

Commentary on the Land and Environment Court of New South Wales

Introduction

The Land and Environment Court Act of 1979¹ (hereinafter referred to as the Court Act) vests power in the Court to determine environmental, development, building and planning disputes and is comprised of six parts. To begin with, Part I contains preliminary information. Next, Part II contains information about the constitution of the court. Then, Part III contains information about the jurisdiction of the court. Subsequently, Part IV contains information about the exercise of jurisdiction. Last but not least, Part V contains information about appeals from the court. Finally, Part VI is entitled “miscellaneous.”

Section 17-21C of the Court Act set out the legislation pursuant to which the Court has jurisdiction, and divides that jurisdiction into eight classes.² The Court does not have the power to determine issues outside of its jurisdiction, but it has the power to resolve issues ancillary to a matter falling within its jurisdiction (§16 (1A) of the Court Act³). Under the Court Act, disputes are divided into eight classes as follows:

- 1) Environmental Planning and Protections Appeals
- 2) Local Government miscellaneous appeals and applications; and tree dispute applications
- 3) Land tenure, valuation, rating and compensation matters
- 4) Environmental planning and protection
- 5) Environmental planning and protection-criminal enforcement
- 6) Appeals with respect to environmental offences
- 7) Applications for leave to appeal with respect to environmental offences and
- 8) Mining Jurisdiction

¹ Land and Environment Court Act 1979 No 204, <http://www.legislation.nsw.gov.au/viewtop/inforce/act+204+1979+FIRST+0+N/> (last visited May 16, 2011).

² *Court Jurisdiction*, NEW SOUTH WALES GOVERNMENT LAW LINK, http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwPrint1/LEC_jurisdictionfull (last visited May 16, 2011)

³ Land and Environment Court Act 1979 No 204, <http://www.legislation.nsw.gov.au/viewtop/inforce/act+204+1979+FIRST+0+N/> (last visited May 16, 2011)

Access to the Court/Standing to Sue

The first issue this commentary will address is whether this legislation will enhance access to the courts (and justice). The first clause of Principle 10⁴ of the Rio Declaration is that: “Environmental issues are best handled with participation of all concerned citizens, at the relevant level.” The fact that any natural person or company can bring an appeal satisfies this first clause of the Rio Declaration. The objective of the Aarhus Convention is that in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the Provisions of the Convention.⁵ Particularly the part of the Aarhus Convention related to participation in public decision-making would be relevant here.

Approximately 58% of the Court's finalized caseload is Class 1 planning appeals.

According to Part 7 Rule 2 UCPR,⁶ the Applicant must be a natural person or company, or in

⁴ Principle 10 of the Rio Declaration on Environment and Development states the following: “Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy shall be provided.”, Rio Declaration on Environment and Development, <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163> (last visited May 16, 2011)

⁵ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on June 25th 1988, <http://www.unece.org/env/pp/documents/cep43e.pdf> (last visited May 16 2011)

⁶ New South Wales Consolidated Regulations, http://www.austlii.edu.au/au/legis/nsw/consol_reg/ucpr2005305/ (last visited May 18 2011)

some circumstances may be a company director. If the applicant is a company, then the name of the company should also be supplied.

The fact that this rule provides that the applicant must be a natural person or a company demonstrates that the Land and Environment Court of New South Wales provides widespread access to those who want to file actions with regard to planning appeals.

Scientific Knowledge

The next inquiry addresses the question of whether the Rules of Procedure for Environmental Cases facilitate the application of environmental science to decision-making.

“The Commissioners are not judicial officers but are appointed because of their special knowledge, experience and qualifications in disciplines of relevance to the Court’s jurisdiction. These include town, country or environmental planning, urban design or heritage, science, land valuation, architecture, engineering, surveying, building, construction, natural resources, aboriginal land rights and law.”⁷

Effectiveness

The next factor that must be evaluated is the extent to which the legal process protects nature and improves the environment instead of simply determining that one particular party prevails and the other party does not. Related to this concept, the fourth clause of Principle 10 of the Rio Declaration states that, “Effective access to judicial and administrative proceedings, including redress and remedy shall be provided.”

⁷ “Implementing the International Framework for Court Excellence: The experience of the Land and Environment Court of New South Wales” Presentation by the Hon. Justice Brian J. Preston to the Asia Pacific Courts Conference October 4th-8th 2010, Singapore , http://app.subcourts.gov.sg/Data/Files/File/APCC2010/Slides/Session2B_BrianPreston.pdf (last visited May 16 2011)

The Environmental Court in New South Wales has served as a precedent and model to a plethora of environmental courts throughout the world. This is one of many ways that the court demonstrates that it creates the opportunity for long term benefit to the environment rather than a simple adjudication of which party prevailed in the cases and which did not.

Procedural Elements

Procedural issues with respect to the environmental courts and tribunals can be evaluated in a variety of ways. This includes general accessibility, the costs in creating environmental tribunals, the efficiency or lack thereof when multiple states in one country have to create environmental tribunals, the existence of an appellate system, the issue of transparency, the existence of online electronic filing systems to make access to the courts logistically easier, and global transparency as a whole. The second clause of the Rio Declaration is that at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous activities in their communities and the opportunity to participate in the decision-making process.

The first procedural element that pertains to the actual functioning of the court is that of an appellate system so that the decisions of the court can be reviewed. Section 56A of the Court Act provides a right of appeal⁸ from the decision of a Commissioner to a Judge. Such an appeal may only be made in relation to a question of law and must be initiated within 28 days of the order or decision being handed down (Part 50 Rule 3 of the UCPR). A Section 56A appeal is

⁸ "Practitioner's Guide to the Land and Environment Court of NSW", A Project of the NSW Young Lawyers Environmental Law Committee <http://www.younglawyers.com.au>, <http://www.lawsociety.com.au/idc/groups/public/documents/internetyounglawyers/026378.pdf> (last visited May 16, 2011)

commenced by way of a summons, Form 84 under the UCPR (see Part 50 Rule 4 of the UCPR), and must contain a statement:

- (a) As to whether the appeal relates to the whole or part only, and what part, of the decision of the court below, and
- (b) As to what decision the Applicant seeks in place of the decision of the court below, and
- (c) Setting out briefly but specifically the grounds relied on in support of the appeal, including, in particular, any grounds on which it is contended that there is an error of law in the decision of the court below.

In the Honorable Justice Brian J. Preston's "Remarks to the dinner for the 30th anniversary of the Land and Environment Court of NSW",⁹ he expresses that the court has been a crucible of innovation and experimentation. Examples are the use of eCourt (electronic court), on-site hearings, court-appointed experts and concurrent evidence and the provision of comprehensive website information, court newsletters and an environmental crime sentencing database.

Electronic filing has become very important as well as a good indicator of accessibility to the court system. As part of its LEC On-Line strategy¹⁰, the Court implemented a new computer system called eCourt in November 2002. The objective of eCourt and other LEC On-Line

⁹ Remarks to the dinner for the 30th anniversary of the Land and Environment Court of NSW by The Hon. Justice Brian J. Preston, [http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Speech_01Sept2010_PrestonJ_WelcomeAnniversaryDinner.pdf/\\$file/Speech_01Sept2010_PrestonJ_WelcomeAnniversaryDinner.pdf](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Speech_01Sept2010_PrestonJ_WelcomeAnniversaryDinner.pdf/$file/Speech_01Sept2010_PrestonJ_WelcomeAnniversaryDinner.pdf) (last visited May 16 2011)

¹⁰ Land and Environment Court "eCourt", http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_ecourt (last visited May 16 2011)

projects is to improve the services available to litigants and their representatives. This system called eCourt enables parties in class 1-4 matters to:

- Initiate proceedings online
- Lodge documents online;
- Obtain hearing dates and adjournments through the eCourt's eCallover facility;
- Use the internet to check the record of activity in their matters; and
- Access any documents that were filed online.

One particular benefit of the eCourt system is that it has a "public user" facility. If a Council chooses to become a public user, all new applications to the Court where that Council is a respondent will be electronically served by the Court on the Council. The e-Court system offers a high level of security and only parties can access eCourt matters.

Access To Information

The concept of access to information is that whereby the public is given access to information that is being decided by a particular court or jurisdiction. The third clause of Principle 10 of the Rio Convention is that "States shall facilitate and encourage public awareness and participation by making information widely available." The objective of the Aarhus Convention is that in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-

making, and access to justice in environmental matters in accordance with the provisions of this Convention.¹¹

The website of the Land and Environment Court is extremely comprehensive. One of its many features is that the previous decisions (both judicial and commissioners' decisions) of the court can be accessed on its website.¹² Not only can these decisions be accessed but the way in which these decisions can be accessed is quite unique. For both the judicial and the commissioners' decisions, the decisions can be searched by most recent decisions, decisions by number, decisions by case name, and decisions by category. They can be searched either by the categories of judicial or commissioners' decisions or by year.

In addition, cases can be downloaded from the website of the Land and Environment Court of New South Wales. This also provides access to information and should serve as an example for other courts which do not already have a mechanism for this in place.

Beyond accessing information available electronically, litigants and others are able to do much more online through the website of the Land and Environment Court of New South Wales compared to others. The Land and Environment Court of New South Wales seems to have the most comprehensive website and the greatest amount of information available electronically. In addition to court documents, applications, the ability to file pleadings electronically, and other such features, the website for the Land and Environment Court provides a resource list of over

¹¹ Introducing the Aarhus Convention, UNITED NATIONS ECONOMIC COMMISSION OF EUROPE, <http://www.unece.org/env/pp/> (last visited May 16 2011)

¹² Caselaw, LAND AND ENVIRONMENT COURT, http://www.lawlink.nsw.gov.au/lawlink/caselaw/ll_caselaw.nsf/pages/cl_lec (last visited May 16 2011)

100 speeches and papers that were delivered by different judges primary dealing with the Land and Environment Court of New South Wales.

Finally, the website for the Land and Environment Court of New South Wales also has a section entitled "Daily Court Lists"¹³ which is published between 3 and 4 p.m. every day. The court list is literally a list of all the hearings that are scheduled for the day with a listing of the judges, the parties involved, the time and the meeting room. This is an easy and efficient way of being able to access information and make it easy on those that are participating in court proceedings.

Traditional measures

How does this legislation/tribunal/court address traditional concerns expressed by courts that litigation is costly and wastes time?

In civil proceedings, the Land and Environment Court's overriding object is to facilitate the just, quick, and cheap resolution of the real issues in dispute. To achieve that object, it has adopted rigorous case management procedures.

This philosophy has been endorsed by the NSW Parliament in §§ 55-60 of the Civil Procedure Act of 2005¹⁴ (hereinafter referred to as the CPA), which mandates in civil proceedings a rigorous regime, which may require the hacking away of technicalities and excuses for delay put forward by less than diligent litigants. The statutory regime includes the following:

¹³ Land and Environment Court, Court Lists, http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_court_lists (last visited May 16 2011)

¹⁴ New South Wales Consolidated Acts, Civil Procedure Act 2005 http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa2005167/index.html (last visited May 18, 2011)

- (a) The court, when exercising its powers, must seek to facilitate the overriding purpose of 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.

Rule 4.2 of the Land and Environment Court rules is a unique costs rule applicable to judicial review and civil enforcement matters. It provides that an applicant in proceedings that the court is satisfied have been brought in the public interest may not be ordered to pay costs if it loses, or may not be ordered to provide security for costs or an undertaking as to damages in support of an interlocutory injunction or order.

Specifically Rule 4.2 entitled, "Proceedings brought in the public interest" includes the following provisions:

- (1) The Court may decide not to make an order for the payment of costs against an unsuccessful applicant in any proceedings if it is satisfied that the proceedings have been brought in the public interest.
- (2) The Court may decide not to make an order requiring an applicant in any proceedings to give security for the respondent's costs if it is satisfied that the proceedings have been brought in the public interest.
- (3) In any proceedings on an application for an interlocutory injunction or interlocutory order, the Court may decide not to require the applicant to give any undertaking as to damages in relation to:
 - a. The injunction or order sought by the applicant, or
 - b. An undertaking offered by the respondent in response to the application,if it is satisfied that the proceedings have been brought in the public interest.

The website which includes information about the New South Wales Land and Environment Court also provides a document entitled "NSW Supreme, District and Local Courts Guidelines for the Waiver, Remission, and Postponement of Fees." This document provides detailed information as to how litigants can navigate themselves through the various alternatives available in order to deal with fees in a non-traditional manner that will assist those that are financially challenged. These provisions take into consideration traditional measures which were concerned with the maximization of savings.

The voluminous information provided on the website of the Land and Environment Court of New South Wales not only provides access to information but also is a time saving measure and thus satisfies traditional concerns of the courts that deal with the extensive time that is wasted by inefficiency in the legal process. A variety of application forms can be accessed in

both word and pdf formats on the website¹⁵ for the Land and Environment Court of New South Wales. These forms include different kinds of appeals, tree dispute applications, various kinds of claim detail forms, statement of claim forms, and summons forms in different varieties. These are provided for all the different classes of lawsuits imaginable and are characterized by class to make it easier for the litigant. In addition, other court forms such as affidavits, affidavits of service, notice of appearance forms, notice of discontinuance forms, notice of motion, notice to produce for inspection, notice to produce to court and various subpoenas, etc. are also available through this website. This availability of information on-line can be a time saving procedure which will ensure that a decision is made in a timely fashion and parties do not have to wait indefinitely to know the outcome of their appeal.

History

A final factor one must consider when analyzing environmental acts creating environmental tribunals is that of the rationale which led to the creation of the environmental tribunal.

The Land and Environment Court of New South Wales was established in 1980 as a superior court of record, replacing the Local Government Appeals Tribunal, the Land and Valuation Court, the Clean Water Appeal Board and the Valuation Boards of Review. In addition, certain jurisdictions formerly exercised by the District Court were also transferred to the new Court. The new legislation creating the court transferred powers to the Court, which was formerly exercised by the Equity Division of the Supreme Court.

¹⁵ Forms and Fees, LAND AND ENVIRONMENT COURT, http://www.ipc.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_forms#application (last visited May 16 2011)