Evaluating Institutional Effectiveness of the Land and Environment Court

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Introduction

There is a huge body of writings on the functions and roles of judicial and other tribunals and, in Australia as elsewhere, the jurisdictional scope, form and processes of dispute-resolution institutions have undergone and are still undergoing substantial change. Across Australia, these institutions have been characterized by a remarkable diversity that is well illustrated among the bodies which have been assigned jurisdiction to determine development appeals[1] and preside over environmental litigation more broadly[2]. In commenting about the difficulty of predicting the precise nature of future changes to Australian courts, Crawford foresaw further "consolidation of administrative jurisdictions and in methods of administrative review and appeal at state level"; "extension of active case-management and of court-annexed mediation and arbitration"; and "formal systems of judicial training or education, improved collection of and access to information about the courts, and further study of and improvements to judicial administration".[3]

Efficiency of the development appeals process was relevantly a major focus of the New South Wales (NSW) Report of the Land and Environment Court Working Party (Cripps Report) in September 2001. The Report recommended continuation of full merits appeals in the NSW Land and Environment Court (the Court). Nevertheless, the purported cost of the present system meant that it needed to be accompanied by greater use of alternative dispute resolution (ADR) for settling development disputes and at all stages of the development application and review process. Specific changes to the Court process, including decreased formality, were also recommended with a view to reducing costs "without prejudicing the rights of any party" and some changes to the governing law were recommended to "assist the general decision making process"[4] in a demonstrably impartial, transparent process which delivered reserved judgments on development appeals within 40 working days of the hearing.[5]

An evaluation of the effectiveness of the Court necessitates an examination of the objectives it is intended to achieve, and there is clearly scope for debate about what the core objectives are within the chaotic NSW environmental planning framework. However, the somewhat incidental treatment of objectives by the Cripps Report and the absence of clear performance criteria are of concern, given the significance of an efficient development process for the NSW economy and the significance of international and national sustainable development obligations. Although, the Cripps Report estimated that development appeals constituted less than 1% of the total number of development applications in NSW, this was not a measure of their economic significance nor of their role in influencing the operation of the development control system more widely and/or alerting policy makers to aspects in need of reform. In any event, justice precludes predetermination of the proportion of appeals among the entire population of development applicants who each, in theory, have been accorded an equal right to appeal against an unsatisfactory determination by a development consent authority.

Rationales for a Special Environment Court

Table 1 provides an overview of different rationales for a special environment court. It includes references to criteria used in the UK Report (see Table 2) and to specific provisions of the NSW *Land and Environment Court Act* 1979. It helps establish the contextual framework of implicit and explicit objectives of the Court. The truism underlying a number of submissions made to the Cripps Working Party also needs to be addressed, namely that processes for applying and making law are difficult to evaluate in isolation from the resulting socio-economic product. The "product" here may well defy consensus definition, although regard for it should be shaped by its adaptability to changing needs and demands, the ethical stance of key participants in the processes, and an overall sense of objective fairness and "value" regardless of who wins.

Maintenance of public respect for the Court is of special importance,[6] but gaining and retaining commitment by stakeholders (at different levels of government and administration, parties to litigation, professionals practising within the Court, the development sector, the conservation movement and the community more generally) require considerable effort. In practice, human beings simplify strategies and make faulty environmental decisions because of inconsistency, inefficiency, and reliance on irrelevant considerations. Decision-making biases are produced by self-interest; over-discounting the significance of what is unknown or distant from immediate concerns; positive distortions about the benefits and extent of harmful consequences of one's behaviour; myopia and preciousness regarding identification of mutually beneficial transactions and exchanges.[7]

A necessary step[8] in ensuring transparency of, and commitment to, Court objectives involves careful definition, inter alia, of:

- criteria to identify the environmental litigation encompassed by a specialist jurisdiction;
- "environmental expertise" – judicial, administrative and technical;
- level(s) of predictability that may be expected in different litigation areas;
- limits to party participation in actually formulating legal rights of access and redress; and
- boundaries of party participation in policy formulation and/or policy review.

Yet, where there are subtle balances between private and public interests, overly precise definitions may impede juridical advances in scoping the nature and content of an environmental justice system. Such considerations would underlie the design of objectives for a court part of whose rationale acknowledged the role of environmental litigation, irrespective of particular case outcomes, in quasi-legislating through the critical mass of case law and generating public information about the appropriateness of responses in the environmental law arena. A more contentious jurisprudential issue, canvassed in the UK Report, concerning whether the court ought to have a pro-active role in the Indian Supreme Court mould[9] or an environmental watchdog role is excluded from Table 1. This role however is distinguishable from an active environmental justice balancing role, the necessary independence for which may be assisted by having a special court supplied with environmental training and adequately articulated environmental decision-making principles.[10]

Institutional performance Criteria derived from Studies of the Court

It has been claimed that the Court readily meets four principal objectives of the legal system – effectiveness, efficiency, timeliness and justice – and that it has elevated public, government and industry awareness of environmental issues,[11] with several external evaluations being relied upon to demonstrate the Court's effectiveness.[12] While the broad objectives are uncontroversial, the malleability of the criteria leaves much scope for drawing different conclusions and consequently raises questions about the use and usefulness of performance criteria for evaluating the effectiveness of the Court. As noted elsewhere, if effectiveness is to be measured in a way that is inclusive of all representative interests in Court performance, there is a need to crystallize more robust, convergent performance indicators.[13]

Evaluation approaches in the Cripps Report share a number of features with the Hayes and Trenordan Report. This earlier report on the efficiency and effectiveness of development appeal and enforcement systems in each Australian State and Territory was based on the rationale that the "system has frequently resulted in lengthy time delays and costs, which reduces the possibility of high-quality cost-efficient developments and leads to greater construction costs, which are not in the best interests of the community".[14] The authors postulated that an appeal system must redress delay while also ensuring that the interest of the public as a whole is not affected, that individual rights in relation to land and to development objections are recognized and safeguarded and that there is decision making certainty. Causes of delay were identified to include governmental under-resourcing of the system, multiplicity of review venues and over-excessive formality, leading to the conclusion that, consistently with an integrated development approvals system, an "integrated single combined appeal system" (with pre-trial ADR and limitations on further appeal rights) was required within a division of each Supreme Court. While some establishment costs would be required, the Report merely assumed that "it cannot be doubted" that there would be a resulting reduced incidence of litigation and consequential savings to the community.[15]

In the ambitious, internationally comparative, UK study, Grant relied on a suite of 18 criteria that were applied, with the assistance of a Steering Group, to eight scenarios in each of 11 jurisdictions, proceeding to an in-depth study of four jurisdictions, one of which was NSW. The criteria, which were premised largely on the "Woolf principles", assigned prime importance to capacity for innovation and broad access to environmental litigation because of the sweeping nature of the environmental protection agenda.[16] The governing principles were intended to ensure a system that would:

- be just in the results it delivers;
- be fair in the way it treats litigants;
- offer appropriate procedures at a reasonable cost;
- deal with cases with reasonable speed;
- be understandable to those who use it;
- be responsive to the needs of those who use it;
- provide as much certainty as the nature of the particular case allows; and
- be effective: adequately resourced and organized.[17]

While the Report deduced certain themes and trends, it noted the inadequacy of the information available for most jurisdictions for the purposes of providing reliable evaluation and that further research was needed.[18] The final report card was therefore a blend of some process and cost estimate statistics and comparative judgements on broader institutional traits. That is, although the study contained some features of performance assessment, its "evaluative criteria" were directed to the study aim of reporting on the feasibility of establishing an environmental court for England and Wales through an identification of "what, if any, might be the essential attributes of an environment court" and how such a court "might bring improvements to the way in which environmental disputes" were resolved there.[19]

In its application to the NSW Court, an extrapolation of the UK evaluation approach is summarized in Table 2, by re-ordering the content of the UK "evaluative criteria" into standards or tests of Court performance that were not necessarily expressed this way in the Final Report. In the absence of reliable benchmarks and credibly derived milestones, the Table uses the terminology of "high" and "low" target standards, but some standards in isolation from others would be double-edged swords unless there was an overall synergy or co-operative endeavour between the aims for related performance areas.

Also, although not dealt with explicitly in the UK Report, this summary posits (contrary to some popular opinion) that a high merits appeal success rate might be more potent than a low rate as an effectiveness measure. This is put forward on the assumption that, for a variety of reasons (such as, high opportunity cost risk, inadequate financial or other resources, project or sub-project substitutability, alienation from the system), any resort to appeal, at least in the case of development projects, will normally be the exception rather than the rule. Certainly, the very low rate of appeals overall is borne out both in the UK Report and in the Cripps Report, although the latter acknowledges significant variations across different NSW local government areas in respect of the magnitude of development and the appeal rate. Idiosyncrasies apart, it is also highly likely that, in a properly functioning institutional system that is transparent and accountable, the reasonable expectations of appellants would be informed by chances of success as measured against, for instance, experience within and/or knowledge of the system.

This proposition is strongly clouded by other factors[20] and, in NSW, by arguments that allege bias, one way or the other, in the merit decisions of the Court. An important scoping issue for the Cripps Review was the weighting to be attached to "the 'community's view' about inappropriate development". However, labelling of the Court by critics, as a "developers' court", was considered to be problematic in the absence of specific evidence of systemic bias, especially if inferences were to be drawn solely from statistics indicating a success rate of 56% of the 48% of development appeals that actually continued through to adjudication, because of the wide variations in appeal grounds and inclusion of consent orders in the statistics. When the criticism was placed in the context of weak third party appeal rights, the Cripps Report appeared satisfied with merely noting that "enhancement of third party appeal rights is beyond the Working Party's terms of reference".[21] In the context that the Court is alleged to make decisions "by passing" council policies, the Report suggested that councils themselves could guard against such a possibility by ensuring policy was incorporated in legally enforceable planning instruments.[22] In relation to criticism based on wrongful assumption of jurisdiction by the Court, through its allowing development applications that were substantially different from those considered by councils, the Report emphasized that legal redress was available where such a case could be proven.[23]

More generally, the Report appeared to accept that use of Court panels of commissioners, or judges and commissioners, in more complex development matters would contribute to removing negative perceptions about the Court, but the Report did not elaborate upon the arguments relating to this issue or related questions about the respective roles (and cost) of judges, commissioners or legal representatives in appeal proceedings.[24] Regarding pre-appeal "inappropriate political decision-making" by councils, the Report observed that a political dimension was built into the development determination process at all levels and pointed to the difficulty of drawing any conclusion purely from examples of council refusals to grant consent to development in compliance with all objective standards. However there were historical instances of council decisions being invalidated for failing to take relevant considerations into account or taking irrelevant considerations into account, and the Court could award costs where, in appeal proceedings, it considered a council was acting inappropriately. Costs orders were promoted as a major Court management tool in a range of circumstances covering poor, or abusive, handling of pre-appeal processes and appeals by all parties (and other associated approval bodies in the case of integrated development).[25]

A jurisdictional capability to review and remedy is also absorbed into the criteria relied upon in the UK Report but, because of the particular focus of that study, such criteria are represented in Table 2 below in the form of inquiries into jurisdictional scope rather than as standards against which to judge actual performance of the Court. A consequential implication, in terms of the significance of each criterion for performance evaluation, is that Court performance may be categorized within two general, but related, sets of criteria that are referred to in Table 2 as "performance capabilities" and "performance competencies":

- performance capabilities – components of the capability environment assigned to the Court, primarily by statute but also including higher court decisions, which are necessary but not sufficient in themselves to ground effective Court performance;
- performance competencies – attributes of Court performance, expressed primarily in Court-influenced procedures, rules and culture, which the Court ought to be able to manage as a consequence of its performance capabilities.

Linkage with Sustainability Performance Indicators

Many of the submissions mentioned in the Cripps Report drew attention to perceived failings in the broader NSW environmental and planning legal system, thereby suggesting the need for a multiple frames approach to evaluating the effectiveness of the Court. The Court operates within the broader institution of the environmental legal system which is increasingly applying an integrative lens to issues of environmental (including natural resources) planning and management and to competing expectations about environmental outcomes. A major tool in this process, if not an objective, is the notion of ecologically sustainable development as represented within national Australian and NSW laws,[26] and interpreted and applied by judicial and other bodies, as part of the Australian response to the Rio+10 sustainability agenda. While the shape of associated performance indicators is still very much at formative stages, this is the ongoing subject of an enormous multidisciplinary, multi-party, multi-interest learning endeavour at many local, national and international levels that has given rise to numerous new working concepts and websites.27

A particular difficulty in evaluating the overall effectiveness of the Court is to distinguish between indicators about how the Court is operating and its internal effectiveness and its effectiveness within a network of relevant institutions. An analogy may be made with indicators for environmental reporting, that may reflect environmental conditions without necessarily having a bearing on sustainability, because they do not reflect the total system nor key action points required to redress imbalances in the system. In particular, environmental indicators (as typically depicted in State of the Environment Reports) rarely show causal relationships between indicators nor their relationship with targets (if any), system thresholds or acceptable limits to change.[28]

One well worked-through schema of inter-related indicators that is potentially adaptable towards a holistic assessment of the Court is the City Environmental Indicators Encyclopedia. Accessible through the Cities Environment Reports on the Internet (CEROI), this model contains six broad indicator groupings – DPSIR (driving forces, pressures, state, impact, response); Economic sector; External impact; Instruments; Physical environment; Social environment - and a matrix of 29 core indicators that have been partly drawn from existing indicator sets. There is a total of 90 indicators, once the core set is incorporated with city-specific indicators. Of particular interest in the Court evaluation context is that, as well as being allocated to one or more of the six aggregate groupings, each indicator is represented, along with interactive connections to its related indicators and indicator groupings, with respect to each of the following attributes:

- Rationale – what it means and why it is an important measure
- How it is compiled, what data are needed

- Measurements and units
- Possible temporal and spatial format (such as trend charts and maps)
- Reference to methodology resources[29]
- Objective
- Targets, benchmarks, reference values
- References to examples of application
- Other comment/background.

Potential LEC Effectiveness Evaluation Model

Undoubtedly, any performance criteria used to evaluate the Court must be related to clearly expressed objectives relating to concrete areas of performance that have been explicated in terms of specific goals, including cost parameters, target timelines and assignment of specific responsibilities. Although not all aspects of performance will lend themselves readily to quantitative measurement, there must be accessible and relevant data for the purposes of reporting and assessing performance against the target indicators. Since there are two current threshold barriers to evaluating the effectiveness of the Land and Environment Court – the absence of fully transparent performance objectives and absence of comprehensive performance-oriented data about its operations - any performance assessment model will therefore need to address mechanisms for closing these gaps. In an ideal process, this would not be a stand-alone model of a Court disconnected from its legislative source of authority, other external operating influences/controls, and its constituent communities of operation and influence.

A complicating factor arises from the divergence of views about the wisdom, on the one hand, of having a specialist court rather than a specialist division within the normal court system and, on the other hand, of having a lay tribunal rather than a judicial forum at all.[30] Associated views about the nature of the "informality" that should attend the merit appeal process also colour the evaluation context. These issues have been canvassed in considerable depth but inconclusively because of strongly held competing expectations about what the legal system ought to deliver, how it should deliver and its capacity for delivery.[31]

Reliable, objective performance criteria for evaluating institutions generally, or the Court specifically, are not readily discernible in existing literature and practices. A helpful insight about institutional effectiveness criteria is however provided in an unpublished paper of Chopra and Duraiappah32 who include laws, the judiciary, the market and property rights among formal institutions, and determine efficiency by the transaction cost incurred by an individual user of a particular institution and effectiveness by the level of involvement in terms of transparency in rules/decision making and benefit sharing; risk minimization/accountability; and institutional "ownership"/consensus. As transaction cost decreases, effectiveness should increase. Yet individual institutions do not exist in a vacuum and synergy among institutions is critical if institutions are to operate as vehicles for the capability creation, strengthening and protection that is of the essence in sustainable development.

Given the plurality of Court "stakeholders", it is likely that a model could be constructed based on an organizational framework that combined balanced scorecard strategy[33] and value chain management.[34] Although the application of these models is not without some practical difficulties, they do provide a combined forwards and backwards looking organizing framework that is relevant to the Court situation. The scorecard, which has application to both private and public sector organizations, attempts to harness financial, "customer", internal process, and organizational learning/growth perspectives into a co-operative whole. At a broad level, outcome measures are related to return on equity; customer satisfaction; process efficiency; employee satisfaction and skill development. A particular attraction of the scorecard approach is its emphasis on cause and effect relationships through systematic hypothesis testing, validation and modification.

Value chain management focuses on moving services downstream to the "customer" and provides an integrative framework to the demand and supply chain. It necessitates effective definition of "value" and adopts strategic and operational management concepts that involve exploration of optimal value chain structures and processes best suited to customer and organizational value expectations. Core processes, sub-processes and key success factors must therefore be identified across the chain(s), and infrastructure must be provided to enable management of organizational capabilities, service and information components across each chain. Relationship management is also critical to the implementation of value chain "partnerships", just as it is in the broader Rio+10 context of "sustainability partnerships" where the chain extends into natural capital and social equity territory. In theory at least, a scorecard can be constructed with respect to both quantitative and qualitative performance measures across a value chain, although some care would be needed in translating the "customer" notion with respect to the Court so as, for instance, to avoid equating litigant satisfaction with "justice".

A vertically and horizontally integrated balanced scorecard strategy would relevantly involve four interconnected processes: (1) clarification of the institutional goals and objectives; (2) planning through setting operational targets, aligning strategic initiatives, allocating resources and establishing missions; (3) communication and linkage of the vision through goal setting and community and user education; (4) feedback and learning through articulation of the vision in an accessible and useable format, strategic feedback and facilitation of strategy review and learning. Institutionally, these processes aim to build motivation and commitment, align individual and institutional goals, and increase obligation and accountability, because the strategy is heavily dependent upon:

- choosing "the right" measures;
- accessing reliable and relevant data; and
- setting and monitoring short-term milestones and minimum thresholds for each measure, in order to mark progress and allow scope for responsiveness to the unforeseen and for performance breakdown.

As a working hypothesis for future research, it is therefore proposed that a composite approach, drawing on the systematic indicator-selection process used by CEROI within a dynamic scorecard accountability framework and disciplined by a value chain strategy, would provide a potentially strong model for driving the Court forward beyond conjectural criticism, as well as providing the tools for evaluating its future effectiveness. In an ideal scenario, conscious symbiotic management would yield an effective Court, devoid of disjunction and dysfunction, and an institutional anchor for a sustainable NSW.

Conclusion

Rather than take issue with, or defend, value judgements that have been made in official reports and miscellaneous media about the effectiveness of the NSW Land and Environment Court, a more beneficial exercise would be to work towards constructing a model which will generate data and be capable of use in future evaluations of the Court. Past assessments have been hampered by an absence generally of workable performance criteria for complex institutions such as the Court, although each successive study of the Court has assisted the challenging task of defining its performance environment and distilling appropriate assessment criteria. Valuable insights are also increasingly available from performance-oriented management research and from the global search for ecosystem sustainability indicators. Together these learning experiences will progressively shape a working model for evaluating the effectiveness of the Court, both as a forum for determining environmental disputes and in its supportive role for the wider NSW environmental justice system.

Table 1: Overview of Environment Court Rationales

[UK Criteria are cross-referenced to Table 2]

RATIONALE: THE LOWER-COST, EFFICIENT, COORDINATING VISION	UK REPORT CRITERIA	LEC ACT PROVISION	INSTITUTIONAL LINKS
Single forum for litigation in all "environmental matters" enables. (a) Concentration & accumulation (even mastery) of relevant judicial & non-judicial knowledge, experience & learning (b) Conformity of interpretations, discretionary tests, significance factors, etc (although individual case outcomes may differ) (c) Consistency in review & remedial practices (although individual case outcomes may differ) (d) Harmony of procedures to avoid duplication, roadblocks, etc. (e) Centralized capture of data re scope/level of rights protection (f) Unification of separate related actions (g) Coordination of infrastructure resources (h) Readily identifiable forum (i) Systematic development of an environmental law resource repository (j) Focussed accountability (including for public sector bodies subject to Court review & the Court itself)	2.4 1 2.4.14 2 4.15	Sections: 15 29–33 56A 62 65–66 72–74 78	• NSW Government: political agendas for environment & justice • Checks & balances in the overall legal system, including to curb balkanization of/by the Court • NGO, industry groups, environment groups & other networks with influence re environmental law developments • University & other independent research communities
Integrative forum strengthens capacity for: (a) Multi-disciplinary perspectives (b) Expansion of environmental justice vision through cross-fertilization of jurisdictional bases & decision-making (c) Innovation in process & outcomes (d) Withstanding "capture" by a narrow clientele base (e) Conscious, deliberate & knowledgeable weighing of competing interests & risks (f) Breadth/depth of implementation of environmental law/policy objects (g) Containment of incidental unjustness	2.4.2 2.4.4 2.4.10 2.4.11 2 4.14 2.4.18	Sections: 12 16–25E 33–40	• NSW environmental legislation & administration • NSW Government: funding for appropriate support staff (e g , research assistants) & arrangements for training/educating Court members • NSW "State of the Environment" reporting
Exclusive forum reduces opportunities for: (a) Forum shopping (b) Arbitrary jurisdictional distinctions & confusion (c) Institutional destabilization from political caprice (d) Inconsistent/incompatible curial principles & practices (e) Uninformed, non-contextual adjudication	2.4.1 2.4.12 2.4.13	Sections: 5 9 56 71 [c.f. 57–61]	• NSW Government: information/education services • Common Law system in regular courts • Superior appellate court system
Inclusionary forum promotes: (a) access to remedies (b) informality in merits appeals & pre-trial processes (c) understanding by users & understanding of user needs (d) procedural fairness	2.4 5 2.4.6 2.4.9	Sections: 14 34 38 63–64	• Standing rules & 3rd party appeal rights • Permits/property rights • Due process & other process principles of general legal system
Efficient forum (a) contains costs & delay (public & private) (b) works at providing decision-making certainty (c) reduces incidence of litigation (d) satisfies process requirements of stakeholders (e) encourages cost-effective alternatives (e g , ADR)	2.4 3 2 4.5 2 4.7 2.4 8 2.4.9	Sections: 26–32 38 41–55 61A–61L 67–70	• NSW Government: budget allocation & audit systems • NSW economy

Table 2: Extrapolation from UK Report Criteria

[Criteria references are to Report paragraph numbers]

UK REPORT CRITERION	EXTRAPOLATED PERFORMANCE AREA(S) AIM (S)	ASSESSMENT SIGNIFICACE	UK ASSESSMENT *(with limitations)*	RELATIONSHIP(S) INTEROPERABILITY
1. Procedural rationalization [2.4.1]	Absence of: • Jurisdictional confusion • Procedural overlap	Primarily performance capability but affected by competency	"high" access & remedy integration: *level of integration relative to non-NSW jurisdiction, but confusion unassessed.*	Criteria 2, 6, 7, 10–15
2. Substantive integration [2.4.2]	High integration level of: • Decision review opportunities • Environmental litigation	Performance capability & competency	"broadest" - vertical & horizontal integration: *normatively & relatively*	Criteria 1, 3–6, 9–17,
3. Speed and delay [2.4.3]	Low: • Appeal process time • Appeal rate High: • Appeal success rate • Litigation process flexibility control	Primarily performance competency but affected by capability	"powerful record": *normatively & relatively re process management.* Median disposal times & caseflows considered.	Criteria 2, 4–9
4. Incorporating expertise [2.4.4]	High: • Non-legal expertise capability: qualifications/experience • Expertise: non-expertise ratio • Expertise "buy-in" capacity	Performance capability & competency	"good experience", formal & informal but incomplete: *normatively & relatively.*	Criteria 2, 3, 5, 6
5. Encouraging informality [2.4.5]	Low level of: • Legal technicality High level of: • Litigation process flexibility control • ADR opportunity in/instead of litigation	Primarily performance competency but affected by capability	"court has not found it easy" except for conferences; "leading" ADR jurisdiction, with 60% mediation settlement rate.	Criteria 1–4, 6–9
6. Access to justice [2.4.6]	Low: • Locus standi barriers • Court access cost • Litigation formality	Primarily performance capability but affected by competency	*"standing" overview re:* merit appeals (restricted 3rd party), civil & criminal matters; "about 15% litigants in person".	Criteria 1–5, 7, 8, 17, 18
7. Cost of justice [2.4.7]	High: • Litigation fee control • Party cost control opportunity	Primarily performance competency but affected by capability	"low court fees but high legal fees"; merit appeals' costs discretion "rarely exercised".	Criteria 1, 3, 5, 6, 8, 9
8. Cost of the system [2.4.8]	Low: • Average cost per case	As above	A$20,000–30,000 per day in major cases = "high" cost.	Criteria 1, 3, 5, 6, 7, 9
9. Special rules of evidence and procedure [2.4.9]	Strong causal link between: • Court process control rules • Evidence admissibility rules and achievement of Court objectives	Primarily performance competency but affected by capability	"independent line" taken by Court on e.g., leave to cross-examine; pleadings; costs undertakings; form of evidence, including experts. *Linkage unassessed.*	Criteria 2, 3, 5, 7, 8
10. Remedies [2.4.10]	High: • Enforcement capability • Remedial capability	Primarily performance capability	Status & statutory sources – "powerful remedies."	Criteria 1–2, 11–18
11. Extent of jurisdiction [2.4.11]	Inquiry re level of inclusion of both: • Civil and criminal jurisdictions • Civil and criminal enforcement/remedial claims	Primarily performance capability	Overview of j urisdictional classes – "yes" both.	Criteria 1, 2, 10, 12–14

CONTINUED...Table 2: Extrapolation from UK Report Criteria

[Criteria references are to Report paragraph numbers]

UK REPORT CRITERION	EXTRAPOLATED PERFORMANCE AREA(S) AIM (S)	ASSESSMENT SIGNIFICACE	UK ASSESSMENT *(with limitations)*	RELATIONSHIP(S) INTEROPERABILITY
12. Original jurisdiction [2.4 12]	Inquiry re: • Original jurisdiction capability	Performance capability	"yes".	Criteria 1, 2, 10, 11, 13, 14
13. Level of jurisdiction [2.4.13]	Inquiry re capability to: • Withstand political intervention • Determine merits • Determine legality of environmental decisions • Guide policy	Primarily performance capability	"High Court: a court of record"; merits & civil enforcement but "no policy review jurisdiction".	Criteria 1, 2, 10–12, 14–18
14. Definition of jurisdiction and the creation of environmental law [2.4.14]	Inquiry re. • Clearly bounded statutory jurisdiction and/or • More open-ended common law jurisdiction • Impact of case law on primary and secondary legislative developments	Primarily performance capability but affected by competency	Overview of jurisdiction – "no civil suits". *No assessment of Court impact.*	Criteria 1, 2, 10–13
15. Treatment of central and local government [2.4.15]	Inquiry re special treatment of: • Public sector development • Development on government land and • Impact of special treatment on Court operations	Primarily performance capability but affected by competency	"no special rules or immunities", but not elaborated on. *No assessment of impact.*	Criteria 1, 2, 10, 13
16. Impact of international obligations [2 4.16]	Inquiry re capability of • independent enforceability of international and national Human Rights (including collective and procedural obligations)	Primarily performance capability	"no special rules"; no obligation unless in domestic law	Criteria 2, 10, 13
17. Guardianship of the environment [2.4.17]	Inquiry re capability to act as· • "Guardian of the environment"	Primarily performance capability but affected by competency	No, but "powerful court"; "portrayed (by politicians)" as political; "frequent media coverage".	Criteria 2, 6, 10, 13, 18
18. Balance in the system [2 4.18]	Inquiry re balance between: • Public interest • Private property rights • Public participation	Primarily performance competency but affected by capability	"broad consensus" = "effective and efficient", but poor planning system & resourcing.	Criteria 6, 10, 13, 17

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2. Grant, M., (2000), Department of the Environment, Transport & the Regions (UK), Environment Court Project Final Report.

3. Crawford, J., (1993), Australian Courts of Law, 3rd ed., Oxford University Press, p. 320.

4 . Cripps, J., (2001), Report of the Land and Environment Court Working Party, NSW Attorney General, pp. iv–v.

5. Ibid, p. 72.

6. Lord Chief Justice Woolf, (1997), Lord Morris Memorial Lecture, "The Courts' Role in achieving Environmental Justice".

7. Bazerman, M. and Hoffman, A., (1999), "Sources of Environmentally Destructive Behavior: Individual, Organizational, and Institutional Perspectives", Research in Organizational Behavior, vol. 21, pp. 39-79.

8. By inference from Whitney, S., (1973), "The case for creating a special environmental court system–a further comment", William & Mary Law Review, vol. 15, pp. 33–56.

9. Grant, n. 2, 1.1 and see UK criteria 2.4.16 and 2.4.17 in Table 2.

10. Hain, M., and Cocklin, C., (2001), "The Effectiveness of the Courts in Achieving the Goals of Environment Protection Legislation", Environmental & Planning Law Journal, vol. 18, pp. 319–338, at 338.

11. Stein, Justice P., (1999), "New directions in the prevention and resolution of environmental disputes–s pecialist environmental courts", The South-East Asian Regional Symposium on the Judiciary and the Law of Sustainable Development.

12. Bignold, Justice N., (2001), "NSW Land and Environment Court–its Contribution to Australia's Development of Environmental Law", Environmental & Planning Law Journal, vol. 18, pp. 257–263, at 257–259, citing (UK), Environment Court Project Final Report (2000), Ch. 5, and Lord Chief Justice Woolf, 1991 Garner Lecture, "Are the Judiciary Environmentally Myopic?", in (1992) 4 Journal of Environmental Law 1–14, and 1997 Lord Morris Memorial Lecture, "The Courts' Role in achieving Environmental Justice".

13. Ryan, P., (2001), "Court of hope and false expectations: Land and Environment Court 21 years on" (under journal submission).

14. Hayes and Trenordan, n. 1, p. 3.

15. Ibid, p. 31.

16. Grant, n. 2, Executive Summary, p. 2.

17. Ibid, n. 2, 11.8.2, citing Rt. Hon. The Lord Woolf MR (as he then was) (1996), Access to Justice Final Report, UK, para. 1.

18. Ibid, ch. 2, p. 2.

19. Ibid, Preface, p. 1.

20. E.g., Bache, S., (1998), "Are Appeals an Indicator of EIA Effectiveness? Ten Years of Theory and Practice in WA", Australian Journal of Environmental Management", vol. 5, pp. 159–168.

21. Cripps, n. 4, p. 13; pp. 39–40.

22. Ibid, pp. 49–50.

23. Ibid, pp. 67–68.

24. Ibid, pp. 54–57; 63–64.

25. Ibid, pp. 21–22; 77–79.

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