



# Environmental Defenders Office

## Land and Environment Court of NSW

*Disclaimer: This factsheet is a guide only and is designed to give readers a plain English overview of the law. It does not replace the need for professional legal advice in individual cases. To request free initial legal advice on a public interest environmental or planning law issue, please visit our [website](#).*

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### What is the Land and Environment Court?

The Land and Environment Court of NSW (**LEC**) 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.<sup>1</sup>

The LEC 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,<sup>2</sup>
- [Protection of the Environment \(Operations\) Act 1997 \(NSW\)](#), such as prosecution for pollutions offences, and
- [Local Government Act 1993 \(NSW\)](#)

The jurisdiction of the LEC is divided into 8 different classes, depending on the type of case. Different procedures apply to each class.

- [Class 1 – Merits appeals](#)
- [Class 2](#) – Local government and miscellaneous appeals and applications (including tree disputes<sup>3</sup>)
- [Class 3](#) – Land tenure, valuation, rating and compensation matters
- [Class 4 – Civil enforcement and judicial review](#)

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<sup>1</sup> [Land and Environment Court Act 1979 \(NSW\)](#) s 5(1) (**LEC Act**).

<sup>2</sup> N.B. Proceedings for an offence against the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act**) or [Environmental Planning and Assessment Regulation 2021 \(NSW\)](#) (**EP&A Regulation 2021**) can also be taken before a Local Court, but the penalty that the Local Court can impose is limited to \$110,000.00 (see EP&A Act, s 9.57).

<sup>3</sup> Such as disputes arising under the [Trees \(Disputes between Neighbours\) Act 2006 \(NSW\)](#).

- [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, 4 and 5 are explained in further detail in this factsheet. Click the titles to skip to these sections.

Visit: The [Land and Environment Court Rules 2007 \(NSW\)](#) (**LEC Rules**) and a range of [Practice Notes](#) for details of the different procedures applicable to each class.

Environmental disputes arising under Commonwealth laws, such as the [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#), are dealt with by the Federal Court of Australia.

## What steps can I take before heading to 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.<sup>4</sup>

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.

### Apply for a review of a development application determination

If a development application or a modification of a development consent application is refused, you may be able to apply to the relevant consent authority for a review of the decision.<sup>5</sup>

This does not apply to determinations of designated development applications, Crown Development or complying development certificate applications.<sup>6</sup>

<sup>4</sup> See EP&A Regulation 2021, Schedule 5; [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.

<sup>5</sup> EP&A Act, s 8.2.

<sup>6</sup> EP&A Act, s 8.2(2).

You may apply to the NSW Planning Portal for a review in the following situations:

- The determination of a development application by a council, local planning panel, a Sydney district or regional planning panel or any person acting as a delegate of the Minister;
- The determination of an application for the modification of a development consent by a council, local planning panel, a Sydney district or regional planning panel or any person acting as a delegate of the Minister; or
- The decision of a council not to determine a development application.<sup>7</sup>

#### How can I apply for a review?

An application for review must be submitted to the NSW Planning Portal in the approved form.<sup>8</sup>

For review of a development application, the application must be submitted to the NSW Planning Portal within 14 days of being notified of a consent authority's decision.<sup>9</sup>

For review of a determination of an application for the modification of a development consent, the application must be submitted to the NSW Planning Portal within 28 days after the determination.<sup>10</sup>

N.B. You will have to pay a fee after submitting an application for review. The fee must be determined with 14 days of the application for review being submitted to the NSW Planning Portal.<sup>11</sup>

A digital lodgement fee may also apply.

Visit: The [NSW Planning Portal Service Fees](#) for additional information on digital lodgement fees.

#### **What can I do if my development application is refused?**

A development application can be refused by a consent authority if they consider the proposal and reject the application.<sup>12</sup> A consent authority can also refuse development applications by not making a determination within the prescribed assessment period.<sup>13</sup> This is known as 'deemed refusal'.

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<sup>7</sup> EP&A Act, s 8.2(1).

<sup>8</sup> EP&A Regulation 2021, 244(1).

<sup>9</sup> EP&A Regulation 2021, s 244(2)(a).

<sup>10</sup> EP&A Regulation 2021, s 244(2)(b).

<sup>11</sup> EP&A Regulation 2021, s 256.

<sup>12</sup> EP&A Act, s 4.16(1)(b).

<sup>13</sup> EP&A Regulation 2021, s 91(1).

There are different assessment periods for different types of development applications:

- 60 days – for designated development, integrated development, development requiring concurrence or development applications that are accompanied by a biodiversity development assessment report (**BDAR**) under the *Biodiversity Conservation Act 2016* (NSW)
- 90 days – for State Significant Development applications
- 40 days – for all other development applications, other than Crown Development.<sup>14</sup>

If the assessment period lapses and the relevant consent authority has not made a determination, the development application is a deemed refusal and has been rejected.<sup>15</sup>

If this occurs, the applicant can apply to the Land and Environment Court to appeal the decision.<sup>16</sup>

## How can I take action in the Land and Environment Court?

### Class 1 – Merit appeals

An applicant can bring a merit appeal to challenge the refusal of their development application.<sup>17</sup> Merits appeals are usually informal in nature, and the rules of evidence do not apply.<sup>18</sup>

Merits appeals are also 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).<sup>19</sup> 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.<sup>20</sup>

#### How do I apply for a Class 1 merits appeal?

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).

Class 1 proceedings must be commenced by an applicant within 6 months after being notified of the decision they are appealing against.<sup>21</sup> Proceedings must be commenced by an objector within 28 days.<sup>22</sup>

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<sup>14</sup> EP&A Regulation 2021, s 91(4); The assessment period for Crown Development applications is 70 days, EP&A Regulation 2021, s 95.

<sup>15</sup> EP&A Regulation 2021, s 91(1).

<sup>16</sup> EP&A Act, s 8.7.

<sup>17</sup> EP&A Act, s 8.7.

<sup>18</sup> LEC Act, ss 38(1) and 38(2).

<sup>19</sup> EP&A Act, s 8.8.

<sup>20</sup> EP&A Act, s 8.6.

<sup>21</sup> EP&A Act, s 8.10(1).

<sup>22</sup> EP&A Act, s 8.10(2).

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

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.

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

N.B. There is a different process for residential development appeals. See the LEC’s [website](#) for more information.

#### Directions hearing and on-site hearings

A directions hearing is a short hearing in a court room. Their primary purpose is to make directions about the filing and serving of documents and evidence, and to list a matter for mediation, conciliation, or a hearing.

Directions can also be made for an on-site hearing. Merits appeals concerning development applications will usually commence on-site, where local residents can appear to express their concerns to the Commissioner.<sup>23</sup> 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.

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.<sup>24</sup>

Opportunities for settlement should be explored at each stage of the proceedings, including before the first directions hearing. Conciliation conferences are mandatory

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<sup>23</sup> LEC Act, ss 34A and 34B.

<sup>24</sup> LEC Act, s 34D.

before a matter can proceed to hearing in some cases.<sup>25</sup> In other cases, the Court may arrange a conciliation conference.<sup>26</sup>

Visit: The LEC page on [Conciliation](#) to read more about conciliation conferences.

### Hearings and evidence

The hearing will commence before a Commissioner or Judge of the Court, based upon the filed or documentary evidence.

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.

In merit appeal cases, 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.<sup>27</sup>

### 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 LEC (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.<sup>28</sup>

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

## **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 LEC to make orders to remedy or restrain that breach; or

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<sup>25</sup> LEC Act, s 34AA.

<sup>26</sup> LEC Act, s 34.

<sup>27</sup> LEC Act, ss 38(2) and 39(3).

<sup>28</sup> LEC Act, s 56A.

- 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.<sup>29</sup>

Class 4 proceedings must be commenced within 3 months after being notified of the decision they are appealing against.<sup>30</sup>

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 consent without the required development consent

Judicial review proceedings

In judicial review proceedings, the LEC 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.

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.

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<sup>29</sup> See for example EP&A Act, s 4.59; [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.

<sup>30</sup> [Land and Environment Court Rules 2007 \(NSW\)](#), s 6.1.

Read: EDO Factsheet on [How to have your say in developments across NSW](#) for more information on the correct procedures for dealing with development applications.

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.<sup>31</sup>

#### How do I apply for a Class 4 Proceeding?

Class 4 proceedings are commenced by filing a summons (Form 4A or Form 4B for Class 4) with the LEC 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 (as of 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.

#### *Civil enforcement proceedings*

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”.<sup>32</sup>

#### Directions hearing

Directions hearings for Class 4 matters are largely similar to directions hearings for Class 1 matters, listed [above](#). In addition to the above, the judge will set down the

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<sup>31</sup> [Uniform Civil Procedure Rules 2005 \(NSW\)](#), rule 59.3 (UCPR).

<sup>32</sup> Exceptions to using this method of evidence are if there is a contrary direction by the Court, if the Court decides that evidence given in the form of charts or summaries will assist or if witnesses are deaf or mute and need to use alternative means; [Evidence Act 1995 \(Cth\)](#) s 29(4), s 31.



timetable for the filing and serving of evidence and any relevant Notices (Notice of Motion, Notice to Produce, the return of Subpoenas etc.) at the directions hearing.<sup>33</sup>

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

### Hearing

The hearing will commence before a Judge of the LEC, based upon the filed evidence and any other documentary evidence that has been served.

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.

In Class 4 proceedings, the usual rule is that the losing party is ordered to pay the winning party's costs.<sup>34</sup> This can turn out to be very expensive, as the losing party will usually have to pay their own legal costs as well.

However, the Court can decide not to order a losing party to pay the other side's costs if the proceedings were brought in the public interest (e.g., for the purpose of protecting the environment).<sup>35</sup>

### What orders can the LEC 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:

- Declarations – this is a legally binding statement by the Court that a breach of an Act has occurred, e.g., the LEC could make a declaration that a development consent is invalid because it was issued in breach of the Environmental Planning and Assessment Act 1979 (NSW) (**EP&A Act**);
- Injunctions – this is an order restraining somebody from doing something, e.g., from carrying out further work on a site<sup>36</sup>;

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<sup>33</sup> See LEC page on [Practice Notes](#) to download and read the [Class 4 Proceedings](#) Practice Note.

<sup>34</sup> LEC Rules, r 4.1; UCPR, r 42.1, [Latoudis v Casey \(1990\) 170 CLR 534](#).

<sup>35</sup> LEC Rules, r 4.2(1); [Oshlack v Richmond River Council \(1998\) 193 CLR 72](#) ([\[1998\] HCA 11](#)); [Minister for Planning v Walker \(No. 2\) \[2008\] NSWCA 334](#).

<sup>36</sup> 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

- 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 be 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.<sup>37</sup>

Even if a breach of the law is proved, the Court has discretion about whether to make any orders at all.<sup>38</sup> 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.

#### Further appeals

An appeal for a Class 4 LEC decision can be made to the New South Wales Court of Appeal.<sup>39</sup>

### **Class 5 – Summary enforcement (criminal matters)**

Criminal matters are usually commenced by the public authority responsible for that area of law, where they attempt to show that an individual or corporation has committed an offence and asks the Court to impose a penalty on that person or corporation.

For example, pollution offences are prosecuted by the NSW Environment Protection Authority (**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.

However, a member of the public can bring a criminal prosecution for a pollution offence under certain circumstances.<sup>40</sup> If you 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), the LEC may grant you leave to bring criminal proceedings.<sup>41</sup>

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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.

<sup>37</sup> UCPR, r 40.6.

<sup>38</sup> LEC Act, s 23.

<sup>39</sup> LEC Act, s 58.

<sup>40</sup> POEO Act, s 219.

<sup>41</sup> POEO Act, s 219.

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.<sup>42</sup>

#### Further appeals

An appeal for a Class 5 decision can be made to the New South Wales Court of Appeal. You can only appeal if you can argue that the Commissioner or Judge of the LEC made an error in the way they applied the law in making a decision (i.e., judicial review).

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<sup>42</sup> 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 2021** means the [\*Environmental Planning and Assessment Regulation 2021 \(NSW\)\*](#)

**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 \(NSW\)\*](#)

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