Environmental Defenders Office

Land and Environment Court of NSW

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This factsheet explains the types of cases the Land and Environment Court of NSW hears, the orders it can make, the rules regarding costs rules, and how to obtain legal aid.

Overview

The Land and Environment Court of NSW (**Land and Environment Court**) is a specialist court which deals with cases relating to development, the environment and local government. It is part of the NSW court system and has equal standing with the Supreme Court of NSW.[1]

The Land and Environment Court was established by the *Land and Environment Court Act 1979* (NSW) (**LEC Act**) and can only deal with matters listed within its jurisdiction.[2]

For example, the Land and Environment Court has jurisdiction to hear cases or appeals arising under the:

- *Environmental Planning and Assessment Act 1979* (NSW), such as appeals about decisions to grant or refuse development consent,[3]
- *Protection of the Environment (Operations) Act 1997* (NSW), such as prosecution for pollutions offences, and
- *Local Government Act 1993* (NSW)

[1] *Land and Environment Court Act 1979* (NSW) s 5(1) (**LEC Act**).
[2] Ibid, s 16.
[3] N.B. Proceedings for an offence against the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) or *Environmental Planning and Assessment Regulation 2000* (NSW) (**EP&A Regulation**) can also be taken before a Local Court, but the penalty that the Local Court can impose is limited to $110,000 (see EP&A Act, s 9.57).

The operation and procedures of the Land and Environment Court are governed by the LEC Act, Land and Environment Court Rules 2007 (NSW) (**LEC Rules**) and a range of practice notes and directions issued by the Chief Judge. The Court's jurisdiction is divided into 8 different classes, depending on the type of case. Different procedures apply to each class.

N.B. Environmental disputes arising under Commonwealth laws are dealt with by the Federal Court of Australia

Visit: The Federal Court of Australia website for more information

If you want to take action in the Land and Environment Court to challenge a decision regarding a Development Application (**DA**), it is important to act quickly as strict time limits apply for bringing a matter before the Court.

There are two forms of appeal – merits appeals and judicial review. It is important to understand the difference between these two types of appeal (see Class 1 and Class 4 proceedings below).

The types of appeal which are available in relation to a given development will depend upon the category of development.

Read: EDO Factsheets on **Development Applications and Consents** and **State Significant Development and State Significant Infrastructure** for more information on how appeal rights arise under each category of development

Alternatives to proceedings in the Land and Environment Court

Penalty notices

For some offences, public authorities can issue penalty notices to avoid the time and cost of a Court hearing.[4]

Penalty notices tend to be available for minor offences and can be issued by an authorised person. If the alleged offender does not want the matter to go to Court, they can pay the penalty notice within the time specified on the notice and avoid a hearing.

[4] See EP&A Regulation, cl 284(1); *Protection of the Environment (Operations) Act 1997* (NSW), Part 8.2 Div 3 (**POEO Act**); *Water Management Act 2000* (NSW) Ch 7 Enforcement, ss 365-366.

Land and Environment Court procedures

The Land and Environment Court is a specialist court which hears appeals and enforcement cases under planning and environment laws in NSW. Jurisdiction is divided into 8 different classes, depending on the type of case. Different procedures apply to each class. The classes are as follows:[5]

- Class 1 – merits appeals
- Class 2 – local government and miscellaneous appeals and applications [including disputes under the *Trees (Disputes between Neighbours) Act 2006* (NSW)]
- Class 3 – land tenure, valuation, rating, and compensation matters
- Class 4 – civil enforcement and judicial review
- Class 5 – summary enforcement (criminal matters)
- Class 6 – appeals from convictions relating to environmental offences (criminal matters)
- Class 7 – other appeals relating to environmental offences
- Class 8 – mining matters

N.B. Only Classes 1 and 4 appeals are explained in further detail in this factsheet. Click the titles to skip to these sections.

Both Judges and Commissioners hear cases in the Land and Environment Court, depending on the nature of the case. Either a Judge or a Commissioner can hear Class 1, 2, 3 and 8 matters, whereas *only* a Judge can hear Class 4, 5, 6 and 7 matters.[6]

Time limits

Most environmental laws contain strict time limits for commencing a case in the Land and Environment Court. Time limits apply to merits appeals, civil enforcement and judicial review proceedings, and to criminal proceedings.

The time limits differ depending on who is bringing the appeal, and in which class the case will be heard. The specific time limit for each type of appeal or proceeding is usually set out in the legislation under which the decision was made that the applicant wishes to appeal against. Where no appeal period is specified, a period of 60 days is applied.[7]

For example, an applicant who is dissatisfied with the decision of a consent authority in relation to their DA can appeal to the Court within 12 months of receiving notice of the decision.[8] Whereas an objector who wishes to appeal against a consent for designated

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[5] LEC Act, ss 16-21C.
[6] Ibid, s 33.
[7] Land and Environment Court Rules 2007 (NSW), r 7.1(1)(a) (**LEC Rules**).
[8] EP&A Act, ss 8.6-8.10.

development must bring their appeal within 3 months after the date on which notice of the determination was given for merits appeals,[9] and 3 months after the date on which notice was given for judicial review.[10]

You may therefore need to act quickly if you are contemplating an appeal to the Land and Environment Court.

Read: EDO Factsheet on **Development Applications and Consents** for more information on time limits and appeals under the EP&A Act

Class 1 – Merits appeals

In a merit appeal (also called a 'Class 1' appeal), the Court remakes the decision which is being challenged – "stepping into the shoes of the original decisionmaker". This is different and not to be confused with assessing the legal validity of a decision, which is known as "judicial review" – see Judicial Review below.

In a merit appeal, the Court usually has the power to make any decision which the original decision-maker could have made, such as by granting or refusing development consent.[11] If the Court approves a development application, then the Court will usually impose conditions of consent.

Merits appeals are available under a range of environmental legislation. However, most merits appeals in the Land and Environment Court are brought by developers against a refusal to grant development consent or against the conditions of consent. In some cases, a person who objects to the granting of development consent (known as an objector or third party) is also entitled to either bring (or be joined to) a merit appeal.[12]

Merits appeals are usually heard by a Commissioner, rather than a Judge. However, if the proceedings are likely to be lengthy, complex or controversial, the matter can be heard by two or more Commissioners, or a Judge and a Commissioner sitting together.[13]

Examples

Most merit appeal cases in the Land and Environment Court are appeals of either a refusal or an approval of development application.

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[9] EP&A Act, s 4.59.
[10] Uniform Civil Procedure Rules 2005 (NSW), cl 59.10(1) (**UCPR**); EP&A Act, ss 4.59, 8.6-8.10.
[11] LEC Act, s 39.
[12] For example, see EP&A Act, s 8.8 Appeal by an objector–designated development applications.
[13] LEC Act, ss 34C(1) and 37(1).

Who can bring merit appeal proceedings?

An applicant can bring a merit appeal to challenge the refusal of their development application.[14]

Objectors have limited rights to bring merits appeals. Merits appeals are only available to 'objectors'– that is, those people who wrote a submission during the exhibition of the proposal objecting to the proposal. Furthermore, merits appeals are only available with regards to certain types of development, namely, designated developments (including state significant development).[15] With regards to State significant developments, merits appeals are only available if the Independent Planning Commission has not held a public hearing in respect of the matter.[16]

How is a Class 1 case conducted?

The Judge or Commissioner can take into consideration all of the material submitted to the original decision-maker, and can consider any fresh evidence which they think may be relevant.[17] Merits appeals are usually informal in nature, and the rules of evidence do not apply.[18] The Court is required to take into consideration the same issues as the original decision-maker in making its decision, e.g., on whether to approve a development, or whether to grant a pollution licence.[19]

Preparation for the hearing

Class 1 proceedings are commenced by a Class 1 Application with the Land and Environment Court Registry and serving it on all other parties (i.e. the consent authority and the person who made the application).[20]

Fees for filing an originating process in Class 1 proceedings start from $996 for an individual and $1992 for a corporation (as of Nov 2021).

If you hold a concession card, do not have a lawyer or your income is below a certain level, you can apply to the Registrar to have payment of these fees waived or postponed.

The respondent is required to file a statement of facts and contentions with the Court and serve a copy on the other parties at least three days before the first directions hearing.

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[14] EP&A Act, s 8.7.
[15] Ibid, s 8.8.
[16] Ibid, s 8.6.
[17] LEC Act, ss 38(2) and 39(3).
[18] Ibid, ss 38(1) and 38(2).
[19] Ibid, ss 39(2) and 39(4).
[20] N.B. There is a different process for residential development appeals. See the Court's website for more information.

Visit: The LEC website to view the pages on:

- Forms to download Form B (Application Class 1, 2, 3 for commencing all class 1, 2 and 3 appeals or applications except those under s 56A)
- Schedule of Court Fees to check the current fee rates before attempting to file documents at the registry
- What it might cost, particularly the "Waiver, postponement or remission of court fees" section for more information about applying to waive court fees

Directions hearings

A directions hearing is a short hearing in a courtroom. The first directions hearing

for Class 1 proceedings is usually before the Court's Registrar. The primary purpose of the directions hearing is to make directions about the filing and serving of documents and evidence and if a matter is ready, to list a matter for a conference, mediation, or a hearing. Conciliation conferences are mandatory before a matter can proceed to hearing in some cases.[21] In other cases, the Court may arrange a conciliation conference.[22]

Prior to the second directions hearing, parties are required to agree on the expert evidence to be called by each party at the hearing, as well as the directions that the Court should make at the second directions hearing.

At the second directions hearing, the Registrar will make directions, including fixing a date for the hearing.

Prior to the commencement of the hearing, all the evidence should be filed with the Court and served on all parties. Opportunities for settlement should be explored at each stage of the proceedings, including the period before the first directions hearing. Litigants should attempt to narrow the issues in dispute as early as possible.

Visit: The LEC page on Conciliation to read more about conciliation conferences

On-site hearing

Merits appeals concerning development applications will usually commence on-site.[23]

Local residents are often able to appear at the beginning of an on-site hearing to express their concerns to the Commissioner. Residents are often invited by the council, the developer or a third party to attend the beginning of a merit appeal to give evidence about what impacts a proposal will have on their property. They can be cross-examined by the other parties' lawyer.

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[21] LEC Act, s 34AA.
[22] Ibid, s 34.
[23] Ibid, ss 34A and 34B.

The Court must always make an inspection of the site of a proposed development before deciding a matter unless all parties agree that a site inspection is not necessary.[24]

Hearing

The hearing will commence before a Commissioner or Judge of the Court, based upon the filed evidence and any other documentary evidence which has been the subject of directions, or which may have been produced during discovery of documents.

Witnesses who prepared affidavits may give oral evidence at a hearing. If a witness has filed an affidavit, the other party can require that they attend the hearing and be available for cross examination. If you want to cross examine a witness of the other side, you need to give them notice that they must attend the hearing at least 7 days before the hearing.

Expert reports

Each side in a merit appeal usually presents several written reports by experts to show the merits or failings of the proposal. For example, an objector to a designated development might tender a report from a town planner showing what impact the proposal is likely to have on the amenity of the area, or a report by an ecologist could be tendered to show the likely impact on threatened species.

If more than one party engages experts to give evidence on the same issue, the Court usually requires that the experts confer and then prepare a joint report, setting out what matters they agree and disagree on. The joint report is either prepared after the experts have filed and served their individual reports, or can be done prior to, or instead of individual expert reports, particularly when the matter in dispute is not complicated.[25]

If a party wants to challenge what is said by an expert in a written report, they should ask the expert to attend the hearing so that they can cross-examine the expert about their report.

Parties' single experts

The Court can require, or parties can agree, that a single expert, known as the parties' single expert, be engaged to provide expert evidence on particular issues.[26] The parties' single expert is briefed by both parties, and both parties are responsible for the expert's fees.[27]

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[24] LEC Act, s 34D.
[25] UCPR r 31.24 and 31.26; see LEC Practice Directions 'Class 1 Development Appeals usual directions for hearing'.
[26] UCPR r 31.37; LEC Act, s 38(3).
[27] UCPR r 31.38 and 31.45.

If the parties cannot agree upon who to appoint as the single expert they are to seek the direction of the Court.[28] Parties are to each file and serve the CVs and fee estimates of 3 appropriately qualified experts and the Court will direct the parties to engage one of these experts to act as the parties' single expert.[29]

No party can seek the preliminary views of the expert before offering that person's name as an expert.[30] Parties must seek the permission of the Court if they want to bring evidence from another expert, if they do not agree with the parties' single expert's report.[31]

What orders can the Court make in merit appeal cases?

In merit appeal cases, the Court can uphold the original decision, or overturn the decision and make a fresh one.

Further appeals

There is no further appeal on the merits against a merit decision.

However, if the decision was made by a Commissioner in Class 1, a dissatisfied party can appeal to a Judge of the Land and Environment Court (Class 4) on the ground that the Commissioner made an error of law when coming to a decision. This type of appeal is called 'judicial review'. It is not possible to introduce new evidence regarding the merits of the proposal.[32]

If the original merit decision was made by a Judge, then an appeal can only be made to the NSW Court of Appeal.

Costs

In a merit appeal, each party usually pays their own costs unless the Court considers that it is fair and reasonable to order one party to pay another's costs.[33] Circumstances where the Court might consider the making of a costs order to be fair and reasonable include where:[34]

- a party has failed to provide, or has unreasonably delayed in providing, information or documents to the other side,
- a party has acted unreasonably during the time leading up to the case,
- the proceedings have been commenced or defended for an improper purpose, or

[28] UCPR r 31.37(2); see LEC Practice Directions 'Class 1 Development Appeals usual directions for hearing'.
[29] see LEC Practice Directions 'Class 1 Development Appeals usual directions for hearing'.
[30] UCPR r 31.37(4).
[31] UCPR r 31.44.
[32] LEC Act, s 56A.
[33] LEC Rules, r 3.7(2).
[34] Ibid, r 3.7(3).

- a party has commenced or continued a claim which did not have reasonable prospects of success

Class 4 – Civil enforcement and judicial review

Class 4 proceedings are concerned with environmental planning and protection, and civil enforcement. They involve either:

- Civil enforcement proceedings

  Where a person alleges that there has been a breach of an environmental law, and asks the Court to make orders to remedy or restrain that breach; or,

- Judicial review proceedings

  Where a person challenges an administrative decision or conduct under planning or environmental laws.

Any person has the right to bring proceedings to enforce environmental and planning laws in Class 4 proceedings.[35]

Civil enforcement proceedings

Examples of breaches of environmental law that might be enforced in the Land and Environment Court include:

- Where a person causes pollution without an environment protection licence or in excess of the limit permitted by that licence;
- Where a developer breaches the conditions of their development consent;
- Where a person breaches wildlife protection provisions of the *National Parks and Wildlife Act 1974* (NSW) or the *Threatened Species Conservation Act 1995* (NSW); or
- Where a person undertakes development without the required development consent.

N.B. The person who brings the case is the applicant. The case is brought against the person who is alleged to have breached the law, the respondent.

[35] See for example EP&A Act, s 9.45; *Local Government Act 1993* (NSW), s 674; POEO Act, ss 252 - 253; *Biodiversity Conservation Act 2016* (NSW) s 13.14; *National Parks and Wildlife Act 1974* (NSW), s 193.

Judicial review proceedings

Examples of cases where a person may seek judicial review, for example where a development consent might be challenged for failure to comply with the requirements of the EP&A Act include:

- Failure to advise a development application in accordance with legal requirements;
- Failure to properly notify relevant people in accordance with legal requirements;
- Failure to provide an Environmental Impact Statement or a Species Impact Statement when required;
- Approval of a development in a zone where developments of that type are prohibited; or
- Failure to take a relevant consideration into account when granting consent.

Read: EDO Factsheet on **Development Applications and Consents** further information on the correct procedures for dealing with development applications

The Court is not concerned with the merits of a proposal, that is, whether the decision was good or bad – it is only concerned with whether the decision was made in accordance with law.

Even if the decision is found to be invalid, there is nothing to stop the applicant from reapplying and the consent authority reconsidering the application, this time ensuring that it follows the correct procedures.

In judicial review cases, the person who brings the case is the applicant. The case is brought against the person who benefits from the decision being challenged, such as the developer who was granted a development consent, as well as the person making the decision, such as the Minister for Planning or the Council. The developer is the first respondent and the decision-maker is the second respondent.[36]

Who can commence civil enforcement or judicial review proceedings?

Many environmental laws allow any person to bring civil enforcement or judicial review proceedings.[37]

[36] UCPR, rule 59.3.

[37] EP&A Act, s 9.45; *Local Government Act 1993* (NSW), s 674; POEO Act, ss 252, 253.

How is a Class 4 case conducted?

Class 4 cases are always heard by a Judge (and not a Commissioner) in the Land and Environment Court.[38] Strict rules of evidence apply, restricting what kind of material the Court can consider.

The onus is on the person bringing the case to point to a particular provision of an environmental law which should have been complied with, and then to present factual evidence to show that it was not. For example, the applicant might show that section 4.15(1)(c) of the EP&A Act, which requires a council to take into account the suitability of a site for a development, was not considered. They could do this by tendering the council's town planning reports, the minutes of a council meeting, or any other documents which show that this matter was not considered.

If the case relates to a breach of a development consent, or to work carried out without development consent, a member of the public could be asked to provide a sworn statement (affidavit) if they witnessed any unauthorised development being carried out.

Preparation for the hearing

Class 4 proceedings are commenced by filing a summons (Form 4A or Form 4B for Class 4) with the Land and Environment Court Registry and serving it on all other parties. In a summons, you list the orders that you would like the Court to make.

Fees for filing an originating process in Class 4 proceedings are $996 for an individual and $1,992 for a corporation (current at 4 November 2021).

If you hold a concession card, do not have a lawyer or your income is below a certain level, you can apply to the Registrar to have payment of these fees waived or postponed.

N.B. The process/documentation described below is for civil enforcement proceedings only

After filing and serving the summons for a civil enforcement proceeding, you (the applicant) must file and serve a Statement of Claim. This Statement sets out the facts that an applicant relies on as the basis of its claim.

After 21 days from the filing and serving of the Statement of Claim, (or any other time that the Court directs), the Respondent should file and serve its Points of Reply, which sets out which parts of the Statement of Claim the Respondent agrees/disagrees with.

Formal rules of evidence and practice and procedure apply in Class 4 proceedings. Evidence-in-chief of all witnesses is to be given by affidavits (Form 40). These are "written statements sworn or affirmed before a person authorised to administer the oath that the contents of the statement are true".

[38] LEC Act, s 33(2).

Visit: The LEC website to view the pages on:

- Forms to download the Summons (Form 4A or Form B), Statement of Claim (Form 3A or 3B) and Affidavit (Form 40) applicable to you
- Schedule of Court Fees to check the current fee rates before attempting to file documents at the registry
- What it might cost, particularly the "Waiver, postponement or remission of court fees" section for more information about applying to waive court fees

Exceptions to using this method of evidence are:

1. If there is any contrary direction by the Court;
2. If the Court decides that evidence given 'in the form of charts, summaries or other explanatory material' will assist in the understanding of other evidence;[39] and
3. If witnesses are deaf or mute, they may give evidence by alternative means.[40]

In civil enforcement proceedings, visual evidence such as photographs or videos is very useful as it enables others to experience or view the site or event in question. Importantly, this type of evidence helps to illustrate the facts asserted in the affidavit.

The applicant bears the onus of identifying the particular provision(s) of law which should have been complied with, and then to present factual evidence to show that it was not.

Documents not included in affidavits that parties wish to rely on are to be included in a 'bundle of documents'. All pages in a bundle of documents must be numbered and there must be a table of contents at the front. Only one bundle of documents is to be filed in the proceedings, so the parties are to discuss and attempt to agree upon what is to be included. If one party objects to a document being included in the bundle, that document is to be included, and the fact it is objected to is to be noted in the table of contents. In judicial review proceedings that involve a challenge to a consent authority's decision, the bundle of documents will typically include the documents that the decision-maker looked at when making the decision.

The Land and Environment Court has prepared a Practice Note for Class 4 proceedings. It is intended that parties adapt the Usual Directions set out in Schedules A and B to the circumstances of their matter, when seeking directions at directions hearings.

Visit: The LEC page on Practice Notes to download and read the Class 4 Proceedings Practice Note

[39] *Evidence Act 1995* (Cth), s 29(4).
[40] Ibid, s 31.

Directions hearings

A directions hearing is a short hearing in a courtroom before the List Judge. The primary purpose of the directions hearing is to make directions about the filing and serving of documents and evidence and, if a matter is ready, to list a matter for a conference, mediation, or a hearing.

Prior to the commencement of the hearing all the evidence should be filed with the Court and served on all parties. At the directions hearing, the Judge will set down the timetable for filing and serving the evidence. The Judge also makes directions to prepare a matter for hearing, such as directions for the filing of evidence, filing of Points of Claim (Appendix 2), Return of Subpoenas, Notices to Produce and Notices of Motion.[41]

Opportunities for settlement should be explored at each stage of the proceedings, including the period before the first directions hearing. Litigants should attempt to narrow the issues in dispute as early as possible.

Generally, directions hearings for Class 4 matters are conducted by the List Judge of the Court each Friday.

Hearing

The hearing will then commence before a Judge of the Court, based upon the filed evidence and any other documentary evidence which has been the subject of directions, or which may have been produced during discovery of documents.

Witnesses who prepared affidavits may give oral evidence at a hearing. If a witness has filed an affidavit, the other party can require that they attend the hearing and be available for cross examination. If you want to cross examine a witness of the other side, you need to give them notice that they must attend the hearing at least 7 days before the hearing.

What orders can the Court make?

Civil enforcement and judicial review proceedings are different from criminal proceedings in that the objective of civil proceedings is not to punish the person who has broken the law, but to restore compliance with the law.

The types of orders that the Court can make in civil enforcement and judicial review cases where the Court finds that there has been a breach of the law include:[42]

- Declarations – this is a legally binding statement by the Court that a breach of an Act has occurred, e.g. the Court could make a declaration that a development consent is invalid because it was issued in breach of the EP&A Act;
- Injunctions – this is an order restraining somebody from doing something, e.g. from carrying out further work on a site;

[41] See LEC page on Practice Notes to download and read the Class 4 Proceedings Practice Note.
[42] EP&A Act, s 9.45.

- Demolition or removal orders;
- Remediation orders – e.g. an order directing a person to carry out remediation work on a site, such as replanting trees; and
- An order that the decision be sent back to the original decision-maker to make again, this time in accordance with the law. Note that the Court cannot make a fresh decision in judicial review cases, but must send it back to the original decision-maker if it finds that the decision must me re-made.

If a person fails to comply with an order of the Court within the time specified in the order, then he or she may be in contempt of Court and liable to a fine, sequestration of property, or even imprisonment.[43]

Even if a breach of the law is proved, the Court has discretion about whether to make any orders at all.[44] Therefore, in addition to proving that a breach of the law has occurred, the applicant also needs to show that environmental harm will occur if the orders are not made and that the case is not just about a technical breach of the law.

Injunctions

The Court can grant an injunction on a temporary basis (interim or interlocutory injunction) or a permanent basis (permanent injunction). Where a person is seeking an injunction, it is important that the proceedings be brought without delay, as any delay might mean that the Court will not grant the injunction because of the prejudice to the other party.[45]

Appeal to Court of Appeal

Appeals from Class 4 decisions are made to the NSW Court of Appeal.[46]

Costs

In Class 4 proceedings, the usual rule is that the loser is ordered to pay the winner's costs.[47] This can turn out to be very expensive, as the losing party will usually have to pay their own legal costs as well.

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[43] UCPR, r 40.6.
[44] LEC Act, s 23.
[45] See Tegra (NSW) Pty Ltd v Gundagai Shire Council and Another (2007) 160 LGERA 1 ([2007] NSWLEC 806), where a trade competitor brought Class 4 proceedings challenging the validity of development consent for a new sand and gravel quarry. The applicant had delayed in bringing the proceedings, and the Court declined to grant an interlocutory injunction because the quarry had already entered into sales contracts.
[46] LEC Act, s 58.
[47] LEC Rules, r 4.1; UCPR, r 42.1, *Latoudis v Casey* (1990) 170 CLR 534.

However, the Court can decide not to order a losing party to pay the other sides' costs if the proceedings were brought in the public interest (e.g. for the purpose of protecting the environment).[48]

When deciding whether a case is in the public interest, the Court will consider the following:[49]

- The public interest served by the litigation;
- Whether that interest is confined to a relatively small number of people in the immediate vicinity of a development, or whether the interest is wide;
- Whether the applicant sought to enforce public law obligations;
- Whether the prime motivation of the litigation is to uphold the public interest and the rule of law; and
- Whether the applicant has no pecuniary interest in the outcome of the proceedings.

Case Study: Costs in public interest environmental matters - Court upholds public nature interest of proceedings

The Court of Appeal upheld the principle that a person who brings a case which is in the public interest may not have to pay the other party's costs, even where they lose the case.

In this case,[50] Jill Walker succeeded in the Land and Environment Court but was unsuccessful in defending a subsequent appeal to the Court of Appeal. After making a decision about the issues raised in the proceedings, the Court of Appeal considered whether the unsuccessful party (i.e. Walker) should pay the legal costs of the successful parties. The usual costs order made by Courts is that the unsuccessful party pays the costs of the successful party. However, in this case, the Court of Appeal did not make the usual order and instead ordered that each party pay their own costs, of both the Court of Appeal and Land and Environment Court proceedings.

The Court found that the proceedings brought by Walker, although ultimately unsuccessful, were properly characterised as 'public interest litigation'. This was because the purpose of the litigation was to uphold the rule of law in relation to how the *Environmental Planning and Assessment Act 1979* (NSW) should be applied and because the interest in the outcome of the case was broader than a small number of people in the vicinity of the development. The Court further stated that additional factors were required to warrant the Court departing from the usual order as to costs.

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[48] LEC Rules, r 4.2(1); *Oshlack v Richmond River Council* (1998) 193 CLR 72 ([1998] HCA 11).
[49] *Engadine Area Traffic Action Group Inc v Sutherland Shire Council (No 2)* (2004) 136 LGERA 365, per Lloyd J.
[50] *Minister for Planning v Walker (No. 2)* [2008] NSWCA 334.

The special circumstances in this case were:

- the case raised a novel question of law
- the point of law raised by Walker was reasonably arguable
- both the Land and Environment Court in the first instance, and the Court of Appeal found the Minister did not take into account the principles of ecologically sustainable development, which is contrary to good decision-making.

Class 5 – Summary enforcement (Criminal matters)

Criminal enforcement cases are also called 'prosecutions'. A prosecution is where the prosecutor (usually EPA or a local council) attempts to show that an individual or a corporation has committed an offence and asks the Court to impose a penalty on that person or corporation.

Examples of typical offences which can be prosecuted in the Land and Environment Court are:

- Polluting water without a pollution licence (or in breach of a licence);[51]
- Carrying out development without development consent (if consent is required) under the EP&A Act,[52] and;
- Clearing native vegetation in breach of the *Biodiversity Conservation Act 2016* (NSW).[53]

Class 5 cases are always heard by a Judge of the Court and are subject to strict rules of evidence under which the prosecutor must prove their case beyond a reasonable doubt. If the defendant pleads guilty, then the Court will proceed to a hearing to determine what penalty it should impose. If the defendant pleads 'not guilty', the prosecutor must provide evidence to establish the offence, which the defendant can contradict. If the defendant is then found guilty, there will then be a further hearing on the penalty.

Penalties

In criminal cases, the Court usually imposes a fine by way of penalty. The Court may also have the power to order remediation of a site which has been damaged, such as the clean-up of pollution, or the replanting of trees.[54] In extreme cases, the Court can even order a term of imprisonment.[55]

The kinds of penalty which the Court can impose are set out under the environmental legislation which has been breached. For example, the EP&A Act allows the Court to

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[51] LEC Act, s 21(a).
[52] Ibid, s 21(f).
[53] Ibid, s 21(i); the *Biodiversity Conservation Act 2016* (NSW), Pt 13, Div 1.
[54] POEO Act, s 245; EP&A Act, s 9.56.
[55] *EPA v Charles Anthony Leslie Gardner* [1997] NSWLEC 169.

impose a penalty of up to $1.1 million for a breach of that Act, if no other penalty is specified.[56]

An important factor which may be taken into account in determining an appropriate penalty is the amount of environmental harm which the offence caused.[57]

Who can commence prosecutions?

Prosecutions are usually brought by the public authority responsible for that area of law. For example, pollution offences are prosecuted by the EPA, and illegal clearing of native vegetation offences under the *Local Land Services Act 2013* (NSW) are prosecuted (civil and criminal prosecutions) by the Local Land Services.

A member of the public can bring a criminal prosecution for a pollution offence,[58] but only if they can demonstrate that the EPA has not taken action to prevent, control, abate or mitigate the harm to the environment caused by the alleged offence or to prevent the continuance or recurrence of the alleged offence (within 90 days of being asked to do so), and only if the Court grants leave.[59]

There are usually strict time limits within which criminal proceedings must be brought. For example, criminal proceedings for an offence against the EP&A Act must be commenced within 2 years of the offence allegedly being committed, or of the offence first coming to the attention of an authorised officer.[60]

Appealing to the Court of Appeal

A decision made by a Judge in the Land and Environment Court (such as those made in Class 5 cases) can be appealed to the NSW Court of Appeal. You can only appeal if you can argue that the Commissioner or Judge of the Land and Environment Court made an error in the way they applied the law in making a decision (i.e. judicial review).

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[56] EP&A Act, s 9.57(3) and 9.57(4).
[57] POEO Act, s 241.
[58] under the POEO Act.
[59] POEO Act, s 219.
[60] EP&A Act s 9.57(5), (5A).

Glossary

Key terms used in this factsheet

EP&A Act means the *Environmental Planning and Assessment Act 1979* (NSW)

EP&A Regulation means the *Environmental Planning and Assessment Regulation 2000* (NSW)

EPA means the Environment Protection Authority

LEC Act means the *Land and Environment Court Act 1979* (NSW)

LEC Rules means the Land and Environment Court Rules 2007 (NSW)

POEO Act means the *Protection of the Environment (Operations) Act 1997* (NSW)