. However, the converse does not necessarily apply. The fact that parties may express a preference not to have the dispute referred to an alternative dispute resolution process is not determinative and the Court will itself diagnose the dispute and the appropriateness of alternative dispute resolution processes for resolution of the dispute. If the Court considers another process is appropriate it may refer the dispute to that process notwithstanding the desires of the parties.

The nature of the dispute can influence the selection of the appropriate dispute resolution process, not only in the ways intrinsic to the dispute and disputants discussed in the sections above on the intake process and criteria for screening and referral in a multi-door courthouse programme, but also because of the division of the Court's jurisdiction into classes and the consequences of such a division. For example, conciliation within the Court, presided over by a Commissioner of the Court, is only able to be offered for disputes in Classes 1, 2 and 3 of the Court's jurisdiction.[97] Early neutral evaluation also can only be offered within the Court by a Commissioner in Classes 1, 2 and 3. Conciliation and early neutral evaluation could be offered external to the Court by other persons for proceedings in Class 4. Mediation is only available within the Court in civil proceedings which are in Classes 1, 2, 3 and 4.

The screening, diagnosis and referral process in the Court is assisted by certain presumptions and protocols that have been adopted by the Court. The Court's Practice Notes, issued in 2007, create a presumption in favour of referring matters in Classes 1-3 of the Court's jurisdiction to conciliation, unless the parties demonstrate a reason to the contrary. Such a presumption is consistent with the recommendations of Sander and Goldberg and Sander and Rozdeiczer.[98]

Practice Note – Class 1 Development Appeals, effective 14 May 2007, requires parties, in preparation for the first direction hearing, to complete an information sheet.[99] Question 3 of that sheet asks:

> "*3. Is there any reason for the proceedings not to be fixed for a preliminary conference under s 34 of the Land and Environment Court Act 1979? If so, provide reasons [point form only].*"

At the first directions hearing, the parties are to hand to the Court the completed information sheet.[100] The parties are to inform the Court if there is any reason for the proceedings not to be fixed for a preliminary conference under s 34.[101] If the parties do not satisfy the Court that there is a good reason the proceedings should not be fixed for a preliminary conference under s 34, then, in the ordinary course, the proceedings will be fixed for a preliminary conference. For short matters, the conference will be fixed before the Duty Commissioner on the next available Friday. For other matters, the conference will be fixed within 14 days, subject to the availability of the Court.[102]

[97] s 34 of the *Land and Environment Court Act* 1979.
[98] Sander and Goldberg, note 50 at 59 and Sander and Rozdeiczer, note 57 at 35-41
[99] Schedule E to Practice Note – Class 1 Development Appeals
[100] paragraph 15 of Practice Note – Class 1 Development Appeals
[101] paragraph 13 of Practice Note – Class 1 Development Appeals
[102] paragraph 14 of Practice Note – Class 1 Development Appeals

Practice Note – Classes 1, 2 and 3 Miscellaneous Appeals makes similar arrangements for conciliation conferences for matters with which that Practice Note deals.[103]

Practice Note – Class 3 Valuation Objections takes the requirements for alternative dispute resolution further. It establishes a pre-action protocol for alternative dispute resolution. Paragraph 12 and part of the attached note provide:

> *"12. If reasonably practicable, before the first directions hearing in the matter, the applicant and the Valuer-General (or their authorised representatives) are either to:*
>
> *(a) meet for the purpose of formal or informal mediation on a "without prejudice" basis for the purpose of determining whether the objection may be resolved; or*
>
> *(b) confer in order to nominate a time for such a meeting to occur so that this time may be notified to the Court at the first directions hearing.*
>
> *Note: Except with leave of the Court, parties will not be permitted to proceed to a hearing of valuation objections unless and until the parties have engaged in an informal or formal process of mediation to ascertain whether the valuation objection may be resolved other than by a hearing before the Court. Parties may proceed to a preliminary conference under s 34 of the Land and Environment Court Act 1979 instead of mediation.*"

The Practice Note requires parties in preparation for the first directions hearing to complete an information sheet.[104] The information sheet asks:

> "*3. Have the parties sought to resolve their dispute by mediation? Yes/No [Give details of the steps taken to resolve the dispute]*
>
> *4. Is there any reason for the proceedings not to be fixed for a preliminary conference under s 34 of the Land and Environment Court Act 1979? If so, provide reasons [point form only]*".

The Practice Note makes similar arrangements, at the first directions hearing, for the parties informing the Court if there is any reason not to fix the proceedings for a preliminary conference under s 34[105] and for the Court to fix such a conference.[106]

Practice Note – Class 3 Compensation Claims addresses the dispute resolution processes of mediation, neutral evaluation and reference to a referee, but not conciliation. The reason is that, historically, virtually all proceedings involving compensation claims in Class 3 have been dealt with by a judge, not a Commissioner. Judges are precluded from acting as a conciliator under s 34. Further, until legislative amendments in November 2006, matters could only be referred to conciliation with the consent of the parties and at their request.

Under Practice Note – Class 3 Compensation Claims, parties are required to give consideration prior to and throughout the course of the proceedings to whether the proceedings or any questions are appropriate for mediation or neutral evaluation or

[103] see paragraphs 8, 9, 10 and the information sheet (Schedule B, question 2) of Practice Note – Classes 1, 2 and 3 Miscellaneous Appeals
[104] Schedule A to Practice Note – Class 3 Valuation Objections
[105] paragraph 16 of Practice Note – Class 3 Valuation Objections
[106] paragraph 17 of Practice Note – Class 3 Valuation Objections

for reference to a referee.[107] The obligation to consider the appropriateness of alternative dispute resolution is also imposed on the legal practitioners:

> *"It is expected that legal practitioners, or litigants if not legally represented, will be in a position to advise the Court at any directions hearing or mention:*
>
> *(a) whether the parties have attempted mediation or neutral evaluation; and*
>
> *(b) whether the parties are willing to proceed to mediation or neutral evaluation at an appropriate time."*[108]

The Practice Note requires parties to ensure that a person with authority to settle attends the mediation or neutral evaluation.[109] The Practice Note specifies the procedure for reference to mediation, neutral evaluation or reference to a referee.[110]

Timing of referral

As a general rule, referrals should be made early after proceedings are commenced in the Court. Delaying referral to alternative dispute resolution processes increases delay and cost to parties and intransigence of parties (they become locked in to their positions). Nevertheless, there needs to be information exposure, articulation of issues and preparation in order to maximise the prospects of alternative dispute resolution processes being successful. Hence, too early a referral can be counter-productive.[111]

The intake processes used by the Court endeavour to achieve these goals of adequate information exposure, articulation of issues and preparation prior to the conducting of alternative dispute resolution processes. The Court's Practice Notes require parties to provide to each other information before matters are referred to alternative dispute resolution processes. This has the benefit of enabling parties to participate in these processes on an informed basis.

Practice Note – Class 1 Development Appeals requires applicants, before the first directions hearing, to ensure that any plans of any development accompanying the development appeal application satisfy the requirements in Schedule A.[112] Before the first directions hearing, on request, a respondent who is a public authority or public official is to provide the other party with access to the documents relevant to the development application or modification application and its decision (if any) within 14 days of the request.[113]

The respondent consent authority is required also before the first directions hearing to file and serve a statement of facts and contentions in accordance with Schedule B.[114] The statement of facts and contentions is divided into two parts. Part A Facts identifies the proposal, the site, the locality, the statutory controls and the actions of the respondent consent authority. Part B Contentions identifies each fact, matter or circumstance that the consent authority contends require or should cause the Court in exercising the functions of the consent authority, to refuse the application or to impose certain conditions.

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[107] paragraph 42 of Practice Note – Class 3 Compensation Claims. See also cl 17A of the NSW Barristers' Rules (NSW) and cl 17A of the Solicitors' Rules (NSW)
[108] paragraph 43 of Practice Note – Class 3 Compensation Claims
[109] paragraph 44 of Practice Note – Class 3 Compensation Claims
[110] paragraphs 45 and 46 of Practice Note – Class 3 Compensation Claims
[111] Stempel, note 93 at 372
[112] paragraph 6 of Practice Note – Class 1 Development Appeals
[113] paragraph 11 of Practice Note – Class 1 Development Appeals
[114] paragraph 8 of Practice Note – Class 1 Development Appeals

All parties are required, in preparation for the first directions hearing, to complete the information sheet in Schedule E and to hand up the completed information sheet to the Court at the first directions hearing.[115] The completed information sheets provide further information of benefit to the parties at any conciliation conference.

Practice Note – Classes 1, 2 and 3 Miscellaneous Appeals makes similar arrangements for provision of information by parties before and at the first directions hearing. Before the first directions hearing, on request, the respondent who is a public authority or public official is to provide the other party with access to the documents relevant to the application and its decision (if any) within 14 days of the request.[116] In preparation for the first directions hearing the parties are to complete the information sheet in Schedule B and hand the completed information sheets to the Court.[117]

Practice Note – Class 3 Valuation Objections requires the Valuer-General (who is always the respondent in these matters) before the first directions hearing, to provide the applicant with access to (and copies of, if requested) documents within the possession, custody or control of the Valuer-General that were relevant to the Valuer-General's consideration and determination of the valuation the subject of the objection.[118] The applicant, in turn, is required before the first directions hearing, to notify the Valuer-General of the valuation for which the applicant contends.[119]

Both parties, in preparation for the first directions hearing, are required to complete the information sheet in Schedule A and hand to the Court the completed information sheets.[120]

The Court has also issued an explanatory note to parties in relation to conciliation clarifying some aspects of the conciliation process undertaken at the Court. First, the conferences involve conciliation and are not merely preliminary meetings. The text of the section makes this clear. The heading to the section may be "Preliminary conference" but the heading is not part of the Act.[121] The only sense in which the conciliation conference is "preliminary" is that for matters in Classes 1 and 2 it is required to precede any adjudication of those matters (unless otherwise directed by the Chief Judge).

Second, parties should be prepared and have sufficient instructions and authority to engage in meaningful conciliation at the conference whether or not they agree to the Commissioner later resolving the dispute by adjudication if agreement is not reached. To this end, the Court will make a direction, when a matter is fixed for a conciliation conference, that:

> "*All parties must be prepared and have sufficient instructions and authority to engage in meaningful conciliation at the conference*".

Third, the parties and their legal practitioners should consider the option provided for in s 34 that, if the parties after participating in good faith in conciliation are not able to reach agreement as to the terms of a decision, the parties can still agree to the Commissioner disposing of the proceedings by adjudication, with or without a further hearing. The Court requests parties and their legal practitioners to inform the Court at the first directions hearing (when matters can be referred to a conciliation conference) of their respective positions on utilising this option. If the parties agree

[115] paragraph 15 of Practice Note – Class 1 Development Appeals
[116] paragraph 6 of Practice Note – Classes 1, 2 and 3 Miscellaneous Appeals
[117] paragraph 10 of Practice Note – Classes 1, 2, and 3 Miscellaneous Appeals
[118] paragraph 10 of Practice Note – Class 3 Valuation Objections
[119] paragraph 11 of Practice Note – Class 3 Valuation Objections
[120] paragraph 14 of Practice Note – Class 3 Valuation Objections
[121] see s 35(2)(a) of the *Interpretation Act* 1987 (NSW)

to this course, the Court asks the parties to have available at the directions hearing draft short minutes of order to enable the conciliation conference to proceed in the agreed, sequential manner (first, conciliation and then, if conciliation is unsuccessful, adjudication). Of course, even if the parties do not agree in advance of the fixing and holding of the conciliation conference to the option of the Commissioner disposing of the proceedings by adjudication, there is still worth in the parties participating in the conciliation conference. The parties may be able to resolve their dispute themselves or they could change their mind after conciliation and agree to the Commissioner disposing of the proceedings.

The presiding judicial officer on the return of the application, whether the Registrar, Commissioner or Judge, will make directions to ensure that parties are adequately prepared for the selected dispute resolution process. This can include directions for statements of facts and contentions; provision of further particulars; discovery of documents; provision of evidence that might assist the dispute resolution process; and the obtaining of requisite instructions and authority to negotiate and settle the dispute. A preliminary session might be directed to be held before the neutral, dispute resolution practitioner, such as a preliminary session with a mediator or a case management session with a Commissioner.

Although ordinarily referral to appropriate dispute resolution processes will occur early after commencement of proceedings, referral can occur at any time. Referral to an alternative dispute resolution process could occur at the hearing of litigation if this was considered by the parties and the Court to be productive, notwithstanding the late stage of referral. Multiple referrals can also occur, at different times, to different dispute resolution processes.

Evaluation of the Land and Environment Court programme

Although many of the components of a multi-door courthouse programme have existed, to varying degrees, in the Court over its life, there has not been a clear, comprehensive or coordinated programme until recently.

The turning point has been the reactivation of conciliation in the Court for administrative review matters in Classes 1, 2 and 3 of the Court's jurisdiction. I have provided recently a detailed explanation of the history, nature and benefits of conciliation in the Court.[122]

At the end of 2006, the *Land and Environment Court Act* 1979 was amended to extend conciliation to all matters in Classes 1, 2 and 3 of the Court's jurisdiction.[123] Following on from these legislative amendments, the Court issued new Practice Notes for the various types of amendments to review matters in Classes 1, 2 and 3 and for proceedings in Class 4. As I have noted above, these practice notes create a presumption in favour of referring many matters in Classes 1, 2 and 3 to conciliation unless the parties demonstrate good reason why this should not occur.

After establishing the legislative and policy framework, the Court set about increasing its capacity to undertake conciliation effectively. It did this in two ways: first, it increased the number and range of expertise of Commissioners available to undertake conciliation by appointing Acting Commissioners and, secondly, it arranged for training of all Commissioners, both full-time and acting, in the conciliation process.

As to the first way, one of the objectives in establishing the Court was specialisation. This was to be achieved in part by the appointment of Commissioners with special

[122] Preston, note 47
[123] *Crimes and Courts Legislation Amendment Act* 2006, effective 29 November 2006

knowledge and expertise in disciplines relevant to environmental, planning and land matters. That special knowledge and expertise could be employed not only in adjudication of administrative review appeals but also in conciliation of them. Indeed, originally, the Commissioners were termed conciliation and technical assessors which better describes their role. In order for this objective of specialisation to be achieved, the Court needed to be comprised of persons who held qualifications across the range of disciplines relevant to environmental, planning and land matters before the Court. The *Land and Environment Court Act* 1979, therefore, required that a person, to be qualified to be appointed as a Commissioner, must have experience in specified disciplines of relevance, including: local government administration; town planning; environmental science; land valuation; architecture, engineering and surveying; building construction; natural resources management; urban design and heritage; and land rights for Aborigines or disputes involving Aborigines.[124]

The Minister is required, in appointing Commissioners, to ensure, as far as practicable, the Court is comprised of persons who hold qualifications across the range of areas specified in the Act.[125]

Over time, however, the Court's composition became dominated by persons with expertise in planning and architecture only. In order to achieve the objective of specialisation and the benefits accruing therefrom, and the statutory requirement that the Court be comprised of persons who hold qualifications across the range of areas, in late 2006 and early 2007, numerous persons were appointed as Acting Commissioners with expertise in Aboriginal land rights and disputes involving Aborigines; arboriculture; engineering; surveying and building construction; environmental science including ecology; heritage; and land valuation. Five of the persons appointed as Acting Commissioners also were accredited mediators and some also accredited arbitrators.

As to the second way, the Court arranged, in August 2007, for a three day training course, organised by the Australian Commercial Disputes Centre, on conciliation with a particular focus on the statutory regime under conciliation for s 34 of the *Land and Environment Court Act* 1979. The training course was attended by all full-time Commissioners, many of the Acting Commissioners and the Registrars of the Court.

The Court also recognised that, in order for an alternative dispute resolution programme to be effective, there was a need to publicise the availability and benefits of the variety of dispute resolution processes available within the Court. To that end, I, together with Mary Walker, an experienced mediator and barrister, have undertaken training seminars and talks on conciliation to a variety of institutions, persons and users of the Court, including local government agencies and their lawyers, practising barristers, and lawyers and other professionals engaged in environmental and planning disputes.[126] Publication of articles on the dispute resolution services available in the Court, in journals as well as on the Court's website, also assists.[127]

Indications are that there has been a significant increase in the acceptability and utilisation of alternative dispute resolution processes offered by the Court. Conciliation has increasingly been utilised for disputes in classes 1, 2 and 3. Conciliation conferences have increased from 11 in 2005, to 29 in 2006, to 143 as at

[124] s 12(2) of the *Land and Environment Court Act* 1979
[125] s 12(2) of the *Land and Environment Court Act* 1979
[126] Seminars on s 34 conferences in the Land and Environment Court delivered to the Local Government Lawyers Group, Sydney, 21 September 2007; the NSW Bar Association, Sydney, 25 September 2007; and the 2007 Environmental and Planning Law Association (NSW) Annual Conference, Penrith, 15 November 2007
[127] Articles include Preston (2007), note 78

12 October 2007. The majority of these are in development appeals under the *Environmental Planning and Assessment Act* 1979 in Class 1 of the Court's jurisdiction. Valuation objections in Class 3 have also benefited from conciliation. Mediations have also increased from 24 in 2005, to 52 in 2006. The majority of mediations involve disputes in Class 3 including compensation claims and valuation objections. Mediations have also been used in environmental planning and protection appeals and local government appeals in Classes 1 and 2 and in civil enforcement proceedings in Class 4. Early neutral evaluation, however, has been quieter. Alternative dispute resolution processes have not been employed in criminal matters in Classes 5, 6 and 7 of the Court's jurisdiction, with one exception. A restorative justice intervention was used beneficially in sentencing for offences of damaging Aboriginal objects and an Aboriginal place.[128]

The institutionalisation of a variety of dispute resolution processes within the Court is altering the way individualised justice is being delivered and perceived.[129] Increasingly, litigation in perceived as neither inevitable nor superior as a dispute resolution process to be employed to resolve disputes before the Court. Litigation may be required to initiate proceedings in the Court but other dispute resolution processes may be employed to end the litigation.[130] There is not an escalating plane on which the dispute resolution processes are arranged, but rather the processes are arranged on an equal plane.[131] Indeed, there is an increasing recognition that it may be appropriate, in the delivery of individualised justice, to "mix and match" dispute resolution processes so as to fit the forum to the fuss.

Nevertheless, whilst the Court may be moving towards becoming a multi-door courthouse, there still is work to be done. In particular it will be necessary to develop:

(a) adequate financial resources, including for programme development, new court personnel, training of existing court personnel, better and more consumer friendly courthouse space and equipment, and preparation and publication of programme literature and information;[132]

(b) adequate human resources, including intake staff and dispute resolution practitioners.[133] Programme staff should have adequate training in the intake process, including diagnosis of disputes and disputants, understanding the relevant advantages and disadvantages of the various dispute resolution processes (options) available in the Court and elsewhere, and matching dispute resolution processes to the disputes;[134]

(c) Adequate facilities, both in terms of having the appropriate facilities such as interview rooms for intake interviewing and counselling, settlement rooms with appropriate equipment (such as round tables, flip charts and whiteboards), readily available computers, copiers and printers, and information available, as well as ensuring that such facilities are in a consumer friendly environment;[135]

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[128] *Garrett v Williams* (2007) 151 LGERA 92
[129] Nolan-Haley, note 6 at 66-67 and E Gray, "Creating History: The Impact of Frank Sander on ADR in the Courts", *Negotiation Journal* (October 2006) 445 at 451
[130] J Lande, "How will lawyering and mediation practices transform each other?" (1997) 24 *Florida St U L Rev* 839 at 841
[131] Ray and Clare, note 32 at 32 and Appendix E
[132] Kessler and Finkelstein, note 32 at 585-586 and Gray, note 128 at 447-448
[133] Kessler and Finkelstein, note 32 at 586
[134] Ray and Clare, note 32 at 22, 26-29 and Kessler and Finkelstein, note 32 at 586
[135] F S Moston, "The evolving field of mediation in the United States", (2001) 13 *Bond L Rev* 486 at 490

(d) Support in the legal profession which is critical to the development and success of a multi-door courthouse programme.[136] There is a need to overcome, what Sander colourfully described as, "the deadening drag of status quoism".[137] Support can be maintained and increased by education and training about the objectives and benefits of a multi-door courthouse programme to parties and to their lawyers. Increasingly, lawyers are recognising they have a role not merely as litigators, but as "counsellors, problem solvers, and deliverers of prompt, appropriate, and affordable justice".[138] Training of lawyers and parties who are repeat users of the Court's dispute resolution services will be beneficial;[139]

(e) More considered criteria for diagnosis of disputes and selection of and referral to appropriate dispute resolution processes. This could beneficially involve development of a manual which could assist in diagnosis of disputes, identifying relative advantages of and disadvantages of different dispute resolution processes available and matching of the appropriate dispute resolution process to the dispute; and

(f) Monitoring and assessment of the programme and adaptive management to improve its effectiveness.[140]

Conclusion

The Land and Environment Court is undertaking, as Sander has encouraged, "continued experimentation and research"[141] into ways of achieving the just, quick and cheap resolution of disputes. The diagnosis of disputes and the matching of dispute resolution processes to disputes has the potential to better achieve individualised justice. Particular dispute resolution processes such as mediation further offer the possibility of individualised justice.[142] The employment of appropriate dispute resolution processes also increases the likelihood of delivering justice quicker and at less cost.

The Court's work in developing a multi-door courthouse is in the early stages; there is still much work to be done. The proposals the Court is offering are, again to use Sander's words, not "panaceas; only promising avenues to explore".[143]

[136] Kessler and Finkelstein, note 32 at 579, 587-588
[137] Sander, note 20 at 132
[138] Ray and Clare, note 32 at 12
[139] D A Hoffman, "The future of ADR practice: three hopes, three fears and three predictions", *Negotiation Journal* (October 2006) 467 at 468-469
[140] An example of such an assessment of a multi-door courthouse programme is described in Ray and Clare, note 32 at 29-31
[141] Sander, note 20 at 133
[142] Nolan-Henry, note 6 at 65
[143] Sander, note 20 at 133