Environmental Law Centre Scotland

Friends of the Earth Scotland

Access to Justice in Environmental Matters

Friends of the Earth Scotland and Environmental Law Centre Scotland Policy Briefing

June 2013

Friends of the Earth Scotland and the Environmental Law Centre Scotland are calling for full implementation of the UNECE Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (the 'Aarhus Convention') in Scotland.

The Aarhus Convention recognizes every person's right to a healthy environment – as well as his or her duty to protect it, including when necessary through the courts. The environment cannot go to court, so it depends on individuals and NGOs to take action on its behalf.

Scotland is in breach of obligations in relation to access to justice in environmental matters, particularly in relation to cost and substantive review. This is the subject of ongoing EU infraction proceedings against the UK.[1]

The Government's Making Justice Work programme and commitment to consult on an Environmental Tribunal presents Scotland with an important opportunity to comply with Aarhus and enable citizens to "protect and improve the environment for the benefit of the present and future generations".[2]

Environmental rights

The Aarhus Convention aims to improve the accountability, transparency and responsiveness of developers, decision makers and authorities in relation to the environment. The first two 'pillars' of Aarhus enshrine rights to access information and participate in decision making that impacts on the environment. EU Directives[3] are in place to implement many of these provisions. In Scotland these are translated into freedom of information[4] and environmental assessment[5] legislation.

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[1] In April 2011 the EC announced it was taking the UK to court for non-compliance with the access to justice provisions within the Public Participation Directive, particularly in relation to the high cost of environmental cases. The case is due to be heard later this year http://europa.eu/rapid/press-release_IP-11-439_en.htm?locale=en

[2] Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, preamble

[3] For Pillar 1, Directive 2003/4/EC on public access to environmental information (repealing Council Directive 90/313/EEC); for Pillar 2 Directive 2003/35/EC providing for public participation in planning, which amended Directives 85/337/EEC (Environmental Assessment) and 96/61/EC (Integrated Pollution Prevention and Control) in relation to public participation and access to justice.

[4] Environmental Information (Scotland) Regulations 2004 http://www.hmso.gov.uk/legislation/scotland/ssi2004/20040520.htm

[5] Environmental Assessment (Scotland) Act 2005 http://www.legislation.gov.uk/asp/2005/15/contents and Environmental Impact Assessment (Scotland) Regulations 2011 http://www.legislation.gov.uk/ssi/2011/139/signature/made

The third 'pillar' of Aarhus requires that members of the public and NGOs have access to justice if rights under the former pillars are denied and if national environmental law has been broken.[6] These procedures must include review of both the "substantive and procedural legality of decisions, acts or omissions", provide effective remedy and be "fair, equitable, timely, and not prohibitively expensive".[7]

The number of judicial reviews and statutory appeals on environmental issues in Scotland is low. The majority are taken by developers or third parties with a commercial interest, with very few taken on an Aarhus basis.[8] Fears that changes to comply with Aarhus allowing better access to the courts will open the flood gates and have an adverse impact on the economy are unfounded. The introduction of a leave stage, as proposed in the Court Reform (Scotland) Bill, will serve to filter out any frivilous or unmeritorious cases. Rather, the benefit of more open access to the courts comes from improved engagement and decision making from developers and public authorities who know their actions can be challenged. In other words, it is the credible threat of legal action which is crucial to ensure decision making is of a high quality. We consider that this largely absent in Scotland.[9]

While important strides have been made recently in case law and with the introduction of Protective Expense Orders (PEOs), we are concerned that significant difficulties in accessing justice in environmental cases remain, The interrelationship between the three pillars (information, participation and then challenge if necessary) is that a failure in the implementation of the third pillar has negative effect on the performance of duties under the first two pillars of Aarhus.

Barriers to access to justice in environmental matters

Prohibitive Expense

Aarhus – and the EU Public Participation Directive – requires that access to justice must not be 'prohibitively expensive'. In Scotland, as throughout the UK, raising challenges to environmental decisions will generally be by way of judicial review or statutory review. There is no doubt that these procedures are very expensive, and prohibitively so for the ordinary person. In *Uprichard v Fife Council*[10], the petitioner faces a total bill of £173,000. In *McGinty v Scottish Ministers*[11], despite being awarded the first ever Protective Expense Order (PEO) in Scotland, the estimation of Mr McGinty's costs was around £80,000 if he was to lose at the Outer House stage.

A recent ruling from the CJEU in *R Edwards v Environment Agency* confirms that the requirement for proceedings to be 'not prohibitively expensive' applies to all costs arising from engaging in judicial proceedings,[12] therefore the introduction of PEOs is not sufficient to meet this criteria.

Protective Expense Orders

We welcome the introduction of rules of court for Protective Expense Orders in March 2013, which limit liability for the other sides' costs to £5,000. However the new rules of court are of limited value. Firstly, Petitioners can still face tens of thousands in costs should they lose. The cross cap for respondents' liability assumes that the Petitioners own legal costs including court fees, lawyers and counsel will be up to £30,000. While arguably this sum is too low an estimation of the real costs

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[6] Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Article 9 http://www.unece.org/env/pp/documents/cep43e.pdf

[7] Aarhus Convention Article 9 (4)

[8] Brodies, Feb 2013 Judicial Review of Planning Decisions in Scotland, http://www.brodies.com/sites/default/files/pages/planning%20e-update%20report%20february%202013.pdf

[9] An example of this is the recent complaint regarding continual planning breaches by the Trump organisation in its development at Menie (see http://www.heraldscotland.com/news/environment/trump-criticised-for-planning-breaches.21352328); given the difficulties that one resident had in trying to obtain access to the courts over a number of persmissions, including one over her own home, it is not surprising that no other resident or NGO has considered taking legal action

[10] http://www.scotcourts.gov.uk/opinions/2011CSIH59.html

[11] http://www.scotcourts.gov.uk/opinions/2011CSOH163.html

[12] R Edwards v Environment Agency http://www.bailii.org/eu/cases/EUECJ/2013/C26011.html

involved in complex environmental cases under the current system, it means that a Petitioner who loses their case is likely to face a minimum bill of £35,000 – considerably more than average annual Scottish earnings – for a case in which they may have had no financial interest. [13]

Furthermore, unlike in England and Wales, the new PEO rules do not apply to all environmental cases, but only those falling under the scope of the Public Participation Directive. This effectively means that only the small number of developments which have an Environmental Impact Assessment are subject to the rules of court on PEOs.

In addition, there is a considerable degree of judicial discretion written into the rules, particularly in relation to eligibility and the cost of appeals. Such an approach is contrary to the Aarhus requirement for certainty.[14] Because a petitioner may incur not inconsiderable expense by the point they are awarded (or not awarded) a PEO, we consider this will continue to put potential litigants off, the so-called 'chilling effect'.

- **Recommendation:** extend rules of court to include all public interest environmental cases; review judicial discretion in provisions regarding eligibility and liability for expenses in appeals to provide for more certainty for potential litigants; introduce guidance for the courts to ensure judges consider all costs for petitioners when reviewing the level of either the cap or cross-cap.

Legal aid

While recent reforms in Scotland mean that more adults now qualify for civil legal aid purely in financial terms,[15] applying for legal aid is an increasingly complex and time consuming process.

Further, the legal aid system in Scotland has granted very few awards of legal aid for environmental cases and effectively prohibits aid for public interest cases, which most environmental challenges are.[16] Civil legal aid regulations strongly imply that a private interest is not only necessary to qualify for legal aid, but that a wider public interest will effectively disqualify the applicant.[17] Due to the low levels of payment for legal aid compared with market rates, and the complexities of judicial review cases, individuals can struggle to find a lawyer willing to represent them on this basis.

This situation is exacerbated by the Scottish Legal Aid Board's recent introduction of a system whereby all the expenses of the case to be covered by legal aid (including Counsel's fees, solicitors fees and outlays) will be capped at £7,000. We think that £7,000 is an unrealistic figure to run a complex environmental judicial review. While applications can be made to increase the cap, this system is likely to further lessen the number of solicitors willing to act in this area as they run the risk of incurring liability for counsel's fees and outlays which are not covered by the level of the cap.

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[13] http://www.legislation.gov.uk/ssi/2013/81/made

[14] ACCC/C/2008/33 http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/C33_Findings.pdf

[15] Although, in the first instance, an individual identifying a problem with a potential legal solution may need to apply for financial help for advice and assistance, and this kind of legal aid has more restrictive financial criteria than civil legal aid. As as a result, there is more limited access to a solicitor to obtain initial advice and help on environmental issues. http://www.slab.org.uk/getting_legal_help/Extended_eligibility.html

[16] In correspondence with the Scottish Parliament's Public Petitions Committee (regarding FoES petition on Aarhus compliance), SLAB indicated that in a three-year period (2008-2011) only two environmental cases where Regulation 15 was considered had been granted legal aid http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/40063.aspx. In the same period, three cases had been refused Legal Aid citing Regulation 15, and all were environmental cases. Correspondence with SLAB in April 2012 confirmed that two of the three cases refused were later granted on appeal, and by that point a further award of Legal Aid had been granted in a case where Regulation 15 was relevant, amounting to a total of 5 cases granted over a 4 year period. We consider that it is likely most of these cases had a strong private interest. To the best of our knowledge, only one of these grants was in a public interest matter, and this was when the case was on appeal, at which point SLAB somewhat arbitrarily decided that Regulation 15 did not apply to the appeal proceedings.

[17] When deciding whether to grant legal aid, under Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 (http://www.legislation.gov.uk/ssi/2002/494/regulation/15/made), the Scottish Legal Aid Board (SLAB) looks at whether 'other persons' might have a joint interest with the applicant. If this is found to be the case SLAB must not grant legal aid if it would be reasonable for those other persons to help fund the case. Further, the test states that the applicant must be 'seriously prejudiced in his or her own right' without legal aid, in order to qualify. For a more detailed dissection see Frances McCartney, 'Public interest and legal aid' Scots Law Times, Issue 32: 15-10-2010

Moreover, while environmental cases tend to affect more than one person, community groups cannot apply for legal aid in Scotland. By contrast, England and Wales has a system that allows the joint funding of a case, where the Legal Services Commission grants legal aid to an individual subject to a wider community contribution, based on what the community group can pay. By their very nature environmental cases tend to affect a large number of people, therefore it makes sense to provide for joint applications. It is also a more sensible use of public money than potentially funding multiple individual cases and, in cases against public authorities, defending those actions.

Lastly we are aware of difficulties that arise due to the restrictions on protection from liability for expenses under the Legal Aid (Scotland) Act 1986. Generally in Scotland someone with a full legal aid certificate will have any liability for expenses modified unless they have acted in a manner which has prolonged or increased the costs of the litigation. However, these provisions do not apply to someone only partially in receipt of legal aid, who is therefore not designed as an 'assisted person' for the purposes of the legislation. Given the uncertainties over obtaining legal aid in environmental cases, and individual financial circumstances, many persons would be reluctant to raise proceedings until full legal aid is granted. However, this can mean that there are months of delay before a case is raised, which in turn only adds more uncertainty for the public authority and developer.

- **Recommendation:** the removal of Regulation 15 of Civil Legal Aid Regulations – prohibiting aid for public interest cases – is essential for Aarhus and PPD compliance; reform the system so as to enable community groups to apply jointly for legal aid in public interest cases; alter the rules on assisted person status; consider a public funded advice centre for initial advice on environmental claims;

Court fees

The Scottish Government is in the process of implementing a policy of full cost recovery in court fees. The Civil Courts exist to provide a vital public service to uphold the rule of law, and should be funded with that function as a core principle. Fee proposals for the Court of Session will have a serious impact on parties seeking access to justice under the Aarhus Convention, because the complexity of environmental cases and a lack of specialization in the judiciary means environmental judicial reviews tend to require lengthy hearings, and fees include an hourly rate for time in court. The UN/ECE recommends reductions in courts fees as a route to tackle prohibitive expense.[18]

Fees for the Court of Session are already very expensive particularly in relation to the time spent in court in judicial review cases. For example in *McGinty* the Outer House hearing took 18 hours, which we estimate would incur costs of approximately £1,620 for the hearing alone; in Walton hearings in the Outer House lasted for 22 hours, and in the Inner House for 18 hours amounting in our estimate to £5,580. Under the new regime, McGinty's costs for time spent in court alone would double to £3,240 in 2014; and Walton's more than double to £12,060.

Petitioners in receipt of legal aid certificates do not pay court fees, however as outlined above, it is extremely rare for legal aid to be awarded in environmental cases.

- **Recommendation:** the policy of full cost recovery in relation to environmental cases should be reviewed in the context of the requirement for proceedings to be 'not prohibitively expensive' in relation to all costs arising from engaging in judicial proceedings.

Substantive review

Aarhus requires that "members of the public concerned...have access to a review procedure...to challenge the *substantive and procedural* legality of any decision, act or omission...relevant [to] provisions of this Convention" and that these procedures "shall provide adequate and effective remedies". [19] The Public Participation Directive also requires substantive review in relation to its provisions.

[18] UN/ECE Aarhus Implementation Guide 2000
[19] Aarhus Convention Article 9 (1)

The Scottish Courts rarely stray into the substantive merits of cases and are openly reluctant to do so.[20] While understandably there is some tension between the ability of governments to take decisions and be accountable for them, and role of judges in policing such decision-making in considering applications for judicial review, there appears to be a contrast between the jurisprudence of public law cases north and south of the border. This may partly be due to a lack of specialism in the Scottish Courts. We note that the Court Reform Bill sets out to implement the Civil Courts Review recommendations in respect of judicial specialisation and we welcome this. However, we consider that there is scope to revise judicial review to incorporate a substantive element including the merits of a case.

As environmental law becomes not only increasingly technical and complex, but increasingly important to society, it is seen to merit specialisation. The number of environmental courts and tribunals (courts specifically designed to hear environmental cases) worldwide more than doubled between 2007-2009; there are now over 350 environmental tribunals in 41 countries.[21] We note that the Government intends to establish an independent tribunal to hear appeals against fixed and varible monetary penalties introduced in the Regulatory Reform (Scotland) Bill,[22] and suggest this is a sensible opportunity to consider the creation of a tribunal with a broader jurisdiction.

Environmental courts and tribunals allow judges to become specialists and draw upon relevant scientific expertise review in a way that is not possible in the normal courts. A specialist court or tribunal could also give the judiciary greater authority and confidence examining issues of substantive review.

- **Recommendation:** as a means of fulfilling the Government's manifetso commitment, establish an independent expert working group to look into how an Environmental Court or Tribunal could improve access to justice in terms of cost, timing and substantive review; reform the judicial review procedure to enable judges to review the merits of a case where appropriate, for example where Local Authority decision making appears to be in conflict wih national policy.

Timeliness

Aarhus requires that access to justice in relation to its provisions is timely. Protracted legal proceedings are costly and stressful, particularly for first time litigants, are not in the interests of petitioners, respondents or the courts. The emphasis of this requirement is clearly weighted towards speedy decisions by the courts rather than any requirement for individiuals to take cases promptly.[23]

Decisions from the Court of Session are notoriously a long time coming, with the petitioner in *McGinty v Scottish Ministers* waiting over a year for a ruling. While improvements to case management proposed under the Making Justice Work Programme should help speed the sysytem up for all parties, we are concerned about current proposals in the Court Reform (Scotland) Bill to introduce a three-month time limit for Petitioners.

Introducing such a time limit may help provide certainty for developers, but it will cause problems for petitioners in complex cases and particularly where there is uncertainty in funding. As outlined above there is a real issue with a finding a solicitor able to act on a *pro bono*, reduced fee or legally aided basis, and the introduction of a presumptive three-month time limit will exacerbate this.

A three-month time limit will create a particular barrier for community groups who will find it extremely difficult to organise, develop collective understanding, agree a course of action and raise the necessary funds to go to court if that is their decision.

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[20] For example Lord Brailsford in McGinty v Scottish Ministers http://www.scotcourts.gov.uk/opinions/2011CSOH163.html
[21] Greening Justice, 2009 http://www.accessinitiative.org/resource/greening-justice
[22] Explanatory notes to Regulatory Reform (Scotland) Bill, para 15 page 26 http://www.scottish.parliament.uk/S4_Bills/Regulatory%20Reform%20(Scotland)%20Bill/b26s4-introd-en.pdf
[23] UN/ECE Aarhus Implementation Guide, 2000 p134

Further, we note that there is often a considerable grey area as to when exactly the time limit starts from in respect of the exact decision to be challenged. Although we note there is a degree of flexibility is contained in the Bill, a presumptive three-month limit is likely to put potential litigants off (a further 'chilling effect').[24]

- **Recommendation:** given the historical culture of lack of awareness of legal rights in Scotland and the comparable importance of Aarhus cases to Human Rights cases, if the Government proceed with introducing time limits, it should introduce a presumptive time limit of a year rather than the proposed three months for such cases; a plea of mora can be used by respondents where petitioners have unreasonably delayed.

Standing

Aarhus requires that members of the concerned public and NGOs promoting environmental protection have standing in the courts. In England and Wales the application of the 'sufficient interest' test is seen as a relatively low hurdle for individuals, communities and NGOs in cases of genuine public interest.[25]

In a landmark ruling in 2011, *Axa v Lord Advocate and others*,[26] the Supreme Court replaced the sometimes obscure Scots' Law test of 'title and interest' to sue with the broader 'sufficient interest'. This means that individuals in Scotland now have the right to take public interest cases to court. The Court also noted in this case that the development of public law in Scotland had been severely hindered by decades of judge-made law, strongly implying need for Government reform.

We welcome the Government's acknowledgment in the Court Reform (Scotland) Bill consultation of the changes made in *Axa*. However it is worth noting that the Scottish Courts have not been quick to apply the new test. In *Walton v Scottish Ministers,*[27] the Court of Session's Inner House questioned not only his standing as a person aggrieved under statutory provisions in the Roads Act, but expressed the view that he would not have had sufficient interest to take a judicial review on the same matter. On Walton's appeal the Supreme Court strongly criticised these comments and made it clear that legal challenges to important decisions and acts by public authorities are a vital means of upholding the rule of law, and emphasised the importance of individuals and NGOs taking cases on behalf of the environment. [28]

What needs to change

Far from enabling citizens to protect the environment in court when necessary, the current system actively hinders such action with expense a major factor in this. It is fundamentally undemocratic that going to court in the public interest is out of bounds to all but the very wealthy.

The Government's 'Making Justice Work' programme and commitment to explore environmental tribunals provides the perfect opportunity to build on progressive Freedom of Information and Strategic Environmental Assessment legislation, by finally implementing the last pillar of Aarhus, and securing access to environmental justice in Scotland.

We recommend:

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[24] See for example *Bova and Christie v The Highland Council and others* [2013] CSIH 41 http://www.scotcourts.gov.uk/opinions/2013CSIH41.html and also *R (on the application of Maria Stella Nash) v Barnet London Borough Council & (1) Capita Plc (2) EC Harris LLP (3) Capita Symonds (Interested Parties)* [2013] EWHC 1067 (Admin)

[25] Lord Gill Review of the Scottish Civi Courts 2009

[26] http://www.supremecourt.gov.uk/decided-cases/index.html

[27] http://www.scotcourts.gov.uk/opinions/2012CSIH19.html

[28] www.supremecourt.gov.uk/docs/uksc-2012-0098-judgment.pdf

- **Protective Expense Orders:** extend rules of court to include all public interest environmental cases; review judicial discretion in provisions regarding eligibility and liability for expenses in appeals to provide for more certainty for potential litigants; introduce guidance for the courts to ensure judges consider all costs for petitioners when reviewing the level of either the cap or cross-cap.

- **Legal Aid:** the removal of Regulation 15 of Civil Legal Aid Regulations – prohibiting aid for public interest cases – is essential for Aarhus and PPD compliance; reform the system so as to enable community groups to apply jointly for legal aid in public interest cases; alter the rules on assisted person status; consider a public funded advice centre for initial advice on environmental claims;

- **Court Fees:** the policy of full cost recovery in relation to environmental cases should be reviewed in the context of the requirement for proceedings to be 'not prohibitively expensive' in relation to all costs arising from engaging in judicial proceedings.

- **Substantive Review:** as a means of fulfilling the Government's manifetso commitment, establish an independent expert working group to look into how an Environmental Court or Tribunal could improve access to justice in terms of cost, timing and substantive review; reform the judicial review procedure to enable judges to review the merits of a case where appropriate, for example where Local Authority decision making appears to be in conflict wih national policy.

- **Timlieness:** given the historical culture of lack of awareness of legal rights in Scotland and the comparable importance of Aarhus cases to Human Rights cases, if the Government proceed with introducing time limits, it should introduce a presumptive time limit of a year rather than the proposed three months for such cases; a plea of mora can be used by respondents where petitioners have unreasonably delayed.

Contact:

Mary Church, Campaigns Co-ordinator
mchurch@foe-scotland.org.uk , 0131 243 2716

Appendix: Access to Justice in Environmental Matters in other Jurisdictions

Methods of implementing Aarhus across Europe vary greatly; however examining practical application in other states can help illustrate the options for better implementation in Scotland.

Overcoming prohibitive costs

It is enshrined in **Portuguese** law that access to justice cannot be denied for economic reasons. All individuals who can demonstrate that they can't afford in part or whole to meet the costs of procedures can be granted legal aid, including legal assistance in bringing the case before the court and exemption from court and attorney's fees. NGOs are exempt from court fees and legal charges, the main cost barrier being their own legal representation which sees the overall cost of taking a case at around €2,000-€3,000 (significantly lower than the UK).

This comprehensive system of legal aid and NGO cost exemption has not led to the courts being overrun by cases; in fact, Portugal has one of the lower numbers of environmental court cases in Europe.[29]

In **Denmark**, a system of independent administrative appeal boards, with legal and technical expertise, provides an efficient and far cheaper alternative to an expensive judicial system. The claimant must pay a small fee (approx €65), which is reimbursed if the appeal is won. While the Judicial route is more expensive, it is less often required due to the comprehensive nature of the appeal boards, and there is the possibility of legal aid both for individuals and NGOs.[30]

In **Spain,** the system of legal aid goes a considerable way to compensating for the expenses of judicial procedure. Moreover, the loser pays principle in practice only applies when the loser is the administration: only in cases of *mala fides ('bad faith')* do the courts impose costs on a private losing party.

Likewise, in the **Netherlands,** only if the party has made an unreasonable use of the right to initiate a lawsuit do the courts impose costs on the loser, while in **Finland** the loser does not pay if the action is against a public authority.[31]

Overcoming restrictive interpretations of standing

Denmark's administrative appeal boards system admits appeals from organisations whose main objective is to protect nature and the environment; or to safeguard recreational interests; as well as any party or individual with a significant interest in the outcome of the case.

Protection of the environment by the state and the fundamental right of every citizen to a healthy and ecologically balanced human environment, are enshrined in **Portugal's** constitution. This progressive legal framework grants standing via the legal right of *actio popularis* (action in the name of the collective interest) to redress offences against the preservation of the environment. No property right, geographical vicinity or specific engagement in bureaucratic procedure criteria is necessary to initiate such a case.

Spain's constitution also recognises environmental rights, and environmental NGOs are granted standing. For individuals with a case that does not fall within *actio popularis* courts require demonstration of a 'legitimate interest', but this need not be direct or individual. Indeed, 'environmental interest' has been recognised as one of the legitimate interests that may allow for an individual to be granted standing. Nevertheless, that interest has to be 'real, effective and actual',

[29] For more detailed analysis see Milieu 2006, *Country report for Portugal on access to justice in environmental matters*
[30] For more detailed analysis see Milieu 2006, *Country report for Denmark on access to justice in environmental matters*
[31] See Milieu country reports http://ec.europa.eu/environment/aarhus/study_access.htm

but it is enough to show an advantage or legal utility derived from the reparation demanded, and this advantage or benefit does not have to be economic or material but it can be moral.

Environmental courts and tribunals

In **Finland**, the grounds for appeal include both the substantive and procedural legality of the decision in question; this is achieved through an administrative court system with fairly low costs and few delays.

Australia, although not a signatory to Aarhus, has taken the lead in establishing environmental courts and tribunals, and has been praised for the innovative techniques they used, such as mediation and arbitration to resolve disputes. New South Wales, Queensland and South Australia have separate environmental courts to hear environmental cases, while the remaining five states have specialist tribunals within the courts to hear environmental cases. The courts are seen to have greater independence and higher status than tribunals; they have greater powers and can conduct judicial review.[32]

The broad application of standing has been interpreted by the courts as indicative of the 'true role' of the courts, that is, 'administering social justice'[33]; and that for open standing to 'be of any value' any order of the courts 'must respond to the interests of the general community'.[34] Indeed, the Land and Environment Court has broad discretion when it comes to applying remedies: under the 1979 Act, the court may 'make such order as it thinks fit to remedy or restrain a breach' that has already been committed or that will be committed unless restrained by the court.[35] Furthermore, the view of the courts is that this system has 'significantly enhanced the quality of environmental decision-making'.[36]

New South Wales provides 'open standing' to enforce breaches of provisions of the 1979 Environmental Planning and Assessment Act at the Land and Environmental Court. What's more, since 1997 this also applies to the 'breach or threatened breach *of any Act* if the breach is causing or is likely to cause harm to the environment'.[37] This allows *any person* to bring proceedings at the Court, whether or not their rights have been infringed as a consequence of the breach.[38] Again, this remarkably liberal provision on standing has not seen the courts flooded with litigation, with statistics showing that individuals and NGOs only account for a maximum of 20% of registrations for proceedings of civil enforcement and judicial review within any year.[39]

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[32] Stein, 2000, Down Under Perspective of the Environmental Court Project http://www.ipc.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_stein_270600

[33] F Hannan Pty Ltd v Electricity Commission of New South Wales, in Access to Justice in Environmental Law - An Australian Perspective, Lord Justice McClellan 2005, http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mcclellan120905

[34] Access to Justice in Environmental Law - An Australian Perspective, Lord Justice McClellan 2005, http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mcclellan120905

[35] Environmental Planning and Assessment Act 1979 Section 124

[36] Access to Justice in Environmental Law - An Australian Perspective, Lord Justice McClellan 2005, http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mcclellan120905

[37] Stein, 2000, Down Under Perspective of the Environmental Court Project http://www.ipc.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_stein_270600

[38] See http://www.austlii.edu.au/au/legis/nsw/consol_act/epaaa1979389/s123.html

[39] Stein, 2000, Down Under Perspective of the Environmental Court Project http://www.ipc.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_stein_270600, and Access to Justice in Environmental Law - An Australian Perspective, Lord Justice McClellan 2005, http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mcclellan120905