OPERATION OF THE LAND AND ENVIRONMENT COURT: HOW IT WORKS AND WHAT TO EXPECT

Justice Peter Biscoe

A paper delivered to the Australian Environment Business Network's **New Environmental Laws Conference – State of Play**, on 5 August 2009

1. I have been invited to speak on the operation of the Land and Environment Court of New South Wales: how it works and what to expect.

2. The Land and Environment Court was constituted in 1979 as a superior court of record, which gives it the same status as the Supreme Court of New South Wales[1].

JURISDICTION

3. The Court's jurisdiction is unusual because it includes not only conventional litigation but also merit appeals. In a merit appeal the Court has the same functions and discretions as the governmental person or body whose decision is the subject of the appeal[2]. In other words, the Court stands in the shoes of that person or body (for example, the council in the case of a merit appeal from a council refusal of a development application).

4. The Court has jurisdiction to hear and determine matters arising under many environmental, planning and mining statutes: s 16.

5. The Court has a civil jurisdiction and a summary criminal jurisdiction. The Court's jurisdiction is divided into 8 classes[3]. Classes 1 to 4 and 8 constitute its civil jurisdiction. Classes 5, 6 and 7 constitute its criminal jurisdiction. The eight classes are described as follows:

[1] s 5(1) *Land and Environment Court Act 1979* (*LEC Act).*
[2] s 39(2) *LEC Act.*
[3] ss 17-23 *LEC Act.*

Class 1	Environmental planning and protection appeals. In practice, most are appeals from refusals to grant development consents or against conditions of development consents.
Class 2	Local government and miscellaneous appeals and applications.
Class 3	Land tenure, valuation, rating and compensation matters. This includes claims for compensation for the compulsory acquisition of land.
Class 4	Environmental planning and protection and development contract civil enforcement.
Class 5	Environmental planning and protection summary enforcement.
Class 6	Appeals from convictions relating to environmental offences.
Class 7	Other appeals relating to environmental offences
Class 8	Mining matters.

JUDGES AND COMMISSIONERS

6. Currently, the Court is composed of six judges (including the Chief Judge), nine full time commissioners (including the Senior Commissioner) and a number of part-time acting commissioners. Commissioners and acting commissioners may be, and most are, appointed on the basis of non-legal, technical backgrounds such as town planning, engineering and valuation[4]. At present, the Senior Commissioner and two other commissioners are lawyers.

7. Classes 4, 5, 6 and 7, which are conventional legal proceedings, can only be heard by a judge[5]. Classes 1, 2 and 3, which are merit appeals, may be heard by a judge or by a commissioner. In practice, the vast majority of such matters are heard by commissioners, except that compensation claims for compulsory acquisition of land are usually heard by a judge. Occasionally, a judge will hear an important case of another type in classes 1 to 3, such as a development appeal or valuation appeal, usually assisted by a commissioner.

[4] s 12 *LEC Act*.
[5] s 33 *LEC Act.*

8. Civil matters in class 8 (mining) may be heard by a judge or by a commissioner who is an Australian lawyer. When a commissioner who is an Australian lawyer hears a mining matter, the commissioner is called a "Commissioner for Mining". It is anticipated that criminal jurisdiction to hear prosecutions for offences under mining legislation will be conferred on the Land and Environment Court before long and that they will be heard only by a judge.

9. Commissioners hear matters by way of delegated authority from the Chief Judge[6].

APPEALS

10. There is no appeal from a judge or commissioner except on a question of law.[7] An appeal from a judge is to the NSW Court of Appeal. An appeal from a commissioner is to a judge.

JUST, QUICK AND CHEAP RESOLUTION OF THE REAL ISSUES IN DISPUTE IN CIVIL PROCEEDINGS

11. There are two essential things to understand about how the Land and Environment Court operates in civil proceedings.

12. First, the Court is committed to facilitating the just, quick and cheap resolution of the real issues in dispute.

13. Secondly, in order to achieve that object, the Court has adopted rigorous case management procedures, including alternative dispute resolution mechanisms, to achieve that result.

14. This philosophy has been endorsed by the NSW Parliament, which has mandated in civil proceedings a rigorous regime[8] which will often require the hacking away of a morass of technicalities and excuses for delay put forward by less than diligent litigants[9]. The regime includes the following:

---

[6] s 36 *LEC Act.*
[7] ss 56A, 57 *LEC Act.*
[8] ss 56-60 *Civil Procedure Act 2005.*
[9] *Hans Pet Constructions Pty Ltd v Cassar* [2009] NSWCA 230 at [47].

(a) the Court, when exercising its powers, must seek to facilitate the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in dispute;

(b) the parties are under a duty to assist the Court to further that overriding purpose;

(c) the parties' lawyers are forbidden from causing their clients to be in breach of that duty;

(d) the Court is obliged to manage proceedings having regard to four stated objects of case management, namely:

- the just determination of the proceedings;
- the efficient disposal of the business of the court;
- the efficient use of available judicial and administrative resources; and
- the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable to the respective parties;

(e) in deciding whether to make any order for the direction or management of the proceedings, the Court must seek to act in accordance with the dictates of justice, including the overriding purpose and objects of case management;

(f) the practices and procedures of the Court are to be implemented with the aim of resolving the issues in such a way that the cost to the parties is proportionate to the importance and complexity of the subject matter in dispute.

15. To these ends, significant powers of case management have been placed in the hands of the courts which, if exercised, can have sharp and even fatal effects on claims. For example, if a party fails to comply with a direction of the court, the court has power to dismiss the proceedings,

strike out a defence and give judgment accordingly, reject evidence or order a party to pay costs10.

SPECIAL PROVISIONS RE MERIT APPEALS

16. In addition, Parliament has made special provision for merit appeals because of their nature (classes 1, 2 and 3)[11].

- first, they are conducted with as little formality and technicality, and with as much expedition as statutory requirements and the proper consideration of the matters before the Court permit;

- secondly, the Court is not bound by the rules of evidence but may inform itself in such manner as it thinks appropriate and as a proper consideration of the matters before the Court permits.

CASE MANAGEMENT

17. The Land and Environment Court's case management procedures and expectations in civil matters are mostly set out in its published Practice Notes (they are currently under revision). Their objects include ensuring that the parties have adequately considered settlement and alternative dispute resolution; that the real issues are defined; that the number and duration of attendance before the Court are minimised; that the parties know what is expected of them each time they attend before the Court, including by usual pre-trial directions attached to the Practice Notes; and that attendances before the Court are minimised and conducted as quickly and cheaply as is reasonably practicable and consistent with justice.

18. The Practice Notes contain provisions common to all classes of the Court's Civil jurisdiction and provisions only applicable to particular classes.

[10] s 61 *Civil Procedure Act.*
[11] s 38 *LEC Act.*

19. The provisions common to all classes include the following:

(a) each party not appearing in person shall be represented before the Court by a legal practitioner or authorised agent familiar with the subject matter of the proceedings and with sufficient instructions to enable all appropriate orders and directions to be made;

(b) legal practitioners and agents for parties should communicate prior to any attendance before the Court with a view to reaching agreement on directions;

(c) it is the responsibility of each party and their representative to consider the orders and directions appropriate to be made to facilitate the just, quick and cheap resolution of the real issues;

(d) the Court may at any stage refer the proceedings to alternative dispute resolution (such as mediation, neutral evaluation or conciliation) where the Court considers that to be appropriate;

(e) if there is any significant breach of the Court's directions, including a breach sufficient to cause slippage in a pre-trial timetable, the parties must notify the Court in writing and provide a written explanation. Parties or their legal representatives may be at risk of being ordered to pay costs if their conduct unnecessarily or unreasonably increases the number of attendances in Court or causes costs to be thrown away;

(f) unnecessary photocopying is to be avoided. This is not a small thing. Experience has shown that unnecessary photocopying can greatly add to the cost of litigation;

(g) provisions concerning expert witnesses.

EXPERT EVIDENCE

20. Expert witnesses must comply with a statutory Expert Witness Code of Conduct, which (among other things) imposes on them an overriding duty

to assist the Court impartially; stipulates that their paramount duty is to the Court and not to any party and that they are not an advocate for a party; and obliges them to work cooperatively with other experts when complying with a direction to confer with them.

21. The Land and Environment Court's Practice Notes require the parties to consider whether expert evidence is genuinely necessary to resolve the issues in dispute. That is because unnecessary expert evidence substantially increases the time and cost of proceedings. Parties are also required to confer in an endeavour to jointly retain a single expert in relation to an issue or to minimise the number of experts. For example, the evidence of surveyors, quantity surveyors, engineers and arborists are often likely to satisfy the criteria for appointment as a parties' single expert.

22. The efficient identification, investigation and resolution of the real issues in contest between experts is greatly facilitated by two requirements:

    (a) the Court directs experts to confer before the hearing to produce a joint report setting out the matters on which they agree, the matters on which they disagree and the reasons for any disagreement;

    (b) at the hearing, experts in the same discipline give their evidence concurrently. That is, they are in the witness box at the same time and can each be questioned on a topic before moving on to another topic. There is even opportunity for them to ask questions of each other.

ALTERNATIVE DISPUTE RESOLUTION

23. The Land and Environment Court actively encourages parties to consider alternative dispute resolution such as mediation, arbitration, neutral evaluation and conciliation.

24. In class 1 development appeals it is usual for the Court to direct that the parties participate in a conciliation conference soon after the proceedings

are commenced. This is an important and effective procedure in development appeals for it often results in the matter settling by agreement.[12]

25. The conciliation involves a commissioner of the Court with technical expertise, acting as a conciliator in a conference between the parties. The conciliator facilitates negotiations between the parties with a view to their achieving agreement as to resolution of the dispute. If they are able to reach agreement, the commissioner can dispose of the proceedings in accordance with the agreement. Even if they are not able to reach agreement, they can nevertheless agree to the same commissioner adjudicating and disposing of the proceedings. If neither agreement is forthcoming, the proceedings are referred back to the Court for the purpose of fixing a final hearing before another commissioner. In that event, the conciliation commissioner makes a written report to the Court setting out that fact and the commissioner's view as to what are the issues in dispute. That is still a useful outcome as it may result in the proceedings being heard and determined more quickly and with less cost.

AGENTS

26. Unlike most courts, legislation permits a person to be represented by an agent (as distinct from a legal practitioner) in civil matters (but not criminal matters) in the Land and Environment Court. In classes 1 to 4, a person entitled to appear before the Court may be represented by an agent authorised in writing. In class 8, a person may appear by an agent only with the leave of the Court.

TRANSFER FROM AND TO SUPREME COURT

27. Sometimes there may be two closely related civil matters where one matter falls within the jurisdiction of the Supreme Court and the other falls within the jurisdiction of the Land and Environment Court. Litigating them in different courts causes wasteful duplication of costs and judicial resources. Recently, in 2009, this situation was improved by legislation which

[12] The machinery for conciliation conferences is in s 34 of the *LEC Act*.

authorises either of those courts to transfer a matter within its civil jurisdiction to the other court if it considers it more appropriate to do so[13].

CRIMINAL PROSECUTIONS

28. I now turn to consider in more detail criminal prosecutions in class 5 of the court's jurisdiction.

29. They are heard and case managed by judges, not by commissioners.

30. They are case managed in a class 5 List by the List Judge on a Friday. The List Judge makes appropriate directions for the orderly, efficient and proper preparation for trial or sentence hearings. As many environmental offences are strict liability offences, there is a high proportion of guilty pleas. One purpose of a directions hearing is to allow the entry of guilty pleas prior to trial.

31. Criminal proceedings in class 5 have traditionally been governed by less rigorous case management than civil proceedings. That has been rationalised on the basis that the accused has a right of silence, criminal proceedings involve the stigma of conviction, and the liberty (or pocket) of the subject are at risk. This hands off philosophy helps to explain why the Court has so far not published Practice Notes in class 5 proceedings.

32. This is about to radically change, largely because of legislation that is expected to be introduced into the NSW Parliament in late 2009. The legislation is expected to adopt the recommendations of the Report of the Trial Efficiency Working Group, which was formed in 2008 to examine inefficiencies in criminal trials. The Working Group was chaired by a former Chief Judge of the Land and Environment Court, Justice McClellan, who is now the Chief Judge of the Common Law Division of the Supreme Court.

33. On 30 April 2009 the Attorney-General announced that the new legislation would give the Court the power to order parties to meet before trial and

[13] Div 2A Pt 9 *Civil Procedure Act 2005*.

identify the key issues for determination. He said that the amendments will relax the requirements of the *Evidence Act* and dispense with formal proof requirements where the issues are not in dispute. The Attorney-General noted that the recommendations of the Trial Efficiency Working Group included:

- requiring prosecution and defence to exchange information immediately following committal;
- allowing the court to order a pre-trial conference to determine if the prosecution and defence can agree on the evidence to be admitted;
- allowing a party to provide a summary of the evidence from a witness where it would not prejudice the other party;
- making it easier for the court to order intensive pre-trial case management and disclosure of the facts and matters in dispute between the parties;
- giving the court the power to order the parties to identify the issues for determination at trial.

34. The Report of the Trial Efficiency Working Group contains 17 recommendations, of which the following are particularly relevant to the Land and Environment Court:

> "4. Review the existing Evidence Act 1995 provisions relating to the admissibility of documents (ss 48, 50) to prove the facts stated therein, with a view to facilitating proof by summaries, charts, schedules and the like…
>
> …
>
> 7. Amend the Criminal Procedure Act 1986 to provide for three tiers of case management:
>
> - compulsory prosecution and defence disclosure of specified matters in all criminal trials;
> - the establishment of a system of pre-trial case conferences which may take place on the application of the parties or by initiation of the court; and

- intensive pre-trial case management on the application of the parties or by initiation of the court.

8. Statutory power to be conferred on the courts to require the parties in all criminal trials to identify the issues for determination in the trial.

9. Amend the Criminal Procedure Act 1986 to enable a party to adduce a summary document of the evidence of a witness or witnesses where admission of the summary would not result in unfair prejudice to any party.

…

11. Briefing of Crown Prosecutors, Public Defenders and trial advocates sufficiently in advance of the trial date to allow for participation by that counsel/advocate in pre-trial management proceedings.

POLLUTION OFFENCES

35. I understand that this conference is particularly interested in pollution offences, to which I now turn.

36. Most prosecutions for pollution offences in the Land and Environment Court concern the escape into waterways of oil or chemicals from industrial premises or ships, or the escape into waterways of earth or sediment from construction activities.

37. Pollution charges are usually brought under s 120 of the *Protection of the Environment Operations Act 1997* (*POEO Act*), which provides simply that:

> **"120 Prohibition of pollution of waters**
>
> (1) A person who pollutes any waters is guilty of an offence.
>
> (2) In this section:
>
> ***pollute*** waters includes cause or permit any waters to be polluted"

38. The section is so worded as to include accidental pollution. A stern policy against pollution lies behind the legislation. In the Court of Appeal in *Axer Pty Ltd v Environment Protection Authority* (1993) 113 LGERA 357 at 359 Mahoney JA held:

> "The community has adopted a stern policy against pollution. The legislative scheme requires that proper, and strict,

> precautions be taken by those whose activities may cause proscribed pollution. The quantum of the fines which may be imposed evidences this: for the present offence, a maximum fine of $125,000 [now $1 million] was available. The quantum of the fines which the legislation allows to be imposed has no doubt been fixed not merely to indicate the seriousness with which such pollution is regarded but also to deter those engaged in such activities and to procure that they will take the precautions necessary to ensure that it does not occur...
>
> …
>
> The legislation does not seek merely to prevent deliberate or negligent pollution. It envisages that, at least in many cases, proper precautions must be taken to ensure that pollution does not occur. Experience has shown that it is not enough merely to take care: accidents will happen. The legislation envisages that in many cases care must be supplemented by positive precautions; business must be arranged and precautions taken so as to ensure that pollution will not occur.
>
> Precautions may be costly. The cost of precautions to avoid pollution will no doubt become accepted, in due course, as an ordinary cost of operating in an industry where, absent precautions, pollution may occur ... The fine should be such as will make it worthwhile that the cost of precautions be undertaken. As the learned judge indicated, in the present case, in order to prevent pollution of the river, it was necessary, inter alia, that the company delay spraying until the conditions were appropriate for it. No doubt that delay cost money. Ordinarily, the fine to be imposed should be such as to make it worthwhile that costs of this kind be incurred.
>
> I do not mean by this that the legislature saw the legislation as providing, by payment of a fine, a licence to pollute. In the end, the object of the legislation is to prevent pollution and to do this, inter alia, by the deterrent effect of a substantial fine and by, in consequence, persuading the industries concerned to adopt preventive measures."

39. Because s 120 is not limited to deliberate or negligent pollution, most defendants plead guilty and the real issue is what sentence should be imposed.

40. The purposes of sentencing are as follows[14]:

[14] s 3A *Crimes (Sentencing Procedure) Act 1999.*

(a) to ensure that the offender is adequately punished for the offence,

(b) to prevent crime by deterring the offender and other persons from committing similar offences,

(c) to protect the community from the offender,

(d) to promote the rehabilitation of the offender,

(e) to make the offender accountable for his or her actions,

(f) to denounce the conduct of the offender,

(g) to recognise the harm done to the victim of the crime and the community.

41. The Court is required to consider five objective gravity matters so far as they are relevant, in addition to any other matters that it considers relevant[15].

(a) the extent of the harm caused or likely to be caused to the environment by the commission of the offence,

(b) the practical measures that may be taken to prevent, control, abate or mitigate that harm,

(c) the extent to which the person who committed the offence could reasonably have foreseen the harm caused or likely to be caused to the environment by the commission of the offence,

(d) the extent to which the person who committed the offence had control over the causes that gave rise to the offence,

(e) whether, in committing the offence, the person was complying with orders from an employer or supervising employee.

42. The sentence must reflect, and be determined by, an instinctive synthesis of all the objective circumstances and subjective circumstances[16].

[15] s 241 *POEO Act.*

43. Other sentencing considerations include:

(a) the maximum penalty. That is the expression by parliament of the seriousness of the offence. The maximum penalty for a pollution offence under s 120(1) is $1 million for a corporation with a continuing penalty of $120,000 per day that the offence continues, and $250,000 for an individual with a continuing penalty of $60,000 per day that the offence continues;

(b) the reasons for committing the offence;

(c) the state of mind of the defendant;

(d) prior good character;

(e) plea of guilty. A discount on sentence in the range of 10 to 25 per cent is generally allowed for the utilitarian value of a plea of guilty, depending on how early the plea was entered and the complexity of the issues;

(f) remorse;

(g) cooperation with authorities;

(h) general deterrence; ie deterrence for others who engage in operations that involve water pollution potential;

(i) individual deterrence; ie whether there is a need to deter the defendant from re-offending;

(j) consistency in sentencing. This is an important objective in a rational and fair system of criminal justice. It involves having regard to the sentences in earlier cases involving the same offence. However, consistency is sometimes difficult with environmental cases because of the wide range of factual circumstances comprising environmental

[16] *Veen v The Queen* (1978-1979) 143 CLR 458 at 490; *Markarian v The Queen* [2005] HCA 25, (2005) 228 CLR 357 at [37], [39], [66] and [73].

offences and the need to tailor sentences to the individual circumstances of the case.

44. The following cases are examples of sentencing of corporations for pollution offences since 2006 when the maximum penalty was increased fourfold:

- the defendant polluted waters of a river during connection of a dam to the river at the conclusion of dam upgrade works. The pollutant sediment laden waters contained soil, earth, clay or similar inorganic matter. The defendant was fined $100,000[17];

- a chemical spill resulted in 650 kilograms of a solid pollutant being collected from a length of 2.5km along the Parramatta River. There was no lasting environmental harm. A fine of $280,000 was imposed plus clean-up and other incidental costs amounting to $83,407.09[18];

- a leak in a heating pipe caused 200 to 300 litres of oil to escape into a watercourse. There was short-term actual environmental harm and potential harm. A fine of $50,000 was imposed[19];

- a fine of $40,000 was imposed where oil escaped from underground storage tanks into wetlands causing fairly serious but short-term environmental harm[20];

- 6,400 litres of a chemical overflowed and it was assumed most had entered the Parramatta River. The substance had low to moderate acute toxicity to aquatic organisms and there was potential for harm. A fine of $58,500 was imposed[21];

[17] *Environment Protection Authority v Snowy Hydro Pty Ltd* (2008) 162 LGERA 273.
[18] *Environment Protection Authority v CSR Building Products Limited* [2008] NSWLEC 224.
[19] *Environment Protection Authority v Hanson Precast Pty Ltd* [2008] NSWLEC 285.
[20] *Wollongong City Council v Belmorgan Property Development Pty Ltd* [2008] NSWLEC 291.
[21] *Environment Protection Authority v Boral Australian Gypsum Ltd* [2009] NSWLEC 26.

- 20 to 50 litres of resin escaped into a creek with no evidence of long term harm. The defendant was fined $25,000 and ordered to pay the prosecutor's investigation costs in the sum of $5,849[22].

COSTS

45. Costs are not awarded in proceedings in classes 1 and 2 and most proceedings in class 3 of the Court's jurisdiction unless the Court considers that a costs order is fair and reasonable in the circumstances[23]. In classes 4 and 8 the usual costs rule is the conventional litigation rule that costs follow the event[24].

46. In criminal matters in class 5, the defendant is normally ordered to pay costs if convicted. If the defendant is discharged or gets an order under s 10 of the *Crimes (Sentencing Procedure) Act 1999*, the Court can order the prosecutor to pay the defendant's costs but only if there has been unreasonable conduct or there are special circumstances[25].

---

[22] *Gosford City Council v Australian Panel Products Pty Ltd* [2009] NSWLEC 77.
[23] r 3.7 *Land and Environment Court Rules 2007.*
[24] r 42.1 *Uniform Civil Procedure Rules 2005*, s 98 *Civil Procedure Act 2005*.
[25] s 257D *Criminal Procedure Act* 1986. Section 10 *Crimes (Sentencing Procedure) Act* relevantly provides*:*

> *"**10 Dismissal of charges and conditional discharge of offender***
> *(1) Without proceeding to conviction, a court that finds a person guilty of an offence may make any one of the following orders:*
> *(a) an order directing that the relevant charge be dismissed,*
> *(b) an order discharging the person on condition that the person enter into a good behaviour bond for a term not exceeding 2 years,*
> *(c) an order discharging the person on condition that the person enter into an agreement to participate in an intervention program and to comply with any intervention plan arising out of the program.*
> *(2) An order referred to in subsection (1) (b) may be made if the court is satisfied:*
> *(a) that it is inexpedient to inflict any punishment (other than nominal punishment) on the person, or*
> *(b) that it is expedient to release the person on a good behaviour bond.*
> *(2A) An order referred to in subsection (1) (c) may be made if the court is satisfied that it would reduce the likelihood of the person committing further offences by promoting the treatment or rehabilitation of the person.*
> *(2B) Subsection (1) (c) is subject to Part 8C.*
> *(3) In deciding whether to make an order referred to in subsection (1), the court is to have regard to the following factors:*
> *(a) the person's character, antecedents, age, health and mental condition,*
> *(b) the trivial nature of the offence,*
> *(c) the extenuating circumstances in which the offence was committed,*
> *(d) any other matter that the court thinks proper to consider."*

47. In classes 6 and 7 (appeals in criminal matters from the Local Court) the general rule is that the defendant may be ordered to pay the costs of the appeal, but a prosecutor will only be ordered to pay costs where the Court is satisfied that there was unreasonable or improper conduct in the investigation or conduct of the matter[26].

[26] s 49(4) *Crimes (Appeal and Review) Act 2001.*