

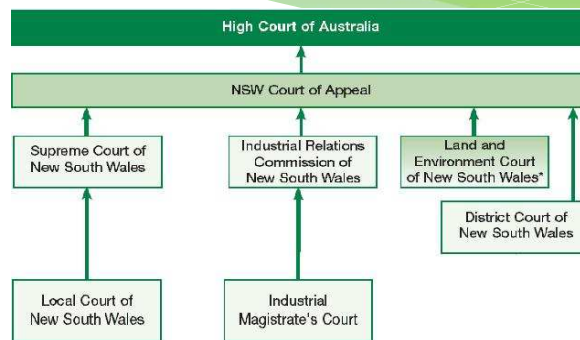
Operating An Environment Court: The Experience of the Land and Environment Court of NSW and 12 Benefits of Judicial Specialisation in Environmental Law

By
Hon Justice Brian J Preston
Chief Judge
Land and Environment Court of NSW

Land and Environment Court in Outline

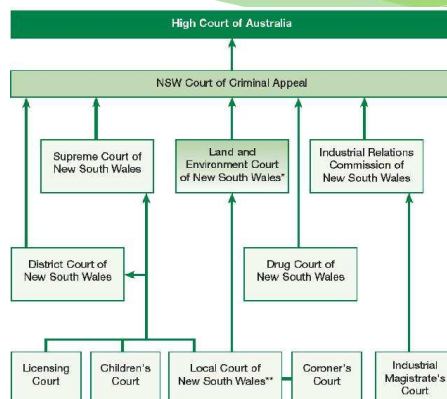
- * Australia is a federal system
- * LEC is a state court
- * New South Wales is the most populous and economically important state in Australia
- * LEC is a specialist statutory court with a wide jurisdiction in environmental, planning and land matters
- * LEC is a superior court of record
- * LEC judges have the same rank, title, status and precedence as a judge of the Supreme Court of NSW

New South Wales Court System – Civil Jurisdiction



* Appeals to the NSW Court of Appeal are in relation to proceedings in Class 1, 2, 3, 4 or 8 the Land and Environment Court's jurisdiction.

New South Wales Court System – Criminal Jurisdiction



* Appeals to the NSW Court of Criminal Appeal are in relation to proceedings in Class 5, 6 or 7 of the Land and Environment Court's jurisdiction.
 ** Appeals from the Local Court of New South Wales to the Land and Environment Court are with respect to an environmental offence under the Crimes (Appeal and Review) Act 2001 and are in Classes 5 and 7 of the Land and Environment Court's jurisdiction.

History of LEC

- * Established by the *Land and Environment Court Act 1979*, assented to 21 December 1979
- * Commenced operation on 1 September 1980
- * Part of a package of environmental law reform, including *Environmental Planning and Assessment Act 1979*

Objectives of Establishment of LEC

- * Two principal objectives: rationalisation and specialisation
- * Desire for a “one stop shop” for environmental, planning and land matters

Rationalisation

- * The judicial system before 1979 was irrational and inefficient
- * Planning and land matters were dealt with by an “uncoordinated miscellany” of tribunals and courts
- * There was no environmental law as we now know it

Pre-LEC Jurisdictional Arrangements

- * Valuation, acquisition and land matters: Land and Valuation Court (jurisdiction transferred from the District Court), Valuation Boards of Review and Supreme Court (for title issues)
- * Building and subdivision and development matters: Local Government Appeals Tribunal (jurisdiction transferred in 1972 from Land and Valuation Court and Boards of Appeal)
- * Civil (equitable) enforcement and judicial review: Supreme Court; and
- * Criminal enforcement: Local Court and District Court.

Rationalisation in LEC

- * The establishment of the LEC allowed all of these diverse jurisdictions to be rationalised in the one court
- * Subsequently, the legislature has added other jurisdiction appropriate to the LEC e.g. tree disputes and mining disputes

Specialisation

- * Wide environmental, planning and land jurisdiction
- * Exclusive jurisdiction- no other court or tribunal could exercise jurisdiction given to LEC
- * Judges appointed with (or would develop) knowledge and expertise in jurisdiction
- * Appointment of technical and conciliation assessors (later termed commissioners)

Specialisation cont.

- * Specialisation is not an end, but a means to an end.
- * A specialist court could:
 - * more ably deliver consistency in decision-making;
 - * decrease delays (through its understanding of the characteristics of environmental disputes); and
 - * facilitate the development of environmental law, policies and principles.

LEC Jurisdiction

- * Administrative (merits review) appeals against government decisions;
- * Civil jurisdiction (eg tree and mining disputes);
- * Civil enforcement (statutory and equitable);
- * Judicial review of government action;
- * Criminal enforcement;
- * Appeals against criminal convictions and sentences of Local Court; and
- * Appeals against decisions of LEC Commissioners.

LEC Merits Review Jurisdiction

- * Merits review involves the re-exercise of the administrative power previously exercised by an original decision-maker such as a local government or state government agency.
- * The court becomes the new decision-maker.
- * The court has the same powers and functions of the original decision-maker.

Benefits of Merits Review

- * Forum for full and open consideration of issues of major importance.
- * Increased accountability of decision-makers.
- * Clarifying meaning of legislation.
- * Ensuring adherence to legislative principles and objects.
- * Focusing attention on the accuracy and quality of policy documents, guidelines and planning instruments.
- * Highlighting problems that should be addressed by law reform.

Merits Review by LEC

- * Merits review uses informal processes such as conciliation conferences and on-site hearings.
- * The Court can inform itself and use its specialist expertise.



LEC Merits Review Jurisdiction

- * Class 1: environmental planning and protection appeals (merits review appeals);
- * Class 2: local government and miscellaneous appeals (mostly merits review appeals); and
- * Class 3: land tenure, valuation, rating and compensation matters (mostly merits review appeals).

Class 1 Merits Appeals

- * Class 1 appeals include:
 - * Appeals under the *Environmental Planning and Assessment Act 1979*, such as against a decision to refuse an application for, or to grant on unacceptable conditions, a development consent or a modification of the consent.
 - * Appeals under the *Protection of the Environment Operations Act 1997*, such as against a decision to refuse an application for, or to vary, or to revoke an environment protection licence.

Class 2 Merits Appeals

- * Class 2 appeals include:
 - * Appeals under the *Local Government Act 1993*.
 - * Appeals and proceedings under the *Strata Schemes Development Act 2015* and *Community Land Management Act 1989*.

Class 3 Merits Appeals

- * Class 3 appeals include:
 - * Appeals concerning land title and interests, such as boundary determinations, encroachments over boundaries, easements and access to neighbouring land.
 - * Appeals concerning the valuation of land for land taxation and rating purposes.
 - * Appeals concerning the compensation payable for the compulsory acquisition of land by government.
 - * Appeals concerning refusal of Aboriginal land claims.

LEC Civil Jurisdiction

- * The Court has original, civil jurisdiction to determine tree and mining disputes:
 - * Class 2: applications for orders in relation to trees causing damage to property or risk of injury to persons and for compensation for damage to property and for orders concerning high hedges under the *Trees (Disputes Between Neighbours) Act 2006*.
 - * Class 8: civil proceedings under the *Mining Act 1992* and the *Petroleum (Onshore) Act 1991*.
- * The Court can exercise civil jurisdiction (e.g. in tort) transferred from the Supreme Court of NSW

LEC Enforcement Jurisdiction

- * The Court has jurisdiction to hear and determine proceedings to enforce planning and environmental laws, both civil proceedings and criminal prosecutions:
 - * Class 4: environmental planning and protection (civil enforcement and judicial review).
 - * Class 5: environmental planning and protection (summary criminal enforcement).

Judicial Review and Civil Enforcement

- * The Court judicially reviews administrative and legislative decisions and conduct under specified legislation.
- * The Court can remedy and restrain breaches of specified legislation.

Legislation Administered by LEC: Examples

- * *Environmental Planning and Assessment Act 1979*
- * *Local Government Act 1993*
- * *Protection of the Environment Operations Act 1997*
- * *Environmentally Hazardous Chemicals Act 1985*
- * *Waste Avoidance and Resource Recovery Act 2001*
- * *Heritage Act 1977*
- * *Biodiversity Conservation Act 2016*
- * *Threatened Species Conservation Act 1995*
- * *National Parks and Wildlife Act 1974*
- * *Local Land Services Act 2013*
- * *Wilderness Act 1987*

Public Participation in Civil Enforcement

- * A key feature of the Court and the legislation it administers is the ability of the public to participate and have access to justice.
- * Open-standing provisions in legislation: any person may bring proceedings to remedy or restrain a breach of the statute eg s 9.45 of *Environmental Planning and Assessment Act 1979*
- * Public interest litigation is facilitated by open-standing provisions and the Court's practice and procedure that lowers barriers to and facilitates public interest litigation.

Criminal Enforcement

- * This is a key jurisdiction of the Court that is expanding.
- * Environmental crimes have their own unique characteristics which demand special consideration.
- * By reason of a specialist environmental court, the Court is better able to achieve principled sentencing .
- * The Court has recently established a new sentencing database for environmental crime, the first in the world.

LEC Criminal Appeals Jurisdiction

- * Class 6: appeals against convictions or sentences relating to environmental offences (appeals as of right from Local Court).
- * Class 7: appeals against convictions or sentences relating to environmental offences (appeals requiring leave of LEC from Local Court).

Criminal Appeals

- * The Court's work provides guidance to lower courts by its decisions reviewing convictions and sentences, its environmental crime sentencing database, and publications on principled sentencing for environmental crime.

LEC Appellate Jurisdiction from Commissioners

- * Appeals from decisions of Commissioners in Classes 1-3 and 8 on questions of law now lie to judges of the Court (previously such appeals were to the NSW Court of Appeal).

Court Personnel

- * Judges: Chief Judge and 5 judges each with an Associate and Tipstaff
- * Commissioners: Senior Commissioner, 8 other full-time commissioners and 11 acting commissioners (part-time as occasion demands)
- * Registrars: Registrar and Assistant Registrar
- * Registry staff

Expertise of Court Personnel

- * Judges: experienced lawyers (2 Queen's Counsel or Senior Counsel, 2 barristers and 2 solicitors).
- * Registrars: Legally qualified Registrar and Assistant Registrar.

Expertise of Court Personnel

- * Commissioners: knowledge and experience in:
 - * Local government administration;
 - * Town, country and environmental planning;
 - * Environmental science or matters relating to the protection of the environment and environmental assessment;
 - * Arboriculture and horticulture;
 - * Land valuation;
 - * Architecture, engineering, surveying and building construction;
 - * Management of natural resources;
 - * Aboriginal land rights and disputes involving Aborigines;
 - * Urban design and heritage;
 - * Law.

Exercise of Jurisdiction: Judges

- * Judges: constitute the Court and may exercise all classes of jurisdiction but usually exercise classes 3- 7, class 8 where complex or difficult issues are involved, and classes 1 and 2 where legal issues or large or controversial issues are involved.

Exercise of Jurisdiction: Commissioners

- * Commissioners: jurisdiction delegated by Chief Judge in classes 1-3 (merits review only) to act as adjudicator, conciliator, mediator or neutral evaluator.
- * Commissioner for mining: commissioners who are legally qualified may exercise the jurisdiction in class 8, by delegation from the Chief Judge.
- * Registrars: case management and conciliator or mediator.

Allocation of Proceedings for Hearing

- * In delegating cases to commissioners, the Chief Judge is required to have regard to:
 - * The knowledge, experience and qualifications of the commissioners; and
 - * The nature of the matters involved in the proceedings.
- * Multi-member panels may be listed, such as a judge and a commissioner (classes 1-3 and 8) or two or more commissioners (classes 1-3).
- * Part or the whole of proceedings may be referred by or transferred from commissioners to judges and determined and/or remitted.

Multi –Door Courthouse

- * LEC encourages Appropriate Dispute Resolution (ADR) in civil matters.
- * Although LEC does not operate as a formal Multi-Door Courthouse, its practices and procedures operate in effect to screen, sort and allocate matters to the appropriate dispute resolution mechanisms.

Multi –Door Courthouse: Internal ADR

- * LEC offers “in-house” a variety of ADR mechanisms:
 - * Adjudication in all classes of jurisdiction (by judges or commissioners).
 - * Conciliation in Classes 1-3 (by commissioners or registrars).
 - * Mediation in Classes 1-4 and 8 (by trained mediators-registrar, full-time commissioners and some part-time commissioners).
 - * Neutral evaluation in Classes 1-3 (by commissioners).

Multi –Door Courthouse: External ADR

- * LEC also facilitates external ADR:
 - * Mediation by accredited, external mediators in Classes 1-4 and 8.
 - * Reference of whole or part of matter in Classes 1-4 and 8 to external referee with special knowledge or expertise for inquiry and report to Court.

Court ADR Protocols

- * Pre-action protocols: Practice Note for valuation objections requires parties to engage in informal mediation before commencing action; compliance verified at first directions hearing.
- * Post-action protocols: Practice Notes for all Classes 1-3 matters require parties to consider and report to the Court at first and subsequent directions hearings the appropriateness of using ADR mechanisms of conciliation and mediation.

ADR Diagnosis and Referral

- * The Court screens, sorts and allocates cases to ADR in consultation with parties but also by own motion.
- * Classes 1 and 2 (environmental planning and local government appeals): by Registrar at call over.
- * Class 2 (tree disputes between neighbours): by Registrar at call over.
- * Classes 3-8: by List Judge or List Commissioner at directions hearing.
- * Parties can select appropriate ADR mechanism and change selection.

Case Flow Management

- * The Court has a duty to facilitate the just, quick and cheap resolution of the real issues in matters.
- * LEC actively case manages all matters in the court.
- * LEC uses differential case management (DCM) in recognition of not only the different classes of jurisdiction but also the different nature of matters within a class.

Practice Notes Implement DCM

- * LEC has Practice Notes for:
 - * Class 1 Development Appeals;
 - * Class 1 Residential Development Appeals;
 - * Classes 1, 2 and 3 Miscellaneous Appeals;
 - * Class 2 Tree Disputes;
 - * Class 3 Compensation Claims;
 - * Class 3 Valuation Objections; and
 - * Class 4 Proceedings (civil enforcement and judicial review).
 - * Class 5 (criminal)
 - * Strata Schemes Development Proceedings
 - * s56A appeals
 - * Subpoena Practices
 - * Urgent applications

DCM: Litigation Plan

- * Practice Notes and information sheets provide template litigation plans.
- * Parties and Court may select or adapt template to suit particular circumstances of the case.
- * Select appropriate litigation steps, evidence and hearing.
- * Emphasis on ensuring proportionality to importance of case and costs.

Pre-hearing Attendance Options

- * The Court offers three types of directions hearings:
 - * **In court directions hearings:** parties' representatives attend in court before Judge, Commissioner or Registrar;
 - * **Telephone directions hearings:** parties' representatives talk with Judge, Commissioner or registrar in a conference call from a specially equipped court; and
 - * **eCourt directions hearings:** parties' representatives communicate with the Registrar and each other electronically using the internet.

Hearing Options

- * **Court hearing:** available for all matters.
- * **On-site hearing:** available for certain Class 1 and 2 matters.
- * **Partial on-site hearing:** available in Class 1-3 matters, usually by commencing on site, taking evidence of lay witnesses such as resident objectors on site, and undertaking a view.
- * **Video-conferencing:** available in all matters for taking evidence of remote witnesses.

Court and on-site hearings

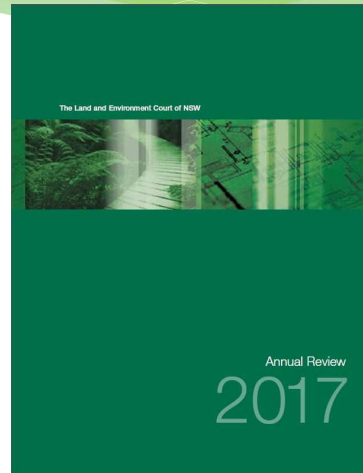


Achieving Objectives of Court Administration

- * Objectives of court administration are equity, effectiveness and efficiency.
- * Court's mission is to achieve current best practice worldwide.
- * LEC has adopted quantitative and qualitative performance indicators to measure its achievement of the objectives of court administration.
- * LEC benchmarks performance against comparable courts in NSW, nationally and internationally.
- * LEC is the first court in the world to implement the International Framework for Court Excellence.

Achieving Objectives of Court Administration

- * LEC monitors and measures its performance by reference to these indicators.
- * LEC publicly reports on its performance, including by its Annual Review.
- * This ensures transparency and accountability.



Benefits of LEC: “Desirable Dozen”

- * 1. Rationalisation
- * 2. Specialisation
- * 3. Multi-Door Courthouse
- * 4. Superior court of record
- * 5. Independence from government
- * 6. Responsiveness to environmental problems
- * 7. Facilitates access to justice
- * 8. Development of environmental jurisprudence
- * 9. Better court administration
- * 10. Unifying ethos and mission
- * 11. Decision-making is value-adding
- * 12. Flexible and innovative

1. Rationalisation of Jurisdiction

Rationalisation and centralisation of jurisdiction results in:

- * **Integrated and coherent** environmental jurisdiction.
- * **Critical mass** of cases.
- * **Economic efficiencies** for users and public resources in “one-stop shop”.
- * **Better quality and innovative decision-making** in both substance and procedure by cross fertilisation between different classes of jurisdiction.

1. Rationalisation cont.

- * Court being a **focus of environmental legal decision-making**.
- * **Increased awareness** of environmental law, policy and issues by users, government, environmental NGOs, civil society, legal and other professions and educational institutions.
- * **Increased enforcement** of environmental law.

2. Specialisation

- * Environmental issues and the legal and policy responses demand special knowledge and expertise
 - * **Judicial education:** Judges need to be educated about and attuned to environmental issues and the legal and policy responses.
 - * **Technical experts:** Decision-making quality, effectiveness and efficiency can be enhanced by the availability within the court of technical experts.
 - * **Practice makes perfect:** Specialisation increases knowledge and expertise over time.

3. Multi-door Courthouse

- * Rationalisation, specialisation and the availability of a range of technical expertise facilitates ADR:
 - * **Rationalisation:** the Court has jurisdiction to deal with multiple facets of an environmental dispute.
 - * **Specialisation:** facilitates a better appreciation of the nature and characteristics of environmental disputes and selection of ADR mechanism for each dispute.
 - * **Availability of technical experts** enables their use in conciliation and neutral evaluation, and improves the quality, effectiveness and efficiency of adjudication.

4. Superior Court of Record

- * **Enlarged jurisdiction:** Establishing an environmental court as (or as part of) a superior court of record enlarges the jurisdiction of the court to include those powers only a superior court of record possesses.
- * **High status and reputation:**
 - * A superior court of record enjoys a higher status than either an inferior court or tribunal.
 - * Public acknowledgment of the importance of environmental issues.
 - * Public pronouncement of the importance of the court and its decisions.
- * **Quality judicial appointments:** A superior court is better able to attract and keep high calibre persons for judicial appointments.

5. Independence from Government

- * Establishing an environmental court as a court, rather than as an organ of the executive arm of government, and as a superior court of record, rather than an inferior court or tribunal, enhances independence.

6. Responsiveness to Environmental Problems

- * An environmental court is better able to address the pressing, pervasive and pernicious environmental problems that confront society (such as climate change and loss of biodiversity).
- * New institutions and creative attitudes are required.
- * Specialisation enables use of special knowledge and expertise in both the process and the substance of resolution of these problems.
- * Rationalisation enlarges the remedies available.

7. Facilitates Access to Justice

- * Access to justice includes access to environmental justice.
- * A court can facilitate access to justice both by:
 - * Its substantive decisions;
 - * Its practice and procedure; and
 - * Addressing inequality of alms.

7. Facilitates Access to Justice: Substantive Decisions

- * A court's **substantive decisions** can uphold fundamental constitutional, statutory and human rights of access to justice.
- * The LEC has upheld:
 - * statutory rights of public access to information
 - * rights to public participation in legislative and administrative decision-making, including requirements for public notification, exhibition and submission and requirements for EIA
 - * public rights to review and appeal legislative and administrative decisions and conduct

7. Facilitates Access to Justice: Practice and Procedure

- * A court's **practice and procedure** can facilitate access to justice by:
 - * Removing barriers to public interest litigation.
 - * Allowing parties to appear by various means (legal representation, agent authorised in writing or in person).
 - * Facilitating access to information eg. requiring discovery of documents and reasons for decision by government agencies.
 - * Facilitating the just, quick and cheap resolution of proceedings.

7. Facilitates Access to Justice: Address Inequality of Arms

- * A court can **address inequality of arms** between parties:
 - * Specialisation and the availability of technical experts redresses in part inequality of resources and access to expert assistance and evidence.
 - * Access for persons with disabilities;
 - * Access to help and information (by court website, information sheets and registry staff);
 - * Access for unrepresented litigants (special fact sheet as well as other sources of self-help above); and
 - * Geographical accessibility (use of eCourt, telephone conferences, video-conferencing, country hearings, on-site hearings and taking evidence on-site).

8. Development of Environmental Jurisprudence

- * The LEC has shown that an environmental court of the requisite status has more specialised knowledge, has more cases and opportunity, and is more likely to develop environmental jurisprudence.
- * The LEC's decisions have developed aspects of substantive, procedural, restorative, therapeutic and distributive justice.

Environmental Jurisprudence: Substantive justice

* **Substantive justice:**

- * ecologically sustainable development (integration principle, precautionary principle, inter and intra generational equity, conservation of biological diversity and ecological integrity and internalisation of external, environmental costs including the polluter pays principle);
- * environmental impact assessment;
- * public trust; and
- * sentencing for environmental crime.

Environmental Jurisprudence: Procedural justice

- * **Procedural justice:** access to justice including removal of barriers to public interest litigation in relation to:
 - * Standing
 - * Interlocutory injunctions
 - * Security for costs
 - * Laches
 - * Costs.

Environmental Jurisprudence: Other justice

- * **Distributive justice:** inter and intra generational equity, polluter pays principle, balancing public and private rights and responsibilities
- * **Restorative justice:** victim-offender mediation and polluter pays principle for environmental crime
- * **Therapeutic justice:** practice and procedure to improve welfare of litigants

9. Better Court Administration

- * The LEC model facilitated better achievement of the objectives of court administration of equity, effectiveness and efficiency.
- * The LEC has, relative to other courts in NSW, minimal delay and backlog, and high clearance rates and productivity.

10. Unifying ethos and mission

- * Rationalisation and specialisation give an organic coherence to the Court and its work.
- * The nature of environmental law gives a unifying ethos and mission.
- * **Esprit de corps** of environmental court:
 - * LEC personnel believe the Court and its work are important and are making a difference;
 - * They view themselves as part of a team; not as individuals working independently; and
 - * The users, legal representatives and experts also share in this spirit and mission.

11. Value-adding function

- * The LEC's decisions and work have generated value apart from the particular case or task involved:
 - * Upholding, interpreting and explicating environmental law and values;
 - * In merits review appeals, the court's decisions add value to administrative decision-making. The court extrapolates principles from the cases and publicises them. The principles can be used by agencies in future decision-making.

11. Value-adding function cont.

- * The LEC has also been an innovator and national leader in court practices and procedures including:
 - * OnlineCourt case management;
 - * Expert evidence including court-directed joint conferencing and report, concurrent evidence and parties' single experts;
 - * On-site hearings and taking evidence on site; and
 - * First court in the world to implement the International Framework for Court Excellence.

12. Flexibility and Innovation

- * Large, established courts can be conservative and have inertia - change is slow and resisted.
- * The fact that the LEC is a separate court has enabled flexibility and innovation. Changes to practices and procedure could be achieved quickly and with wide support within the institution.

Conclusion

- * The LEC is undoubtedly a model of a successful environmental court.
- * It is long established - 38 years
- * It has a pre-eminent international and national reputation
- * It has received many favourable reviews and been a basis for recommendations for an environment court.
- * It is continuing to adapt to meet the environmental challenges of the future.