ELECTRONIC INFORMATION AND SERVICES IN THE ENVIRONMENT COURT OF NEW ZEALAND

- Access advantages and risk factors for self-represented litigants

A paper presented by Principal Environment Judge Laurie Newhook (NZ), to the AIJA Conference:

JUSTICE WITHOUT BARRIERS: Technology for greater access to justice.

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Introduction

[1] I commence with a fairly bold claim that I believe is backed by statistical analysis, that, in contrast to the situation about a decade ago, the Environment Court of New Zealand is one of the more efficient parts of the resource management (planning) system in the country, and can also claim to have one of the best clearance rates of cases amongst all courts in New Zealand. Electronic innovations have contributed significantly to these successes.

[2] I do not claim that electronic initiatives have made all the difference. Electronic initiatives are but one part of a multi-pronged approach, and have to be seen amongst a number of activities such as robust case management, increasing use of alternative dispute resolution, conferencing of expert witnesses, and the employment of law graduates in many of the registry support roles. But increasingly the use of technology is proving very important in that mix.

[3] Other papers being presented in this conference session today will discuss the impact of technology on parties in small claims cases and similar. My paper will in some contrast discuss the impact of technology in long causes which are best described in summary as multi-party multi-issue cases, the hearings for which often run for many days or weeks. Such cases can involve litigation over many dozens of complex technical issues, and involve many dozens and even hundreds of parties. Cases in our Court are mostly conducted under the Resource Management Act 1991, a sophisticated kind of planning regime, the

prime purpose of which is "the sustainable management of natural and physical resources", something of an inter-generational equity management system. Cases can range from planning for fresh water use in sensitive catchments, cities, ecologically important places, built heritage, motorways, ports, coal mines, wind farms, fish farming and other large developmental or infrastructural proposals, to smaller cases in towns, cities and in remote areas. And everything in between! Contentious issues can raise a major gamut of technical expert testimony, for example, engineering in its many guises (traffic, acoustic, geo-technical, civil, etc), economic, ecological, landscape and urban design, cultural, social, planning, and many others.

[4] In the course of harnessing new technologies it has been necessary to keep firmly in mind the needs of self-represented litigants, of which my Court has many. Hand in hand with that factor goes the knowledge that some self-represented litigants do not have access to computers, may lack computer skills, or suffer from poor band-width and slow service.

[5] In this paper I will describe the electronic initiatives we have recently been employing, and will record in each case the advantages/risks for self-represented litigants seeking access to justice in the NZ Environment Court.

Electronic initiatives

[6] It is trite that we live in an electronic age. This fact brings the good, the bad, and occasionally the ugly from the perspectives of skilled and regular users, as well as for those less advantaged. Unfortunately, many government (and indeed private sector) platforms and systems assume vast proportions and come at great cost. Some work and some don't. Many again however are in the genuinely "cheap and cheerful" category, and I think it is fair to say that there is an increasing trend worldwide, in a fiscally tough climate, to explore the latter. The initiatives that I am about to describe fall into the latter.

Website

[7] The Environment Court's website has a somewhat old-fashioned look and feel, but has recently been adapted to allow the exchange of evidence amongst parties and to assist lodgement in Court, all to lessen the need to create very large volumes of paper.[1] This approach was initially taken in one large multi-party multi-issue Auckland Plan Change case.

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[1] Statements of evidence and other documents employed in cases in our Court (including high resolution graphic exhibits) are notoriously voluminous.

The experiment was quite successful, particularly given that the issues of interested parties varied considerably amongst them, and not all parties required to receive all evidence.

[8] The approach has more recently been extended to some of the large Direct Referral cases lodged in our Court, where Council hearing processes are by-passed and we become the first-instance hearing body, in which inherently larger numbers of parties are involved than are known in our normal appellate work. An example of this is a recent case about a proposal for a new marina in a bay on Waiheke Island near Auckland, involving 310 parties. The use of the website has been expanded in this instance beyond the filing and service of materials, and is being used for many other types of communication as well. For instance, Minutes issued during the course of case management, and Memoranda received from parties, are routinely lodged and exchanged with all parties electronically.

[9] The Resource Management Act gives the Environment Judges considerable powers and discretions about process, for instance as to waivers. The Waiheke case has accordingly been the subject of judicial directions for the use of the Court's website on an interactive basis amongst parties. With the numbers of people involved, the savings in generation of paper can immediately be seen. One need only imagine in contrast, a registry process of preparing, copying, stuffing envelopes and mailing, a five page Minute to 310 parties. Then extrapolate that advantage to the lodgement and service amongst 310 parties, of many lever arch folders-worth of evidence!

[10] The Court has been conscious that not all parties are likely to have access to computers, or good bandwidth, or be computer-literate. In the Waiheke Marina case, this disadvantage for a small number of parties was largely overcome by persuading the Auckland Council to install a computer terminal at its Waiheke Island service centre, and arrange for a member of its staff to assist with its use when called upon. In making these arrangements, we have drawn on the e-filing experience of the Singapore Courts, where computer stations have been made available in registries, to people lacking equipment or skills.

iPads

[11] In 2013 three divisions of my Court trialled iPads in conducting the hearing of some large cases, namely ***Buller Coal*** (a proposal for a moderate-sized mine for the extraction of coking coal on the West Coast of the South Island); ***Hurunui Wind Farm*** (Canterbury) and ***Hagley Park Cricket Ground*** (Christchurch). Parties and counsel were given good advance notice, necessary given that hearings have a tendency to move at a fast pace when such

equipment is employed. Therefore, not only were members of the Court and our Hearing Manager equipped with iPads and an appropriate document management application (GoodReader), but so too were counsel and the more important witnesses.

[12] As confirmed by surveys of members of the Court and the parties, the use of iPads was a tremendous success. Hearings proceeded at a significantly faster pace, with all pre-lodged evidence and submissions being uploaded to the iPads, and mostly pre-read by all participants. (The faster pace can be understood when one compares our new ability to dot and dart between electronic pages while witnesses are being questioned or submissions addressed, with traditional methods of moving ponderously amongst many folders of paper materials[2]). Counsel found themselves confidently cross-examining witnesses from notes, references and cross-references annotated on the electronic materials. They advanced submissions to the Court wielding an iPad instead of floundering through piles of paper contained in countless folders. New materials becoming available during the course of the trial, including the transcript, were steadily uploaded to the iPads and again could be easily referred to by members of the Court and parties.

[13] Some difficulties were initially experienced around the uploading of materials and backing up of the iPads. The Ministry of Justice has not been keen on File Transfer Protocol ("FTP") programmes and Cloud services often employed to achieve these things. Ultimately, the Court was introduced to an FTP called "Box," which is understood to be encrypted and secure. The recommendation came from some senior commercial litigators who had represented parties in a High Court trial where the protection of commercially sensitive material had been particularly important to their clients. The need for a high level of confidentiality is much less significant in proceedings before the Environment Court, but is of course helpful on the rare occasions when confidentiality orders are made. By the end of 2014 the operations of uploading case materials to multiple devices, and backing them up on a regular basis, was working relatively seamlessly using Box.

[14] A possible issue arising from the use of iPads in hearings might occur once again for self-represented litigants, at least for those without access to this technology. Hearings definitely proceed at a faster pace when iPads are in use by the key players, because the need to plunge through vast quantities of paper is avoided. Any difficulties for self-represented parties have, however, barely surfaced, I consider for the following reasons. First, self-represented litigants are commonly focussed on only one or a small number of

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[2] There is one limitation that should be noted. While iPads are great for examination of detail on drawings, plans, maps etc (in particular by pinching the scale in and out), they have their limitations when the whole of a large plan or other graphic exhibit needs to be the subject of overview. In the latter instance, there currently remains little viable alternative to the use of the full size paper exhibit.

issues in our complex cases, and are likely to bring to court only small quantities of paper material for their reference. The pace of the hearing is little affected on such occasions. Secondly, some self-represented litigants are well-resourced and computer-savvy, so will not be disadvantaged. Thirdly, the Court often encourages self-represented litigants to band together and arrange common representation. On those occasions, the problem is resolved because counsel are retained and use of iPads proceeds without anyone being disadvantaged.

[15] An example of these factors at work has been seen in the Waiheke Marina case I have already mentioned. About 290 of the 310 parties got together under the umbrella of a well-resourced community group that appointed counsel and engaged a number of expert witnesses. Counsel and expert witnesses employed iPads. (This coalescing of interests was brought about through the assistance of Process Advisors to Submitters appointed by the Court[3]). The remaining self-represented parties have generally been interested in a limited number of issues in this multi-faceted case, so the first of the three mitigations discussed in the last paragraph has prevailed.

[16] It may yet occur in some cases that self-represented parties without iPad access or skills might need to be accommodated by modulation of the pace of the hearing. This might be so particularly if there are large numbers of such parties. I think such cases will be rare. One way to mitigate the problem would be to make use of the large electronic screens that are found in our more recently fitted-out courtrooms. The management of material being displayed on the screens would need to be undertaken by a member of the Court staff, or a person appointed by a key party – probably the applicant seeking consent, or the council. This approach was successfully undertaken in a large case about a motorway that I conducted a few years ago.

Electronic filing pilot

[17] The Environment Court would like to move as soon as possible to pilot electronic filing on behalf of all civil courts in New Zealand. In 2006, the Court was selected by all Benches and the Ministry of Justice to run such a pilot. What was then commenced proved cumbersome, process-laden and ultimately unaffordable, and was cancelled (entirely with

[3] The processes in the Environment Court can be daunting for the uninitiated, and the progress of cases can be impacted by the time that can be needed to cope with the levels of enquiry generated and the need to assist such persons concerning process. Appointment of Process Advisors can assist to keep cases moving and allow fair participation by all. The advice is free to self-represented parties, the cost often being recovered from the Applicant by the Court. It is important to stress that the Advisors are not authorised to offer substantive advice about the law or the technical topics on which evidence is presented. In that sense the system should be seen as contrasting with traditional legal aid systems.

justification) in the 2011 New Zealand Government budget round. It appeared to be taking on the character of yet another large, expensive, home-grown project whose ultimate success could not be guaranteed. (The basis of selection of our Court for the project had been its relatively small size, its agility, and ability to use statutory directions to govern process.)

[18] The Environment Court was selected again, in 2013, this time to pilot a small electronic filing system on behalf of all Civil Courts and Tribunals. Our Court had at that stage been introduced to some "cheap and cheerful" examples of the art in Australia. In particular, in 2013, the Supreme Court of Victoria Australia was running an inexpensive pilot to manage cases bearing some similarity to those of the New Zealand Environment Court (the Victorian Court's Technology, Engineering and Construction List). In 2014 that pilot, having been successful, became business-as-usual, and was rolled out to a number of Lists, the ultimate intention apparently being, to all of them. (The system, "*Red Crest*", has been described in more detail by others at this conference, but I note is described on the website of that Court as its "electronic case management system for use in all new judge-managed proceedings that fall under the Commercial, TEC, IP, and Corporations Lists". It is stated to be hosted in a secure Cloud-based environment which allows parties to electronically file and manage documents related to their proceeding from any location with access to the internet, 365 days a year; access to case files is securely limited to appropriate parties; and practitioners can electronically lodge, process and retrieve court documents relating to civil cases through the Court's electronic lodgement service, at a fee).

[19] Sadly in our view, the apparent intention of the NZ Ministry of Justice as at early 2014, to have the Environment Court commence a similar pilot on behalf of Civil Courts and Tribunals, seems to have stalled. Civil Courts and Tribunals are, however, undergoing process and documentation studies preparatory to yet another approach to establishing e-filing in New Zealand. With the greatest of respect to those involved, it is to be hoped that there will not be thought a need to invent a completely new wheel in New Zealand, and that the hard work of the Supreme Court of Victoria, Western Australia, and others, will be able to be harnessed.

[20] As confirmed by Justice Elliott's paper earlier in this conference, the cases transacted in the Supreme Court of Victoria involve mainly high-level legal input by counsel and solicitors. (Exceptions are apparently occasionally made for self-represented defendants, but it remains for a protocol to be developed for wider participation by self-represented parties). Possibly in contrast, the NZ Environment Court hosts cases in which there can be large numbers of self-represented litigants. The issues for e-filing would be very similar to

those we are experiencing with current web-based case management as I have already described. I consider the issues to be manageable if identified early and addressed squarely.

The ultimate goal

[21] Visitors to our registries and chambers are flabbergasted at the quantities of paper that confront them. These visitors have recently included Ministers of the Crown and senior officials. There seems to be no disagreement that it is important to wage war on paper, and the visitors take no persuading that there are efficiencies to be gained from the use of electronic systems, leading for instance to savings of many days of hearings, and the avoidance of lugging mountains of paper around the countryside (including dozens of lever arch folders of material per panel member for the larger hearings).

[22] The ultimate goal is, I suggest, to get these various electronic components to “talk to each other” as an integrated system in the quest to become as paperless as possible.

[23] Certainly there are mild security issues (less for the Environment Court than say commercial courts), particularly around the use of iPads, but steps can be taken to largely overcome these. Also, the situation of self-represented litigants with limited access to computers, and possessed of limited skills, cannot be overlooked. I look forward to the day when all members of the Court and their hearing managers, and parties, run cases (particularly the larger cases) through iPads, with evidence being exchanged amongst parties via web portal and lodged in Court electronically and materials uploaded seamlessly to the Court’s database and to the tablets.

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