

ENVIRONMENTAL COURT SYSTEM

By Patricia Ryan*

The Land and Environment Court stands at the centre of the system of environmental planning and assessment which commenced operation last year. The Court represents a centralizing of jurisdiction that was previously exercised by various judicial and non-judicial tribunals. Jurisdiction is conferred upon the Court by a wide range of statutes but, as the author demonstrates, the selection is at times neither logical nor consistent. In this article, Ms Ryan examines the bases of the Court's jurisdiction and provides a guide to the many matters that come within the ambit of the Court. Ms Ryan then discusses procedural and evidentiary issues and the relationship of the Court to the Supreme Court and shows that in both these areas there are serious issues awaiting resolution.

I INTRODUCTION

The 1979 Environmental Planning and Assessment legislation of New South Wales has not only introduced significant changes in the substantive law of environmental planning and assessment, it has created a new court system. Largely this is achieved by the Land and Environment Court Act 1979 (N.S.W.) which establishes a new superior court: the Land and Environment Court. This Court, which became operative on 1 September 1980, is constituted as a specialised tribunal of lay experts and judges functioning from the three major jurisdictional bases of appellate, civil and criminal work. It has assumed the jurisdiction of a number of existing and also now defunct tribunals in matters relating to valuation, rating, water rights, opening and closing of roads, Crown leases, resumption compensation, land development, building, subdivision, cultural heritage and environmental pollution. These tribunals were as follows.

First, the Land and Valuation Court, established by the Land and Valuation Court Act 1921 (N.S.W.), which consisted of a traditional judge of Supreme Court status who could call on lay experts for assistance. Its initial jurisdiction was partly of an appellate nature relating to objections and appeals against valuations and ratings, and appeals against decisions of local land boards. At various times it enjoyed jurisdiction with respect to building and subdivision matters and in development matters. The remainder of the Court's initial jurisdiction lay over claims for compensation in resumption cases.

Secondly, The Local Government Appeals Tribunal, established in 1972, which consisted of lay experts and no judges. Its specialist members were drawn from eight categories as set out in the Local Government Act 1919 (N.S.W.)¹ The Tribunal's jurisdiction was of an appellate nature relating to building appeals, subdivision appeals, development appeals and miscellaneous matters of a similar nature. The concept of "mini-

* LL.B (Syd.), LL.M. (N.S.W.); Lecturer, School of Economic and Financial Studies, Macquarie University. Based on a paper prepared for the Faculty of Law, University of New South Wales, Continuing Education lectures on 7 November, 1980.

1 Section 342AV.

num requirements" in the Local Government Act 1919 (N.S.W.)² extended this jurisdiction over that enjoyed by the Land and Valuation Court in these matters. An appeal on a question of law could be taken to the Supreme Court.³

Thirdly, The Clean Waters Appeal Board, constituted under the Clean Waters Act 1970 (N.S.W.), with jurisdiction under sections 13(1) and 25 of that Act. This Board sat little more than a handful of times in its five years of existence.

The final tribunals replaced by the Land and Environment Court are the Valuation Boards of Review, established in 1961, to deal with routine valuation cases that would otherwise have gone to the Land and Valuation Court.

As well as replacing these tribunals, the Land and Environment Court was given jurisdiction previously entrusted to Magistrates in the Courts of Petty Sessions and to traditional judges in the District and Supreme Courts. In some cases, it also takes over from a ministerial appeal function.

On its face, therefore, the Land and Environment Court represents a rationalising and centralising of jurisdiction which has been spread about a number of tribunals operating either as judicial or non-judicial tribunals, but not as both in combination. The kinds of jurisdiction it has been given are likewise in novel combination: administrative appeals and civil and criminal jurisdiction. In keeping with tradition, however, the civil and criminal jurisdiction of the Land and Environment Court is excisable only by the judicially qualified members of the Court.

The apparent rationalisation of jurisdiction nevertheless provides no more than a loose title for the Court. Ascertaining the precise contents of the jurisdictional package is not without its challenges, given the multiplicity of statutory instruments to which one must resort for information and a seeming perversity in the selection of jurisdictional matters.

II LAND AND ENVIRONMENT COURT JURISDICTION

In order to ascertain the Court's jurisdiction, it can be necessary to check the Land and Environment Court Act 1979 (N.S.W.) and its regulations and rules of Court; the Environmental Planning and Assessment Act 1979 (N.S.W.) and its regulations; the Miscellaneous Acts (Planning) Repeal and Amendment Act 1979 (N.S.W.) and its regulations; any gazetted environmental policies; local environmental plans; ministerial directions made under the Environmental Planning and Assessment Act 1979 (N.S.W.); and any specific legislation pertinent to the matter in question. To add to the difficulties, the seventy-plus statutes amended by the Miscellaneous Acts (Planning) Repeal and Amendment Act 1979 (N.S.W.) are only set out in chronological order, with no alternative alphabetical listing, and some jurisdictional matters arising under those statutes have been assigned to the Land and Environment Court while other matters under the same statutes have not.

Even the location of the information sometimes defies intuition. For instance, the right to bring proceedings under section 123 Environmental Planning and Assessment Act 1979 (N.S.W.) to remedy breaches of that Act was extended to breaches of planning instruments, consents or conditions in force prior to 1 September 1980 by the Regulation made under the Miscellaneous Acts (Planning) Repeal and Amendment Act 1979 (N.S.W.) but not under the transition provisions attached to the Environmental Planning and Assessment Act 1979 (N.S.W.), containing section 123, or in a regulation made under

2 Sections 342NA, 342VA, 317M.

3 Section 342BK.

that Act. Another instance involves the former right of neighbouring landowners to object to a residential flat development under section 342ZA Local Government Act 1919 (N.S.W.). That section was repealed by the Miscellaneous Acts (Planning) Repeal and Amendment Act 1979 (N.S.W.). In its place, a general right to object (and hence bring a third party appeal in the new Court) was given under the Environmental Planning and Assessment Act 1979 (N.S.W.) provided that the development in question was of a class, type or description "designated" in the regulations or in the planning instrument. The Regulation under that Act does not "designate" residential flat developments but the Regulation under the Miscellaneous Acts (Planning) Repeal and Amendment Act 1979 (N.S.W.) does preserve section 342ZA for the purposes of plans in force prior to 1 September 1980.

There are also significant omissions from the jurisdictional list. In particular, natural resources such as forestry and national parks are not included. Although academic and political distinctions are easily made between control of natural resources and general land-use development control or between resources management and environmental management, in practice land-use and environmental issues are involved in natural resource control and management. In any event, some resources such as fisheries and soil have been included. Further, mining authorised under the Mining Act 1906 (N.S.W.)⁴ and extractive industries are brought within the third party appeal scope of the Court's jurisdiction because they are "designated" developments.

Similarly, omissions in the environmental pollution area are apparent. Not only is the State Pollution Control Commission Act 1970 (N.S.W.) absent from the list, but so is any jurisdiction over statutory measures designed to cope with forms of pollution other than general noise, vibration, odour, air and water pollution. Excluded, for instance, are local government control over "public health, safety and convenience" through Part X of the Local Government Act 1919 (N.S.W.), oil pollution in navigable waters,⁵ pesticides and breaches of pollution conditions in mining licences.

More disquieting, however, is the selection process which has taken place inside the statutory listing. That there is no consistency of approach within that list is obvious from a brief survey of the scope of the Court's jurisdiction within the three distinct areas of appellate, civil and criminal jurisdiction.

1. *Appellate Jurisdiction*

Appellate jurisdiction is provided in three of the five classes of jurisdiction conferred by Part III of the Land and Environment Court Act 1979 (N.S.W.). These are, first, environmental planning and protection appeals, objections and applications under section 17 of the Act; secondly, local government appeals, objections and references under section 18 of the Act; and finally, land tenure, valuation, rating and compensation matters under sections 19, 24 and 25 of the Act, and under Schedule 2 of the Miscellaneous Acts (Planning) Repeal and Amendment Act 1979 (N.S.W.). In hearing and disposing of compensation claims, the Court is also empowered to determine the nature of the estate or interest of the claimant.

⁴ Schedule 3, Paras. (m) and (n) Environmental Planning and Assessment Regulation 1979 (N.S.W.).

⁵ There are temporary practical reasons for this exclusion. Constitutional responsibility for off-shore areas was not clarified until the High Court held, in *New South Wales v Commonwealth* (1975) 135 C.L.R. 337, in favour of Commonwealth sovereignty in the territorial sea to the low-water mark. In 1980, the Coastal Waters (State Powers) Act 1980 (Cth) and the Coastal Waters (State Titles) Act 1980 (Cth) were passed to give the States historical powers over the sea. In 1981 a package of bills on Pollution of the Sea was introduced into the Commonwealth Parliament.

These three classes of appellate jurisdiction give the Court a jurisdiction similar to that previously enjoyed by the various boards of appeal, the Land and Valuation Court and the Local Government Appeals Tribunal. Although termed "appellate", the jurisdiction is really in the nature of an administrative adjudication requiring the Court to assess for itself the merits and demerits of any application and to reach an objective decision. Accordingly, the Land and Valuation Court took a wide view of its power in relation to the various "appeals" it heard.⁶

In planning appeals, however, the approaches taken by the lay tribunals and the judicially-constituted tribunals differed, probably because of the wide scope of the appellate jurisdiction. The Land and Valuation Court consistently held the view that the decision of the planning authority should not be set aside when made in good faith under a proper appreciation of its duties, especially where the decision involved a question of local significance or the authority's future proposals for development of its area.⁷ The lay tribunals consisting of planning professionals, on the other hand, reflected a more independent attitude to the planning authority's policies.

Vesting of jurisdiction in the Land and Environment Court restores the system of local government, planning and other appeals to a judicially-based system, but it represents a compromise given the role of the lay assessors. In appeals, the Court's jurisdiction may be exercised by a Judge of the Court *or* by one or more assessors. Assessors may merely assist and advise the Court *or*, under section 36, proceedings can be heard and disposed of by assessors and assessors' decisions are deemed to be decisions of the Court. Moreover, under section 34, with respect to Class 1 and Class 2 matters, preliminary conciliation conferences are compulsory, dispensable only by the direction of the Chief Judge.⁸ In proceedings heard under section 36, referral of a point of law by an assessor to a Judge is discretionary. As a result, there have been some early instances where a point has not been referred and the parties have been able to avail themselves of appeal procedures from the Court on a point of law, so that the first time an issue of law has effectively been before a Judge has been in the Court of Appeal.

2. *Civil Jurisdiction*

Class 4 jurisdiction under section 20 Land Environment Court Act 1979 (N.S.W.) comprises the same civil jurisdiction as that of the Supreme Court to hear and dispose of proceedings relating to any right, obligation, duty or exercise of a function conferred or imposed by a planning or environmental law. Specifically, the definition of "planning or environmental law" in section 20(3) means that the Court is empowered to enforce rights, obligations or duties; to review or command the exercise of functions; and to make declarations of right in relation to any right, obligation or duty or the exercise of any function conferred or imposed under one of the many acts listed in the section. Also included in Class 4 are proceedings under Section 153 of the Heritage Act 1977 (N.S.W.) and under section 317JB of the Local Government Act 1919 (N.S.W.) and within sections 35 and 123 of the Environmental Planning and Assessment Act 1979 (N.S.W.).

This is where the internal cohesion of the totality of the Court's jurisdiction begins

6 See G. Sawyer, "Town Planning by Judges: The County of Cumberland Scheme in New South Wales" (1959) 45 *Journal of the Town Planning Institute* 109, 111-12; *Sydney Congregation of Jehovahs Witnesses Pty. Ltd. v Ku-ring-gai Municipal Council* (1965) 11 L.G.R.A. 280, 287; *Soft v Wollondilly Shire Council* [1975] 2 N.S.W.L.R. 614.

7 See generally, M. Wilcox, *The Law of Land Development* (1967) 410-11.

8 On 3 February 1981, the Chief Judge issued a general direction that a conference was not to be held in any case where a Judge orders expedition of the hearing of the proceedings; *cf.*, section 35 requiring party consent to an inquiry being conducted by an assessor on Class 3 proceedings.

to break down. The very specific content of a "planning or environmental law" in section 20 not only excludes general tort or contractual proceedings but excludes review of most local government activities falling outside building, subdivision, fire safety and development controls.⁹ Likewise, it excludes review of: the validity of resumptions unless a resumption is effected under a "planning or environmental law"; validity of consents to develop or exploit resources granted other than under the nominated statutes; and independent review of many of the functions relevant to appeal proceedings in Classes 1, 2 or 3. The result is that the Court's civil jurisdiction is exclusive of that of the Supreme Court in the areas designated by section 20, but otherwise which proceedings could have significant impacts for proceedings in Classes 1, 2 and 3 have to be instituted separately in the Supreme Court.

This jurisdiction is exercisable only by a Judge of the Court and is essentially an enforcement and remedial jurisdiction, largely dependent upon the application of common law principles. From sections 22 and 23, it appears that the jurisdiction is not confined necessarily to proceedings of an administrative law character. Provided only that there be proceedings before it, the Court may grant all remedies in respect of a legal or equitable claim "properly brought forward", so as finally to determine all matters in controversy and avoid a multiplicity of proceedings concerning those matters.¹⁰

3. *Criminal Jurisdiction*

The Court's jurisdiction is rounded out in Class 5 and is exercisable only by a Judge. This criminal jurisdiction under section 21 covers proceedings under the acts listed. There are inter-jurisdictional linkages provided by the inclusion of the Clean Air Act 1961 (N.S.W.), Clean Waters Act 1970 (N.S.W.), Environmental Planning and Assessment Act 1979 (N.S.W.), Heritage Act 1977 (N.S.W.) and Noise Control Act 1975 (N.S.W.). There is only a tenuous link with the Local Government Act 1919 (N.S.W.) and, for practical purposes, even the apparent links through the above statutes are tenuous where alternate proceedings are possible, such as in Petty Sessions. Questions of law connected with such alternate proceedings, and not related to a function under the statutes listed in section 20(3) would be outside the Court's jurisdiction. There is no effective linking at all with other statutes brought within the Court's appellate jurisdiction.

Although there is an open provision for including additional offences, the initial selection of offences in Class 5 throws into sharpest relief the arbitrary nature of the overall selection process in the conferral of jurisdiction upon the Court.

III THE TOTAL JURISDICTIONAL PICTURE

In summary, the new Court system is not always as systematic as one might hope. Ascertaining the Court's jurisdiction is akin to entering a jurisdictional maze. The overall picture of jurisdiction in environmental planning and assessment matters is even more complex and can be roughly presented as follows.

1. *Environmental Planning and Assessment Act Matters*

The Environmental Planning and Assessment Act 1979 (N.S.W.) is essentially concerned with environmental planning, development control, environmental assessment

9 The first bill omitted Parts XI and XII of the Local Government Act 1919 (N.S.W.) and Parts XIIA and XIIB were only added as a consequence of the decision in *Grace Bros. Pty. Ltd. v Willoughby Municipal Council*, unreported, Supreme Court of New South Wales, 1 October 1980.

10 This was commented upon by Cripps J., at the recent Women Lawyers' Association of N.S.W. Practical Seminar on "Recent Developments in Local Government and Conveyancing Law and Practice", 14 February 1981.

and enforcement. All aspects lie within the jurisdiction of the Land and Environment Court, but not without the occasional qualification. Moreover, a nexus between this statute and other statutes which do not give the Court specific or limited jurisdiction, may qualify an apparent absence of jurisdiction under those statutes.

In addition to what is excluded from the Court's jurisdiction by way of omission or statutory interpretation, some matters are excluded by express provision. In particular, a challenge to the validity of an environmental planning instrument based on a failure to comply with the formal or procedural requirements of Part III of the Environmental Planning and Assessment Act 1979 (N.S.W.) with respect to the instrument's making, is limited by section 35 to proceedings commenced within three months of the date of the instrument coming into force. However, as a consequence of the 1980 amendment to section 20(3) of the Land and Environment Court Act 1979 (N.S.W.) the Court's jurisdiction over the planning process does extend to planning instruments made under the repealed Part XIA of the Local Government Act 1919 (N.S.W.).

Jurisdiction under section 98 of the Environmental Planning and Assessment Act 1979 (N.S.W.), to hear an appeal lodged by a third party, depends upon the development in question having been "designated". The Court is deprived of appellate jurisdiction where the Minister exercises his functions either under section 101 to "call in" an application for consent, or under section 88 to direct the holding of an inquiry into a "designated" development. However, it is not deprived of its jurisdiction in proceedings which have been instituted before a direction is given.¹¹

It would seem, moreover, that the exercise of functions by a consent authority could not be separately reviewed by the Court where those functions are derived from powers conferred by sections of the Local Government Act 1919 (N.S.W.) outside Parts XI, XII, XIA or XIIB.¹² Presumably, the Court may determine its jurisdiction on an appeal, including whether a condition appealed from is validly imposed.

General common law remedies which rely on the creation of rights by application of common law principles are not expressly within the Court's "enforcing" jurisdiction under section 20(2) (a) of the Land and Environment Court Act 1979 (N.S.W.). This section is not concerned with the exercise of functions.¹³ Excluded, therefore, might be jurisdiction over matters which depend upon showing a defect in the way a function is carried out (*e.g.* negligently), rather than failure to perform the function.

The Court's criminal jurisdiction is restricted to "offences against the Act", but not against regulations made under the Environmental Planning and Assessment Act 1979 (N.S.W.). It is further depleted by section 127(6) of the Act which prescribes written consent for the institution of criminal proceedings in the Court.

2. Local Government Act Matters

Apart from building, subdivision, rating, fire safety and land acquisition functions of local authorities, most aspects of local government are excluded from the Court's jurisdiction. Moreover, general enforcement of the Local Government Act 1919 (N.S.W.) does not fall within the Court's jurisdiction. For instance, proceedings under section 587

11 *Gazebo Hotels Pty. Ltd. v Sydney County Council*, unreported, Land and Environment Court, 2 December 1980.

12 Cripps J., made a strong plea for reform of this situation at the Seminar referred to in note 10 *supra*.

13 *Cf.*, section 20(2) (b) "reviewing" jurisdiction and section 20(2) (c) "declaratory" jurisdiction where the *exercise* of functions is expressly mentioned.

of that Act¹⁴ are not included in the section 20 list nor are nuisance proceedings brought by local authorities. Local councils are in no special position over ordinary citizens for the purposes of sections 123 or 127 proceedings brought under the Environmental Planning and Assessment Act 1979 (N.S.W.). Only fire safety measures give the Court a truly comprehensive jurisdiction with respect to local government.

Outside Parts XI, XII, XIII and XIIB, validity issues with respect to local government functions are excluded. Even so, whether a ratepayer could raise the validity of a rate on an appeal before the Court is a matter for some conjecture.¹⁵ Challenges to the validity of a council resumption would, however, appear to be excluded.¹⁶ Local government resumption powers are conferred in Parts XVIII and XXV of the Local Government Act 1919 (N.S.W.) which do not come within the description of a "planning or environmental law", although there is also a power in section 321 which is in Part XII of that Act and within the section 20 description.

3. *Mining Act Matters*

A relationship between the Mining Act 1973 (N.S.W.) and the Environmental Planning and Assessment Act 1979 (N.S.W.) is clearly established at the development control stage through section 116 of the Mining Act 1973 (N.S.W.) and at the environmental impact assessment stage through section 113 (1A) of that Act, thereby giving the Court some jurisdiction. Any continuance of the Court's jurisdiction, however, would depend upon the continuance of that relationship.¹⁷ Where a development consent has been obtained from a local council and a mining lease has been subsequently granted, the Environmental Planning and Assessment Act 1979 (N.S.W.) (or environmental planning instruments made under that Act) cannot operate so as to prevent the holder of the lease from carrying out mining operations in the mining area. At the same time, section 116 provides that the holder of the lease is not exempted from complying with any conditions imposed under the development consent unless those conditions are "prescribed conditions". These include preparation of the land for mining, the mining methods to be employed, reinstatement of the land either during the carrying on of mining operations or after they have ceased, safety measures, and guarantee deposits concerning the performance of such conditions.

Enforcement proceedings could thus be taken in the Court with respect to breaches of some development conditions. Enforcement of prescribed lease conditions, by contrast, would be left to the mining warden's court. Moreover, since there are no appeals from a mining warden's court to the Land and Environment Court, the Court is not involved in any supervision of that tribunal's functions, as are the District Court and the Supreme Court. Those functions are considerable and are part of a quite independent system with respect to mining operations, despite an overt connection between mining operations and environmental planning and assessment.

14 Query whether a council could bring Class 4 enforcement proceedings in the Court relying upon its status under section 587 with respect to a building or subdivision breach.

15 The grounds of appeal in section 133 do not include the validity of the rate and section 133 does not fall within the definition of a "planning or environmental law", but see *Alan E. Tucker Pty. Ltd. v Orange City Council* (1969) 90 W.N. (Part 1) (N.S.W.) 477 where Else-Mitchell J., rejected an objection to the jurisdiction of the Land and Valuation Court.

16 There is no history of *de facto* assumption of jurisdiction by the Land and Valuation Court and there is strong dicta against such a practice in *Pye v Hawkins* (1955) 87 W.N. (Part 1) (N.S.W.) 143, 150 *per Roper C.J.* in Equity.

17 That connection was established in *Hastings Municipal Council v Mineral Deposits*, unreported, Land and Environment Court, April, 1981.

Appeals from the initial development consent, including third party appeals where the mining activity was “designated” would, however, go to the Land and Environment Court. Also, it is arguable that the obligation contained in section 111 of the Environmental Planning and Assessment Act 1979 (N.S.W.) would apply to the Minister responsible for the actual mining leases. That obligation on public “determining authorities”, to “. . . examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of . . .” an activity, could operate even after a lease has been granted (by reason of the carrying out of mining operations). It might be that ministerial failure to act on breaches of mining conditions provides evidence of a failure to examine and take account of the ongoing impacts of mining operations, thereby founding an action for breach of the Environment Planning and Assessment Act 1979 (N.S.W.) which could be litigated in the Land and Environment Court.

4. *National Parks and Wildlife Act Matters*

These matters are excluded from the Court and jurisdiction remains largely with the Minister. Offences are heard in the District and Supreme Courts as well as in Petty Sessions and there is general parliamentary supervision. Management and park development aspects, however, could attract the environmental impact requirements of the Environmental Planning and Assessment Act 1979 (N.S.W.) and the jurisdiction of the Land and Environment Court.

5. *Pollution Statute Matters*

The Land and Environment Court has summary enforcement jurisdiction in proceedings under the Clean Air Act 1961 (N.S.W.), Clean Waters Act 1970 (N.S.W.), Noise Control Act 1975 (N.S.W.) and Waste Disposal Act 1970 (N.S.W.) but not under other pollution statutes. All four statutes come within the description of a “planning or environmental law” for the purposes of the Court’s civil jurisdiction, and objections and appeals under the first three of these statutes are also included in Class 1 appellate jurisdiction of the Court. The Court’s jurisdiction over pollution matters arising under these statutes is, therefore, quite comprehensive. Additionally, where a person has been convicted of an offence, the Court is given remedial powers under the statutes with respect to the contravention.¹⁸

Excluded from the Court’s appellate jurisdiction are disputes involving a public authority which are referred to the Premier for settlement or to the Minister. Included within the Court’s review and enforcement jurisdiction would be requirements arising from directions given by the State Pollution Control Commission or the Minister under the various statutes, even where appellate proceedings have been denied by the statutes. Directions pursuant to the State Pollution Control Commission Act 1970 (N.S.W.) itself, however, have not been brought within the Court’s jurisdiction, nor have common law actions arising out of polluting activities with the possible exception of an action for breach of statutory duty.

Public authorities who are “determining authorities” with respect to pollution-causing activities could come within the Court’s jurisdiction over environmental assessment requirements, irrespective of the form of pollution.

18 Section 32 Clean Air Act 1961 (N.S.W.); section 34 Clean Waters Act 1970 (N.S.W.); section 81 Noise Control Act 1975 (N.S.W.).

6. *Resumption Matters*

Compensation and entitlement disputes following a compulsory acquisition of land have generally been brought within the Court's Class 3 appellate jurisdiction, although the Court has been given no specific jurisdiction over allied matters such as preliminary trespass by an acquiring authority.

Assuming that the validity of a resumption cannot be challenged in compensation proceedings, since there is no appeal against a resumption notice, it would need to be questioned in separate proceedings. Normally those proceedings could not be heard in the Land and Environment Court, unless requirements relating to the resumption were imposed by the Environmental Planning and Assessment Act 1979 (N.S.W.), its regulations, or an environmental planning instrument. In this regard it is significant that where a resumption is effected under the Environmental Planning and Assessment Act 1979 (N.S.W.), the resumption is deemed by section 10 of that Act to be for an authorized work under the Public Works Act 1912 (N.S.W.) while the requirements of the latter Act are not deemed to be requirements of the former.

7. *Heritage Matters*

Generally, Heritage Act 1977 (N.S.W.) matters have been brought within all aspects of the Court's jurisdiction, except for some appeals which remain with the Minister. Applications which are "prescribed" under the Heritage Act 1977 (N.S.W.) comprise applications for approval of a consent authority under both the Environmental Planning and Assessment Act 1979 (N.S.W.) and various parts of the Local Government Act 1919 (N.S.W.). Applications which are not "prescribed" do not come within the appellate jurisdiction of the Court at all. Nor do all "prescribed" application appeals come within its jurisdiction. It is only where the Minister is *not* of the opinion "... that the matter has special significance for the conservation of an item of the environmental heritage ..."¹⁹ that an appeal is remitted to the Court.

8. *Local Lands Board Matters*

Questions relating to the occupancy and use of Crown lands are brought into Class 3 jurisdiction of the Court by section 19(a) of the Land and Environment Court Act 1979 (N.S.W.). Provision for the inclusion of other appeals and references under statutes, such as the Water Act 1912 (N.S.W.), is made in section 19(h). Such statutes are listed in the Miscellaneous Acts (Planning) Repeal and Amendment Act 1979 (N.S.W.).

The Court's jurisdiction on appeal is governed by the relevant statutes, and "standing" requirements in particular might deprive the Court of jurisdiction. Where there is no appeal from a board's determination, the Court would not have jurisdiction to review the proceedings since the relevant statutes under which the boards operate do not constitute a "planning or environmental law". It might be possible to utilise the environmental impact provisions in the Environmental Planning and Assessment Act 1979 (N.S.W.) with respect to decisions ultimately made by the Minister for Lands.

9. *Miscellaneous Natural Resource Matters*

Some limited aspects of natural resource jurisdiction, such as that over fisheries and soil, have been brought within the Court's jurisdiction through the Miscellaneous Acts

19 Section 77 Heritage Act 1977 (N.S.W.).

(Planning) Repeal and Amendment Act 1979 (N.S.W.). By and large, however, natural resource jurisdiction would be excluded from the Court without an environmental planning or assessment connection.

IV FEATURES OF LAND AND ENVIRONMENT COURT JURISDICTION

Apart from the fundamental jurisdictional questions about the Court, there are many interpretative and attitudinal issues associated with the actual operation of the Court. There are also procedural and evidentiary issues awaiting resolution.

Despite a depressing ignorance in both the professional and lay community about the Court's existence and functions, which the confusing information base has done nothing to dispel, the potential of the Court is enormous. The concept of the Court, its mix of personnel²⁰ and its principal legislation are all new. It could add an environmental or public dimension to traditional narrowly-focused dispute settlements and prosecutions. Yet it is more than a novel forum for "greenies". Its areas of jurisdiction are directly related to professional practice in such fields as conveyancing law, valuation, town planning and engineering. It is also more than a re-vamped local government and valuation tribunal.

The changes in the governing law of environmental planning when taken in conjunction with the Court's own peculiar characteristics signify that the Land and Environment Court is unique. Its unique qualities, of course, automatically make it a target for cynicism and criticism.

1. *Standing*

Since standing is a separate preliminary or jurisdictional issue going to the right to apply for a remedy, it is a question of law whether an applicant has standing, and a determination on standing could form the basis of an appeal from the Court.²¹

The right to institute appeals in the Court depends upon the relevant enactment under which the appeal is brought. Nevertheless, because the Court hears appeals *de novo*, may receive fresh evidence, is not bound by the rules of evidence, and may inform itself on any matter in such manner as it thinks appropriate in Classes 1, 2 and 3,²² there would appear to be no bar to the Court itself inviting the presentation of views of disinterested objectors at the merits stage of an appeal, and the Court has entertained requests for leave to intervene by objectors without appeal rights. However, the Court has also repeatedly stressed that objections do not constitute the sole determinant of "public interest" in an appeal.

With respect to civil proceedings in the Court, section 123 of the Environmental Planning and Assessment Act 1979 (N.S.W.) and section 153 of the Heritage Act 1977 (N.S.W.) specifically provide that proceedings to enforce breaches of those statutes are not subject to common law notions of standing. In providing standing to any person and permitting class actions and maintenance of proceedings, however, section 123 does not apply to enforcement proceedings outside that section or proceedings with respect to other statutes contained in the definition of a "planning or environmental law".

Decisions on section 123 thus provide no authority for resolving standing issues

20 The categories of specialization from which lay members are drawn are set out in section 12 Land and Environment Court Act 1979 (N.S.W.).

21 See generally, L. Pearson, "Locus Standi and Environmental Issues" (1980) 3 *U.N.S.W.L.J.* 307.

22 Sections 38 and 39 Land and Environment Court Act 1979 (N.S.W.).

generally in Class 4 proceedings. They have revealed, on the one hand, that the Court is not prepared to "read down" section 123 and, on the other, that the plaintiff in section 123 proceedings is not to be equated with the Attorney-General with regard to the exercise of the Court's discretion in granting a remedy.²³

Outside the special statutory provision, standing in the Court's civil jurisdiction is a question for common law and raises a threshold question as to the freedom of the Judges of the Court to develop a special jurisprudence in this regard. Such a freedom does seem to have been assumed by some Judges of the Federal Court of Australia with respect to the Trade Practices Act 1974 (Cth),²⁴ and even outside a special statutory framework for the institution of relief there does appear to be a trend by some Judges towards a wider view of standing.²⁵

The right to institute proceedings in the criminal jurisdiction of the Court is governed by the Class 5 statutes.

2. Procedure

While the Court has its own rule-making powers in connection with the procedure and practice in the Court, general legislative guidelines have been laid down with the conferral of jurisdiction under the Land and Environment Court Act 1979 (N.S.W.).

The Court's appellate jurisdiction may be exercised by a Judge or by one or more assessors. Under section 35, the Court may, with the consent of the parties, direct that an inquiry into any issue raised in, or other matter connected with, Class 3 proceedings be made by an assessor. The Court may, with the consent of the parties, adopt any findings or observations set out in a report made pursuant to section 35, and the assessor who made the inquiry is thereafter disqualified from participation in the proceedings unless the parties otherwise agree. Under section 36, the Chief Judge may, of his own motion or upon the request of a party, direct that Classes 1, 2 or 3 proceedings themselves be heard and disposed of by one or more assessors, in which case the assessors' decisions are deemed to be the decision of the Court. Where questions of law arise, the assessors may, of their own motion or upon request of a party, refer those questions to the Chief Judge for determination by a Judge. Under section 37, a Judge hearing Class 1, 2 or 3 proceedings may be assisted by one or more assessors who assist and advise the Court without actually adjudicating upon a matter before the Court.

In practice, to date, Class 1 and 2 matters have mostly been allocated to one of the nine assessors, the three Judges being allocated what have been considered to be the most important appeals, especially those likely to raise a point of law. Class 3 matters, however, have largely been heard by a Judge.

A significant aspect of the assessors' work is to preside at preliminary conferences as provided for by section 34. These conferences may result in a consent order which is deemed to be a decision of the Court. Where no agreement is reached, the assessor either prepares a written report of his or her views on the issues, with party consent, may dispose of the proceedings with or without further hearing. Unless the parties consent,

23 *E.g., Rowley v N.S.W. Leather & Trading Co. Pty. Ltd.*, unreported, Land and Environment Court, 15 October, 1980.

24 *E.g., Phelps v Western Mining Corporation Ltd.* (1978) 20 A.L.R. 183, 190 *per* Deane J.

25 *See, Seamen's Union of Australia v Utah Development Co.* (1978) 53 A.L.J.R. 83, 86; *Australian Conservation Foundation Inc. v Commonwealth* (1980) 54 A.L.J.R. 176, 188; *Grace Bros. Pty. Ltd. v Willoughby Municipal Council (No. 2)*, unreported, Supreme Court of New South Wales, 1980; *R v Inland Revenue Commissioners; ex parte National Federation of Self Employed and Small Businessmen Ltd* [1980] W.L.R. 579.

evidence as to what is said or admissions made in the course of a conference is not admissible at a hearing, and an assessor who has presided over a conference is disqualified from further participation in subsequent proceedings. Statistics kept in the Court's registry reveal that a significant percentage of appeals have been disposed of at preliminary conferences.

Generally, by section 38(1), proceedings in Classes 1, 2 and 3 are to be conducted " . . . with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and as the proper consideration of the matters before the Court permit". The Court may, by section 38(4), in respect of a matter not dealt with by the Act or rules, give directions as to the procedure to be followed at, or in connection with, the hearing. In the early days of the Court's operation, its individual Judges have shown themselves willing to hear suggestions on the workings of the Court, such as country sittings, call-over procedures and procedures for formulating a question of law for referral from an assessor to a Judge.

Legal representation of parties is neither required nor forbidden, and all proceedings, unless the Court otherwise orders, are to be heard in an open court.²⁶ Where counsel do appear they, like members of the Court, are forbidden to robe.²⁷ In any proceedings, the Court has power under section 68(1), at any stage, to order any amendments to be made which in the Court's opinion are necessary "in the interest of justice". Under section 68(2), a failure to comply with requirements of the Act or its Rules is to be treated as an irregularity and is not to nullify proceedings.

Informality, however, is a relative notion in the context of the many rules which have been prescribed, and under Part 6, Rule 1 of the Rules, provisions of various parts of the Supreme Court Rules 1970 (N.S.W.) are deemed to form part of the Land and Environment Court Rules and to apply "with such adaptations as may be necessary" to Class 1, 2 and 3 proceedings. Any conflict in the operation of the Court rules and the Supreme Court Rules is to be resolved in favour of the former. There is a real risk, however, that the prescribing of so many rules in regular adversarial fashion will result in "informality" being little more than a pious exhortation. There is already some evidence, for instance, of a greater proportion of legal representation in appellate proceedings than in similar proceedings before the Local Government Appeals Tribunal.

The Court's civil jurisdiction is to be exercised by a Judge, and the Court is not expressly given the benefits of even a notional procedural informality or any outside expert assistance, as is provided in section 38 for appellate proceedings. The Crown may appear, as it may in appellate proceedings, in any case in which the public interest is involved and the Court's powers over procedural irregularities operate.²⁸ Otherwise the Act is silent about the conduct of Class 4 proceedings. Under Part 6, Rule 1(2) of the Court Rules, the provisions of the Supreme Court Rules covering appellate proceedings, service of process outside the State, appearance, interim preservation and general evidence apply to the Land and Environment Court. Commencement of proceedings is governed by Part 7 of the Land and Environment Court Rules and, as in appellate proceedings, proceedings are commenced by an "application" in or to the effect of the form set out in the Schedule to the Rules. Vexatious legal proceedings are dealt with in section 70.

Proceedings of a criminal nature are governed by sections 41 to 55, which emphasize due process over expedition, except that several charges against the one defendant

26 Sections 62 and 63 Land and Environment Court Act 1979 (N.S.W.).

27 Part 2, Rule 7 Land and Environment Court Rules. Representation by solicitors is governed by Part 5 of the Rules.

28 Sections 64 and 68 Land and Environment Court Act 1979 (N.S.W.).

or charges against two or more defendants may be heard together under section 51. The Court, constituted by a Judge, does not have the benefit of section 38 to enable it to obtain the assistance of any person having professional or other qualifications relevant to the proceedings. Under the Court Rules, the provisions of Division 2, Part 75 of the Supreme Court Rules are deemed to form part of the Court Rules and apply to Class 5. The incorporated Division itself incorporates other Parts of the Supreme Court Rules such as those relating to subpoenas, affidavits, security for costs and contempt of court.

The variety of procedures available in the different Classes of the Court's jurisdiction have been reflected in the design plans for the building which will ultimately house the Court, although the initial plans make no special provision for defendants held in custody in Class 5 matters.

In its first months of operation, the workload of the Court was predominantly in its appellate jurisdiction where it successfully disposed of the back-log of appeals pending in the former Local Government Appeals Tribunal. There were very few third party appeals or criminal proceedings, but there were several instances of combining appellate and civil jurisdiction even where an appropriate application had not been initially made to the Court under section 20 of the Land and Environment Court Act 1979 (N.S.W.).²⁹ The overall workload position by April 1981, despite operational difficulties associated with transcription of Court proceedings, accommodation and inadequate library funding, was that all proceedings could be instituted and heard in a relatively speedy manner.

3. Evidence

By section 38(2), the Court is not bound by the rules of evidence in Class 1, 2 or 3 proceedings but may inform itself in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits. The Court's role could be inquisitorial in that it is not confined to the evidence presented by the parties and it may, by section 38(4), obtain the assistance of any person having relevant professional or other qualifications for any issue arising for determination. Furthermore, under section 64, the Crown may appear before the Court in any case in which "the public interest" may be effected or involved, and the Attorney-General or the Minister for Planning and Environment, or both, may intervene and address the Court with respect to matters relevant to the proceedings. Court powers as to production of evidence are set out in section 67.

Fresh evidence may be introduced in an appeal, and even where at the commencement of a hearing it was announced that there was no longer a dispute between a local council and an applicant for consent, objectors have been heard by the Court before arriving at its decision.³⁰ However, Rule 15, Part 12 provides that where all parties consent the Court may give its decision without a hearing, but having regard to any documentary evidence and written submissions exchanged by the parties and lodged with the Court.

In hearing an appeal, the Court must act fairly and according to natural justice requirements. Thus it could not take evidence "behind the back" of a party, and generally could not place a party at a disadvantage by depriving that party of an adequate oppor-

29 *E.g., Charing Cellars Pty. Ltd. v Waverley Municipal Council*, unreported, Land and Environment Court Act, 19 September 1980.

30 *E.g., Nahum v North Sydney Municipal Council*, unreported, Land and Environment Court, 12 January 1981.

tunity to comment upon material relevant to its decision where the material is gleaned from sources external to the proceedings before the Court. Similarly, any submissions of hearsay evidence would have to be kept relevant and "reliable" under rules of natural justice,³¹ and natural justice would also govern the situations where the assessors relied on their own expertise.

The nature of the subject matter before the Court in its appellate jurisdiction includes the necessity to consider some matters of general social concern.³² If the Court is to receive and evaluate social science research, attention will have to be paid to the methodology and reliability of studies, as much as to their relevance to the case in hand. There is little doubt, however, that the Court's initial approach to the difficulties posed by social evidence is an extremely cautionary one.³³ Early decisions of the Court further indicate that, in the absence of explicit statutory directions to consider broad policy issues, the Court will not consider itself able to do so.³⁴

The Land and Environment Court Act 1979 (N.S.W.) is basically silent about the evidentiary position in civil proceedings. The Rules import the Supreme Court Rules on general evidence but in civil proceedings, there is no statutory equivalent to section 46, Land and Environment Court Act 1979 (N.S.W.) which applies the Supreme Court practice and procedure for taking and receiving evidence in criminal proceedings. At this stage, one can only speculate as to whether the Court would also receive evidence in support of some broader perspective which a particular contest in the civil jurisdiction of the Court might underscore.

In criminal proceedings, normal rules of evidence expressly apply but it should be noted that the burden of proof on the prosecution, especially with regard to pollution offences in Class 5, has been considerably lessened. In many instances³⁵ special statutory provisions enable a certificate signed by designated persons to be *prima facie* evidence of matters certified in and by the certificate. Methods of analytical testing are also invariably prescribed in regulations made under the pollution statutes, and special provisions have been made in the statutes with respect to the use of incriminating evidence.³⁶

4. Court Orders and Powers

In its appellate jurisdiction, the Court has indicated that it does not consider itself bound by any principles which may have been enunciated by the former Local Government Appeals Tribunal.³⁷ The Court's own view of its powers on appeal has not been a limiting one. For instance, the Court has varied building lines as incidental to the deter-

31 *Müller v Minister of Housing and Local Government* [1968] 1 W.L.R. 992; *Galassi Constructions Pty. Ltd. v Leichhardt Municipal Council*, unreported, Land and Environment Court, 7 November 1980.

32 *E.g.*, section 90 Environmental Planning and Assessment Act 1979 (N.S.W.).

33 See *McDonald Industries Ltd. v Sydney City Council*, unreported, Land and Environment Court, 18 December 1980, in which the Court offered no guidelines for dealing with such evidence beyond its own philosophical prejudice and the legalistic status of the evidence.

34 *McLean v Hornsby Shire Council*, unreported, Land and Environment Court, 24 November 1980; *T.B.A. Pty. Ltd. v Ryde Municipal Council*, unreported, Land and Environment Court, 9 January 1981.

35 Section 30 Clean Air Act 1961 (N.S.W.); section 32 Clean Waters Act 1970 (N.S.W.); section 78 Noise Control Act 1975 (N.S.W.).

36 Section 23(2) Clean Air Act 1961 (N.S.W.); section 28(3) Clean Waters Act 1970 (N.S.W.); section 74(5) Noise Control Act 1975 (N.S.W.).

37 *Balgownie Pty. Ltd. v Shoalhaven City Council*, unreported, Land and Environment Court, 6 November 1980.

mination of appeals not brought against the fixing of a line,³⁸ even though the actual fixing of a building line is unappealable.³⁹ Further, the Court has not been immune to considerations of utility in deciding an appeal.⁴⁰

Under statute, the general powers of the Court in section 39 include the power to determine an appeal notwithstanding that consultation has not taken place or that concurrence or approval has not been given to a development as required under the Environmental Planning and Assessment Act 1979 (N.S.W.). The Court is given additional powers in section 40 when hearing certain appeals to provide for a drainage easement and related work. Generally, it has all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter and in making its decision the Court is to have regard to "the circumstances of the case and the public interest".⁴¹

In its civil jurisdiction, the Court may make orders of such kind as it thinks appropriate. Such a power has an acknowledged width, and on the appropriateness of injunctions the Court has indicated that it is concerned "to do what is fair and just as between the parties in the public interest".⁴²

Provided only that there be proceedings before it, the Court may grant all remedies in respect of a legal or equitable claim, "properly brought forward", so as finally to determine all matters in controversy and avoid a multiplicity of proceedings concerning those matters. From sections 22 and 23 a great deal is left to the imagination of litigants and the Court, and one can only speculate on their width. With the exception, however, of enforcement claims brought under section 20(2) (a), section 20(2) jurisdiction does not appear wide enough to allow a claim for compensation to actually originate proceedings in the Court. The unsettled state of the general law with respect to claims for loss suffered as the result of *ultra vires* conduct would exclude many claims to the extent that "fault", in the sense of negligence, needs to be proven.

In addition to such internal jurisdictional issues, demarcation problems between the jurisdiction of the Supreme Court and the Land and Environment Court arise in the Court's civil jurisdiction. The Court's jurisdiction in Class 4 matters is, by section 71, exclusive of that of the Supreme Court except for appeals brought against a decision of the Land and Environment Court. Wootten J. has accordingly argued against an expansive interpretation of section 20, and has found that that section only deprives the Supreme Court of its right to grant injunctive relief and not its declaratory jurisdiction.⁴³ Cripps J. has offered this solution:

It is of course, inappropriate for me to express any views on what might be the outcome of a jurisdictional dispute without hearing argument. It is, however,

38 *Walt Edwards & Sons Pty. Ltd. v Lake Macquarie Municipal Council*, unreported, Land and Environment Court, 31 October 1980; *Kent v Kogarah Municipal Council*, unreported, Land and Environment Court, 17 September 1980.

39 *Cantor v Woollahra Municipal Council* (1924) 7 L.G.R. (N.S.W.) 35.

40 See *Csnayi v Leichhardt Municipal Council*, unreported, Land and Environment Court, 10 September 1980; *Pillon v Wade Shire Council*, unreported, Land and Environment Court, 30 January 1981.

41 McClelland C.J. in particular has indicated a preference for a wider "public interest" than the local public that might be affected by a development. In *McDonald Industries Ltd. v Sydney City Council*, note 33 *supra*, he believed that the development of the Palisades site was not to be determined in the light of the narrow public interest of the public of Darlinghurst. Although their interest had to be considered, there was a wider public interest in the development of one of the "best endowed building sites in Sydney".

42 Note 23 *supra*.

43 *Grace Bros. Pty. Ltd. v Willoughby Municipal Council (No. 2)*, note 25 *supra*.

fairly clear that it was intended that traditional equity matters remain in the Supreme Court notwithstanding that they involved planning or environmental laws and that planning and environmental matters (as defined) were to be within the exclusive jurisdiction of this Court. The legislature has not sought to draw a precise line because, one suspects, it was too difficult. The matter must be left to the good sense of the Supreme Court and Land and Environment Court to make the system work.⁴⁴

In criminal proceedings, the Court is given powers with respect to the appearance and apprehension of defendants, subject to the Bail Act 1978 (N.S.W.). The Court's powers to dismiss charges and adjourn hearings are also set out in the Land and Environment Court Act 1979 (N.S.W.). Orders for payments of fines and costs may be enforced as if the orders for payment were orders of the Supreme Court made under the Supreme Court Act 1970 (N.S.W.). Under section 54, the Court may allow time for payment, direct payment by instalments, or direct the giving of security, with or without sureties. By Rule 3, Part 15, of the Court Rules, where a fine is imposed, it is to be paid to the Court registrar who must pay all monies so received into consolidated revenue.⁴⁵

Depending upon the statutory provision under which a defendant is charged in criminal proceedings, the Court's power in disposing of proceedings might include the making of enforcement or remedial orders. For instance, under section 126(3) of the Environmental Planning and Assessment Act 1979 (N.S.W.) the Court may, in addition to or in substitution for any pecuniary penalty, direct the planting and maintenance of new trees and vegetation and the provision of security for the performance of such obligations.⁴⁶ With respect to proceedings for an offence under the Environmental Planning and Assessment Act 1979 (N.S.W.) the Court is precluded from even proceeding to a conviction where the matter constituting the offence is the subject of unfinished proceedings under section 123 or where an order has been made under section 124 of that Act.

Under section 55, the Court also has jurisdiction over auxiliary offences to the extent that a person who aids, abets, counsels or procures the commission of an offence punishable in the Court is guilty of the like offence and may be tried at the same time as, or before or after, the trial of the principal offender. In the absence of specific statutory provisions conferring on the Court original criminal law jurisdiction, it is not clear whether Class 5 extends to such attendant offences as attempts and conspiracies to commit an offence in Class 5.

5. Costs

Costs in appellate and civil proceedings are in the discretion of the Court and, under section 69, the Court may order costs to be taxed or otherwise ascertained on a party and party basis or on any other basis. Security for the payment of costs may be ordered, and proceedings may be dismissed for non-compliance with such an order. In the case of an appeal to the Court, "costs" include the costs of, or incidental to, the proceedings giving rise to the appeal, as well as the costs of, or incidental to, the appeal. No order under section 69 may be made by an assessor without the concurrence of the Chief Judge.

In *McDonald Industries Ltd. v Sydney City Council*⁴⁷ the Chief Judge referred to the "general rule", established by the Local Government Appeals Tribunal in appeals from decisions of local councils, that parties should meet their own costs. Without

44 At the Seminar referred to in note 10 *supra*.

45 *Cf.*, section 640 Local Government Act 1919 (N.S.W.).

46 See also note 18 *supra*.

47 Note 33 *supra*.

ignoring the Court's discretion under section 69, he proposed to adopt the general rule unless some exceptional circumstance is established.⁴⁸

Costs in criminal proceedings are covered by section 52, under which the Judge may order the defendant, in the case of a conviction or order under section 556A(1) of the Crimes Act 1900 (N.S.W.) to pay costs to the prosecutor or, in the case where a charge is dismissed, order the prosecutor to pay costs to the defendant. The Judge is to specify an amount, which seems just and reasonable to him, in the conviction or order.

V APPEALS FROM THE COURT

Cases may be appealed to the Supreme Court, under section 57, on a question of law arising in proceedings within Classes 1, 2 or 3. By section 48(1) (a) of the Supreme Court Act 1970 (N.S.W.) appeals are determined by the Court of Appeal. Section 57 is substantially similar to the repealed section 342BK of the Local Government Act 1919 (N.S.W.) in allowing an appeal "against an order or decision of the Court on a question of law". However, it departs from section 342BK in not providing that the question of law must be "raised during the proceedings" and that notice must be given "during the proceedings that the party appealing intended to appeal if the board decided the question of law contrary to the manner put by that party".

On the hearing of an appeal under section 57, the Supreme Court may remit the matter to the Court for determination in accordance with the decision of the Supreme Court or it may make such other order in relation to the appeal as seems fit. Where an appeal is made to the Supreme Court, either the Court or the Supreme Court may, under section 59, suspend the operation of any relevant order or decision until the Supreme Court makes its decision. A suspension by the Court may, however, be terminated by either the Court or the Supreme Court and a suspension by the Supreme Court may be terminated by that Court. The procedure for making an appeal is governed by the Supreme Court Rules.

An appeal against a decision of the Court must be instituted by "a party" to the Class 1, 2 or 3 proceedings. As a consequence of the Court of Appeal decision in 1980 in *Sydney Legacy Appeals Fund v Tanna*⁴⁹ it could be important to examine the position of an objector who has appealed as a third party before the Land and Environment Court, or who has otherwise been allowed into the proceedings. In that case, a person had objected under section 342ZA of the Local Government Act 1919 (N.S.W.) and had been granted leave to appear and be heard as a party in an appeal brought by the applicant for approval in the Local Government Appeals Tribunal. The Court of Appeal held that the objector had no right to appeal further to the Supreme Court under section 342BK, and that there was no discretionary reason why he should be added as a party to Supreme Court proceedings for declaratory relief and an injunction. Under section 342ZA an objector could apply for, and be granted leave to appear and be heard, *as if he were a party* to the appeal but that did not make him "a party" for the purposes of the appeal to the Supreme Court.⁵⁰

48 Cases in which exceptional circumstances were established include *Park Rail Development Pty. Ltd. v Shellharbour Municipal Council*, unreported, Land and Environment Court, 28 October 1980; *Colin Graham & Partners Pty. Ltd. v Warringah Shire Council*, unreported, Land and Environment Court, 3 December 1980; *Gazebo Hotels Pty. Ltd. v Sydney City Council*, note 11 *supra*.

49 Unreported, Supreme Court of New South Wales, Court of Appeal, 11 August 1980.

50 In section 97 Environmental Planning and Assessment Act 1979 (N.S.W.), a similar phrase is used. Contrast section 98 where a different phrase is used with respect to the joinder of the applicant for consent and the consent authority: they "shall be entitled to be heard at the hearing of the appeal as parties thereto".

A party dissatisfied with an order or decision of the Court in Class 4 proceedings may appeal, under section 58, to the Supreme Court. The Supreme Court may reverse, affirm or amend the order or decision appealed against; remit the matter to the Land and Environment Court; direct a rehearing of proceedings; or make such other order as seems fit. As in the case of appeals from Class 1, 2 or 3 proceedings, the appeal from Class 4 matters is to the Court of Appeal but is not limited to a "question of law".

Appeals from Class 5 proceedings, by section 56(b), are governed by the Criminal Appeal Act 1912 (N.S.W.). No special provisions regarding such appeals are contained in the Land and Environment Court Act 1979 (N.S.W.). The Land and Environment Court itself has no appellate jurisdiction with respect to appeals from proceedings under statutes referred to in Class 5 where such proceedings are brought in a court of petty sessions.

The Supreme Court also has its general supervisory powers over any exercise of jurisdiction by the Land and Environment Court. These powers are not affected by the fact that the Court is constituted "a superior court of record" since a statutory court is an "inferior" court in the sense that its jurisdiction is confined by statute.⁵¹ Likewise, Supreme Court declaratory jurisdiction concerning the initial decision maker, from whom a Class 1, 2 or 3 appeal is taken to the Land and Environment Court, might be available. However, depending upon the context in which Supreme Court jurisdiction might be invoked, in lieu of the Land and Environment Court's appellate jurisdiction, the Supreme Court might be expected usually to decline jurisdiction since one must balance the utility of seeking a declaration in a particular case against regarding "the machinery of a declaration as a device capable of being used to strike at the roots of other established jurisdictional structures".⁵²

VI CONCLUSION

The court system provided by the Land and Environment Court Act 1979 (N.S.W.) from a jurisdictional viewpoint, is far from systematic. The Act has, however, already been amended in this regard and one would hope that further amendments will be forthcoming. Acceptance and recognition of the Court certainly seems to have been hampered by a general failure in the communication techniques used by the Government to inform the community about the Court. This position is worsened by a decision not to publish a set of authorised law reports of the Court's judgments although Butterworths intends to provide a non-authorised, comprehensive reporting service later in 1981.

How long the new Court survives is anyone's guess, given the historical record of land-use tribunals in New South Wales. Arguments are piled high in support of, and against, all variants of environmental resource and land-use tribunals. We have an excellent opportunity to monitor this particular system, and it is encouraging to find that the Court has appointed research assistants and has begun to keep rudimentary statistics. At present, a lot of guessing is done about the value of various tribunals to the community and to litigants, but no previous tribunal in this area has kept any useful statistics so that past assessments have been highly descriptive and subjective.

51 *Ex parte Tooth & Co. Ltd.; re Sydney City Council* (1962) 80 W.N. (N.S.W.) 572. Whether the Court's status as a "court" might notionally influence the Supreme Court when exercising its powers over the Court, especially with respect to Class 1, 2 or 3 proceedings, is debatable given the possibility of such proceedings being heard solely by an assessor, but see *ex parte Samuel Taylor Pty. Ltd.; re Clegg and Willoughby Municipal Council* (1964) 10 L.G.R.A. 321, 329; *ex parte Tooth & Co. Ltd.; re Sydney City Council*, note 51 *supra*.

52 *Sutherland Shire Council v Leyendekkers* (1970) 91 W.N. (N.S.W.) 250, 259.