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The Honourable Justice David H Lloyd
The Land and Environment Court of New South Wales

The Land & Environment Court is a specialist court of equivalent status to the Supreme Court of New South Wales. It is presently comprised of six judges and nine commissioners. The judges have the same rank, title, status and other rights as do judges of the Supreme Court (s 9(2) *Land and Environment Court Act* 1979).

The commissioners are not necessarily lawyers. They are persons who have qualifications and expertise in some specialised disciplines such as town planning, architecture or engineering. There are, in addition, part-time commissioners of Aboriginal background who possess suitable knowledge of matters concerning land rights for Aborigines and possessing qualifications and experience suitable for the determination of disputes involving Aborigines (s 12 *Land and Environment Court Act* 1979).

The Court's jurisdiction is divided into seven different classes.

Classes 1, 2 and 3: administrative appeals

Classes 1, 2 and 3 of the Court's jurisdictions are, in the main, administrative appeals and include:

> appeals against decisions of local government councils on applications for the development of land, such as the use of land, subdivisions and the erection of buildings;
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> appeals against a range of other decisions made by local government councils; Sections 17, 18 Land & Environment Court Act 1979
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> appeals relating to the valuation of land (for rating and taxing purposes);
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> claims for compensation by reason of the compulsory acquisition of land;
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> boundary disputes;
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> disputes involving the encroachment of buildings;
>
> land claims under the New South Wales Aboriginal Land Rights Act 1983; and
>
> disputes regarding the election to and administration of Aboriginal land councils. Section 19 Aboriginal Land Rights Act

Classes 1, 2 and 3 are, in the main, administrative appeals which involve a full hearing on their merits (s 39(2) *Land and Environment Court Act* 1979). That is, for the purpose of hearing and disposing of an appeal, the Court has all the functions and discretions which the body or persons whose decision is the subject of the appeal had in respect of the subject matter of the appeal (s 39(2) *Land and Environment Court Act* 1979). The Court thus sits in the place of the local government council or other decision-making body in what is an exercise of administrative power. As such the Court conducts a rehearing, and fresh evidence in addition to or in substitution for the

evidence given on the making of the decision may be given on the appeal (s 39(3) *Land and Environment Court Act* 1979).

Moreover, such proceedings are free from much of the formality of legal procedure. They are required to be conducted with as little formality and technicality, and with as much expedition as the proper consideration of the matters before the Court permits (s 38(1) *Land and Environment Court Act* 1979). The rules of evidence do not apply (s 38(2) *Land and Environment Court Act* 1979).

Proceedings in Classes 1, 2 and 3 of the Court's jurisdiction may be heard either by judges, or by commissioners, or both. Aboriginal land claims and disputes regarding Aboriginal land councils must be heard by a judge and two Aboriginal commissioners.

Although administrative appeals in Classes 1, 2 and 3 of the Court's jurisdiction are free of much of the formality of legal procedure and free of the rules of evidence, the rules of natural justice and procedural fairness, however, apply.

Natural justice often requires, for instance, that evidence is tested by an opposing party by means of cross examination.

Natural justice and procedural fairness also requires the judge to be neutral. For example, a hearing in the Court which ran for eleven days was aborted by the Court of Appeal because the judge had cross examined a witness himself to such an extent that it was held that the rules of fairness had been denied. The judge had, in doing what he did, not been impartial and was, in effect, putting the case for one of the parties (*Burwood Municipal Council v Harvey* (1995) 86 LGERA 389).

In another case a commissioner took a view of a site without the knowledge of the parties. The Chief Judge of the Court (Pearlman J) held that this constituted a breach of the rules of procedural fairness which in turn amounted to an error of law (*Cacalot Pty Ltd v Sydney City Council* (1996) 90 LGERA 424).

In yet another case the applicant's legal representative, while taking two commissioners back to the Court from a view of the site, deviated and took them to an additional site for a view. The respondent was informed of this when the hearing resumed and thereafter made an application for the two commissioners to disqualify themselves. The judge (Cowdroy AJ) noted that

> "*It is fundamental to the administration of justice, that the rules of natural justice or procedural fairness be adhered to at all stages of a judicial proceeding. Such rules apply not only to judges, but to persons who, although not judges, are appointed to determine issues between litigants. Any departure, however slight, from such principle has the potential to lead to an erosion of confidence in the administration of justice*."

His Honour further held that "*Such deviation and view where only one party was present would, in the mind of an objective observer give rise to a suspicion that one party had achieved an advantage and as such offends the basic principles of natural justice."* The judge ordered that the two commissioners be disqualified from further hearing the proceedings.

The parties are required to file and serve a statement of issues together with the reports of any experts upon which they intend to rely two weeks before the case is heard (*Land and Environment Court Rules*, Pt 13 r 16). If the parties identify a question of law, then that question is referred to a judge for separate determination as a preliminary question, before the hearing of the merits of the case. If, however, the question of law is one of mixed fact and law then the practice is for the whole of the matter to be heard by either a judge alone or a judge sitting with a commissioner.

If a question of law arises in the course of a hearing before a commissioner then the commissioner may refer that question to a judge, either on his own motion or at the request of the parties (s 36(5) *Land and Environment*

Court Act 1979). In such cases the judge determines the question of law and then remits the matter back to the commissioner.

Class 4: civil enforcement

Proceedings in Classes 4, 5, 6 and 7 are judicial in nature and may only be heard by a judge.

The Court has the same civil jurisdiction as the Supreme Court:

> (a) to enforce any right, obligation or duty conferred or imposed by a planning or environmental law;
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> (b) to review or command the exercise of a function conferred or imposed by a planning or environmental law;
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> (c) to make declarations of right in relation to any such right, obligation or duty or the exercise of any such function.
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> (s 20(2) *Land and Environment Court Act* 1979)

The Court can thus make declarations of right and grant injunctions to enforce planning or environmental laws. The Court's jurisdiction includes *judicial review* of decisions made by the government, by local government councils and by certain other public bodies. That is to say, the Court can restrain such bodies, including the government, from acting beyond their power.

The principles governing judicial review of administrative decisions are often misunderstood, even by some lawyers. The Court does not conduct a rehearing of the merits of the particular administrative decision. It only examines whether the administrative decision was unlawful in some respects.

The grounds for relief in judicial review have been developed by the common law and may be broadly stated as follows:

1. *Illegality*. The decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

2. *Irrationality*. The decision is liable to be set aside if it is so unreasonable that no reasonable authority could ever have come to it - often referred to as *Wednesbury* unreasonableness (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 233, at 234).

3. *Procedural impropriety*. This includes failure to observe procedural rules that are either expressly laid down, or failure to act with procedural fairness.

Illegality may include the following:

(a) failure to take into account a relevant consideration which the decision-maker is *bound* to take into account;

(b) taking into account an irrelevant consideration.

In both these cases, however, two things may be noted:

(1) the Court will not interfere if a factor is so insignificant that it could not have materially affected the decision. The Court will only interfere if it is a *material* consideration;

(2) acting under dictation. A public authority entrusted with a statutory discretionary power must exercise its power independently and not under the direction or at the behest of some other body, or the government;

(c) that the person making the decision does not have authority or jurisdiction to make the decision;

(d) that the decision was made for another purpose: ie it was made for a purpose other than a purpose for which the power is conferred, or it was an exercise of discretionary power in bad faith, or it constitutes an abuse of power;

(e) that the decision involved an error of law;

(f) that the decision was affected by fraud;

(g) that there was no evidence or other material to justify the making of the decision;

(h) that the decision was otherwise contrary to law.

Procedural impropriety includes not only procedural fairness and the rules of natural justice (such as the right to be heard) but also the perception of bias on the part of a decision-maker. The Court may disqualify a decision-maker by a mere apprehension of bias and not just for actual bias. Similarly, a judge must disqualify himself from hearing a case where there may be an apprehension of bias.

An example will illustrate how judicial review operates in practice (*Leichhardt Municipal Council v The Minister for Planning* (1992) 78 LGERA 306). In the Sydney suburb of Leichhardt there was a number of large industrial sites that had become redundant. The sites, although zoned for industrial purposes were no longer required for those purposes. The Minister for Planning wanted to implement the State government policy of urban consolidation by rezoning the land for multi-unit housing. The local government council for the area, however, preferred the land to be rezoned for low density housing and for recreational open space. The Minister nevertheless made a regional environmental plan to rezone the land for multi-unit housing. The Council successfully challenged the validity of the regional environmental plan. The Court declared that the regional environmental plan was invalid because of the failure by the Minister to consult the local council before making the regional environmental plan, as required by the legislation relating to the making of such planning instruments (s 45 *Environmental Planning and Assessment Act* 1979).

Standing

One distinguishing feature of much of the legislation administered by the Court is open standing.

At common law the question is whether the complainant has a sufficient "special interest" to give standing to sue (*Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 42).

The bulk of the legislation administered by the Court, however, allows "any person" to bring proceedings in the Court for an order to remedy or restrain any breach of the law, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.

Moreover, proceedings under these provisions may be brought by any person on his or her own behalf, or on behalf of himself or herself and on behalf of other persons (with their consent), or on behalf of a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings (s 123 *Environmental Planning and Assessment Act* 1979, s 674 *Local Government Act* 1993, s 219 *Environmental Offences & Penalties Act* 1997, s 147 *Threatened Species Conservation Act* 1995).

The fact that actions may be brought by persons in a representative capacity makes such actions similar to class actions, such as those in the Federal Court expressly permitted by the rules of that Court.

Judgments in rem

Orders of the Court relating to planning appeals, orders to restrain breaches of development consents, declarations and orders relating to the validity of consents or relating to the use of land result in a judgment *in rem.* This because they determine rights of property. A development consent, for example, is a public document operating *in rem* for the benefit of the owner and of successors in title (*Parramatta City Council v Shell Co of Australia Ltd* [1972] 2 NSWLR 632, at 637; *Eaton & Sons v Warringah Shire Council* (1972) 129 CLR 270, at 293; *P E Bakers Pty Ltd v Yehuda* (1988) 15 NSWLR 437; *Sydney Serviced Apartments Pty Ltd v North Sydney Municipal Council (No 2)* (1993) 78 LGERA 404, at 407-8).

> "*A judicial decision* in rem *is one which declares, defines, or otherwise determines the status of a person, or of a thing, to the world generally, and therefore is conclusive for, or against, everybody as distinct from those decisions which purport to determine the jural relation of the parties only to one another, and their personal rights and equities* inter se *and which, therefore, are commonly termed decisions* in personam*."*
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> Spencer Bower & Turner (1969), *Res Judicata*, 2nd Edition, at p 213.

Classes 5, 6 and 7

The Court has a criminal jurisdiction relating to offences against planning and environmental laws. Criminal prosecutions are determined by a judge alone - that is, without a jury.

For the more serious environmental offences (those which involve an element of wilfulness or negligence on the part of an offender) the penalties are severe: $1.1 million for corporations or $250,000 together with up to seven years imprisonment for individuals.

If a corporation commits an environmental offence, a corporation's directors and managers are also taken to have committed it, unless they can show that the offence occurred without their knowledge, or that they were not in a position to influence the conduct of the corporation, or that they used all due diligence to prevent the commission of the offence (s 169 *Protection of the Environment Operations Act* 1997).

In addition to imposing a penalty the Court may order the offender to take steps –

(a) to prevent, control or mitigate any harm to the environment caused by the commission of the offence, or

(b) to make good any resulting environmental damage, or

(c) to prevent the continuance or recurrence of the offence

(s 245 *Protection of the Environment Operations Act* 1997).

It is convenient to give two examples of cases in the Court's criminal jurisdiction which I decided and which illustrate the exercise of that jurisdiction in practice.

One case concerned a company which owned a fleet of 20 vehicles, all of which were fairly old and most of which were diesel trucks. The company had received 24 penalty infringement notices in relation to these trucks for the emission of pollution in the past. In the particular case the company was charged with the offence of air pollution because one of its trucks discharged thick black smoke from its exhaust pipe. Whilst all the trucks had passed their annual road inspections every year, these inspections had never been performed when the vehicles were

under load. The evidence made it clear that it was when the engines were under load that pollution problems arose.

I fined the defendant company the sum of $18,000, which is just under 14.5% of the then maximum penalty of $125,000. The defendant also had to pay the prosecutor's costs of $5,500. In reaching this amount, I had regard on the one hand to the large number of infringement notices and a prior air pollution conviction which the defendant company had received and the fact that the pollution from an unserviced diesel truck can cause up to 100 times the amount of pollution caused by a single car. On the other hand, I had regard to the fact that the defendant pleaded guilty and had fully co-operated with the prosecutor; and that it had since replaced all the vehicles in its fleet with new ones, ensuring far less possibility of a recurrence of the offence (*Environment Protection Authority v Vickery Corporation Pty Ltd* (1997) 96 LGERA 146).

In one of the more serious cases of environmental crime to have come before the Court, a land owner and his wife owned and operated a caravan park adjacent to a river. During a period of about 30 months the owner pumped effluent, including human faeces and urine, which was of a kind that could have been removed from septic tanks into the waters of the river. The owner concealed and denied the existence of the underground pipes. He wilfully pumped the effluent into the river and did so to save money. The waters of the river were changed physically, chemically and biologically. More importantly, the sediments near the outlet of the pipes were found to be contaminated with viruses that had come from the pipes.

In determining the penalty I had regard to the seriousness of the offence; the fact that the owner must have known that his pumping activities were illegal and would cause harm to the environment; the fact that his actions were not an isolated or single act of pollution but were carried out over a period of 128 weeks; and the volume of sewage illegally discharged and the fact that it was done for the motive of financial gain. I sentenced the defendant to twelve months imprisonment and fined him $250,000, the maximum penalty for an individual. I also ordered the defendant to pay the prosecutor's costs of $170,000.

Finally, the Court's criminal jurisdiction also includes appeals from decisions of magistrates relating to environmental offences.
