

**THE HON T F BATHURST AC**  
**CHIEF JUSTICE OF NEW SOUTH WALES**  
**ENVIRONMENTAL/JUDICIAL SESSION**  
**27<sup>TH</sup> LAWASIA CONFERENCE, BANGKOK, THAILAND**  
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1. Good afternoon. It is a pleasure to have been invited to participate in the 27<sup>th</sup> LAWASIA Conference and to join today's discussion of judicial specialisation, particularly in relation to environmental courts. Before I get to specialisation, I should briefly mention that earlier this year I had the privilege of welcoming the LAWASIA Secretariat to its new home in Sydney. LAWASIA performs a vital role in the region, working to foster professional relationships between lawyers, members of the judiciary, and those in the broader legal community. I had the benefit of seeing some of the work done by LAWASIA at the Conference of Chief Justices last year, and I am pleased that I can make a contribution as incoming chair of the Judicial Section. In that regard, can I thank former Chief Justice de Jersey and Justice Muir for their stewardship of the Section.
  
2. Having made those acknowledgements, I should (as I've been invited to) say something about judicial specialisation. I hesitated a little before accepting this invitation because, as is no doubt obvious, I'm the only generalist on a panel of specialists which has been asked to discuss the benefits of specialisation. It is occasions like this that one gets the feeling they might have been invited as the

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\* I express my thanks to my Research Director, Haydn Flack, for his assistance in the preparation of this address.

sacrificial lamb. So, despite being the patch of onion weed between the rose bushes, I want to offer a few thoughts about the respective advantages and challenges presented by specialisation, as well emphasising the importance of carefully delineating the jurisdiction of specialist courts. However, before getting to that, it would be imprudent if I didn't briefly say something about the specialist/generalist divide.

3. Specialisation in business is by no means a new concept. Formative thinkers of the industrial revolution – including, of course, Adam Smith and others before him such as Bernard Mandeville in his work *The Fable of the bees* – outlined the benefits of dividing tasks between individuals to achieve economic efficiencies.<sup>1</sup> Specialisation is equally not a new thing for the legal profession; although, some would no doubt suggest that like most matters, the law came around to specialisation much later than everyone else. In Australia, judicial specialisation is not a recent phenomenon. The Federal Court of Bankruptcy was created in 1930 and the Commonwealth Industrial Court in 1956.<sup>2</sup> While both courts were later subsumed into what is now the Federal Court of Australia, they preceded by many decades other contemporary specialist courts, like drug courts<sup>3</sup> and, importantly, the New South Wales Land and Environment Court.<sup>4</sup>

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<sup>1</sup> See A Smith, *An inquiry into the nature and causes of the wealth of nations* (4th ed., Edinburgh, 1850) at 2 and B Mandeville, *The fable of the bees Part II* (1732) at 243. The division of labour in relation to judicial specialisation is discussed in L Baum, *Specializing the Courts* (University of Chicago Press, 2011) at 1; L Baum, "Probing the Effects of Judicial Specialization" (2009) 58 *Duke Law Journal* 1667 at 1675.

<sup>2</sup> Federal courts that operated prior to the establishment of the Federal Court of Australia are discussed in R J Ellicott, "The autochthonous expedient and the Federal Court" (2008) 82 *Australian Law Journal* 700 at 702.

<sup>3</sup> For instance the New South Wales Drug Court, established by the *Drug Court Act 1998* (NSW).

<sup>4</sup> Established by the *Land and Environment Court Act 1979* (NSW). For a discussion of specialist courts in Australia see J Crawford and B Opeskin, *Australian Courts of Law* (4<sup>th</sup> ed, Oxford University Press, 2004) Ch 13.

4. Despite having a reasonably lengthy history, judicial specialisation is a subject that still generates strong opinions. Many practitioners and academics call for greater specialisation to deal with what are seen as increasingly complex legal disputes.<sup>5</sup> For instance, in Australia, the Productivity Commission, which is an independent advisory body to the federal government, recently completed a report into access to justice arrangements. What is noteworthy is that several submissions to the inquiry called for further environmental courts.<sup>6</sup> On the other side of the coin, a number of Australian judges (generalists, I should add), have warned against embracing judicial specialisation. Writing extra-curially, former High Court Justice William Gummow criticised what he describes as the ‘unending fascination of state governments in the creation of new “specialist” courts and tribunals.’<sup>7</sup> More recently, in the significant High Court decision in *Kirk v Industrial Relations Commission*, now former Justice Dyson Heydon warned against accepting too readily the validity of what specialist courts do.<sup>8</sup>
5. This probably seems like a grim way to start. There is undoubtedly a strong global movement towards specialist environmental courts, and some very sound reasons for doing so. The New South Wales Land and Environment Court was established in 1980, and there are now many specialist courts operating throughout the Asia Pacific region. However, the point I want to make at the outset is that while the debate may seem to involve absolute positions, the

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<sup>5</sup> See eg J Katz, “Access to justice from the perspective of the commercial community: judicial specialisation” (2012) 18 *Auckland University Law Review* 37.

<sup>6</sup> See the submission of the Australian Network of Environmental Defender’s Offices (November 2013) to the Productivity Commission’s inquiry, *Access to Justice Arrangements*.

<sup>7</sup> B Opeskin and F Wheeler (Eds.), *The Australian Federal Judicial System* (Melbourne University Press, 2000), foreword by W M C Gummow, at v.

<sup>8</sup> *Kirk v Industrial Relations Commission (NSW)* [2010] HCA 1; (2010) 239 CLR 531 at [122].

distinction between generalist and specialist courts is not black and white.<sup>9</sup> As Justice Heydon acknowledged in *Kirk*, specialisation can come in the form of separate courts, as well as divisions or lists within a generalist court.<sup>10</sup> I can briefly point to some examples from the Supreme Court of New South Wales.

6. As some of you may know, the Supreme Court has a Common Law Division and an Equity Division. There are also lists for particular types of matters; these include a corporations list, a family provision list and a possession list, to name a few. Each list has its own practical guidelines for practitioners and involves, to some extent, a degree of judicial specialisation. Only a few weeks ago the Court released an amended practice note regarding class actions, which sets out a specific panel of judges who will hear representative proceedings.<sup>11</sup> Even in the Court of Appeal, the preferences and skills of each judge are considered when allocating work, particularly in relation to commercial and corporate matters. These types of processes are not at all uncommon in generalist courts, and are consistent with the recommendations that were made by Lord Jackson in England in relation to drawing on the expertise of individual judges.<sup>12</sup>
7. These initial observations are not an underhand attempt to draw the discussion away from environmental courts. They are simply to emphasise that generalism and specialisation are not distinct positions; but instead exist on a spectrum. It

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<sup>9</sup> In the course of earlier LAWASIA forums, others have made the point that the characteristics which make a court either generalist or specialist cannot be defined with precision. See the Hon M Moore, "The Role of Specialist Courts – An Australian Perspective" [2000/2001] *LAWASIA Journal* 139.

<sup>10</sup> *Kirk v Industrial Relations Commission (NSW)* [2010] HCA 1; (2010) 239 CLR 531 at [122].

<sup>11</sup> Practice Note SC Gen 17 available at

[http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2\\_class\\_action.html,c=y](http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2_class_action.html,c=y).

<sup>12</sup> Lord Justice Jackson, *Review of Civil Litigation Costs* (Final Report, December 2009) Ch 39 at [4.6].

is also important to recognise that perceptions of specialisation may well fluctuate over time. The Federal Court of Australia, which first sat in early 1977, might seem an unlikely example.<sup>13</sup> However, at the time many considered the Federal Court a specialist body that was at best unnecessary, and at worst a threat to the integrity of the legal system. Former Chief Justice of New South Wales, Sir Laurence Street, warned those who he described as ‘empire builders’, that the ‘system of justice is too precious an inheritance to be allowed to become a pawn in a power struggle between Commonwealth and State.’<sup>14</sup> While the Federal Court’s jurisdiction increased in the 1980s and ‘90s, it would be hard for many today to believe that an Australian Court of general jurisdiction was opposed so stridently to begin with.

8. Having put in place those two provisos – that there is a scale between complete generalism and specialisation, and that perceptions of specialist bodies can shift with time – I should bite the bullet and say something definite about the benefits and challenges of judicial specialisation in relation to environmental disputes.
9. What are broadly described as the competing merits and drawbacks of specialised judicial bodies have been explored and debated by countless judges, practitioners and academics.<sup>15</sup> It is unnecessary for me to repeat them

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<sup>13</sup> For a discussion of the Federal Court of Australia’s jurisdiction, see the Hon Justice S Kenny, “The Evolving Jurisdiction of the Federal Court of Australia - Administering Justice in a Federal System”, *Seminar on the Jurisdiction of the Federal Courts, National Judicial Institute, Ottawa, Ontario, Canada* (28 October 2011).

<sup>14</sup> The Hon Sir L Street, “The Consequences of a Dual System of State and Federal Courts”, (1978) 52 *Australian Law Journal* 434 at 437. See also the Hon Sir H Gibbs, “The State of the Australian Judicature” (1981) 55 *Australian Law Journal* 677.

<sup>15</sup> See eg L Baum, *Specializing the Courts* (University of Chicago Press, 2011) at 226-7; C Oldfather, “Judging, Expertise, and the Rule of Law” (2012) 89 *Washington University Law Review* 847 at 854-878; L Baum, “Probing the Effects of Judicial Specialization” (2009) 58 *Duke Law Journal* 1667 at 1675-1684; the Hon Justice B Preston, “Operating an environment court: The experience of the Land and Environment Court of New South Wales”,

today, beyond briefly summarising that on one view specialisation allows judges (and also practitioners) to develop expertise in a particular field. This is said to result in efficiencies in the time and cost of decision-making, and supposedly will lead to more 'correct' outcomes. On this view, specialisation gradually produces a coherent body of law that is further refined over time. The counter-arguments are that specialisation leads to insularity; that particular perspectives can come to dominate; and that, as Chief Justice Street put it, the fragmentation of courts and tribunals weakens the fabric of what should be an integrated legal system.<sup>16</sup>

10. That, I should emphasise, is a compressed summary of what are broadly seen as the pros and cons of judicial specialisation. However, one of the principal difficulties in considering specialisation is measuring its effectiveness.<sup>17</sup> While it's possible to calculate the time involved in the decision-making process and perhaps the cost of having a dispute adjudicated, the quality of decisions and the coherency of the resulting body of law cannot be easily measured. However, I must admit that in preparing for this session I came across a paper from the United States which ranks federal circuit court judges based on their productivity, opinion quality and judicial independence.<sup>18</sup> A terrifying prospect.

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(2008) 25 *Environmental and Planning Law Journal* 385 at 386; the Hon M Moore, "The Role of Specialist Courts – An Australian Perspective" [2000/2001] *LAWASIA Journal* 139 at 139-143; The Hon R French, "In praise of breadth' – A reflection on the virtues of generalist lawyering", *Law Summer School 2009, University of Western Australia* (20 February 2009) at 16-18; the Hon M Kirby, "Hubris contained: why a separate Australian tax court should be rejected", *Challis Taxation Discussion Group* (Union Club, Sydney, 3 August 2007).

<sup>16</sup> The Hon Sir L Street, "Proliferation and fragmentation in the Australian court system", (1978) 52 *Australian Law Journal* 594 at 595.

<sup>17</sup> The fact there have been few assessments of the benefits and costs of judicial specialisation is referred to in Productivity Commission, *Access to Justice Arrangements* (Draft Report, April 2014) at 511. See also L Baum, "Probing the Effects of Judicial Specialization" (2009) 58 *Duke Law Journal* 1667 at 1683-84.

<sup>18</sup> S Chio and G Gulati, "Choosing the next Supreme Court justice: an empirical ranking of judge performance", (2004) 78 *Southern California Law Review* 23.

11. I want to focus on one advantage of specialisation having regard to several features of the New South Wales Land and Environment Court. Justice Preston will no doubt expand on other beneficial features of environmental courts shortly. However, I should mention that unlike many environmental courts and tribunals around the world – which apparently now number more than 500<sup>19</sup> – the Land and Environment Court wasn't established solely with specialisation in mind. As Justice Preston has discussed previously, while specialisation was a significant goal, so too was amalgamating various pre-existing courts and tribunals.<sup>20</sup> The Court's jurisdiction was further broadened in 2009 when the Warden's Court, which dealt with mining-related matters, was abolished and its jurisdiction transferred to the LEC. As such, specialisation and consolidation were both motivating forces behind the Land and Environment Court. The goal of amalgamating decision-making bodies is perhaps not unlike the formation of various so-called super tribunals in several Australian states and territories.
12. What is undeniable is that the creation of specialist environmental bodies leads to their decision-makers having unparalleled expertise. The New South Wales Land and Environment Court is a testament to that fact. The expertise of its judges has also fostered innovation. I know Justice Preston has previously spoken at length about the Court's sentencing database.<sup>21</sup> However, I want to particularly mention the principles the Court has developed in relation to merits

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<sup>19</sup> George (Rock) Pring and Catherine (Kitty) Pring, "21<sup>st</sup> century environmental and natural resource dispute resolution: there is an ECT in your future", *International Bar Association Annual Conference* (Boston, Massachusetts, 8 October 2013) at 1.

<sup>20</sup> The Hon Justice B Preston, "Operating an environment court: The experience of the Land and Environment Court of New South Wales", (2008) 25 *Environmental and Planning Law Journal* 385 at 387.

<sup>21</sup> See eg the Hon Justice B Preston and H Donnelly, "The establishment of an environmental crime sentencing database in New South Wales" (2008) 32 *Criminal Law Journal* 214.

review appeals of planning decisions. The Court began developing planning principles in 2003 with the aim of improving the consistency of decisions in merits review appeals; and its website now boasts around 40 such principles.<sup>22</sup>

13. While the Court of Appeal has held there is no rule which demands consistency in relation to merits-based appeals in the Land and Environment Court, it emphasised that consistency is a desirable objective and singled out planning principles as a tool in working toward that goal.<sup>23</sup> The principles serve an important purpose; not only in encouraging consistency in merits review proceedings, but also by providing clear guidance for administrative decision-makers. Initiatives like planning principles, along with the fact that reasons given by the Court's judges and commissioners are all freely available online, should bring about greater coherence in administrative decision-making.
  
14. The expertise of the Land and Environment Court is further enhanced by its commissioners and acting commissioners. They bring specialised and practical knowledge in relation to a range of subjects including planning, environmental science, land valuation, architecture and land rights.<sup>24</sup> The Commissioners are involved in the Court's work in a number of respects and, importantly, the Chief Judge considers their knowledge, experience and qualifications when allocating work.<sup>25</sup> The Court also makes use of the commissioners' expertise by enabling them to sit with judges in certain circumstances. In those cases the

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<sup>22</sup> See [http://www.lec.lawlink.nsw.gov.au/lec/principles/planning\\_principles.html](http://www.lec.lawlink.nsw.gov.au/lec/principles/planning_principles.html). The principles concern Class 1 and 2 proceedings, which relate to merits review appeals of planning disputes and disputes in relation to trees.

<sup>23</sup> *Segal v Waverley Council* [2005] NSWCA 310; (2005) NSWLR 177 at [95]-[96].

<sup>24</sup> The necessary qualifications to be appointed a commissioner or acting commissioner are set out in the *Land and Environment Court Act 1979*, s 12(2).

<sup>25</sup> *Land and Environment Court Act 1979*, s 30(2).

commissioners assist and advise, but do not adjudicate.<sup>26</sup> This is another area in which the Land and Environment Court has been particularly innovative.

15. Finally, judges of the LEC undoubtedly have expertise in relation to concepts that are peculiar to the Court's work. Ecologically sustainable development,<sup>27</sup> as well as related concepts such as the precautionary principle<sup>28</sup> and inter-generational equity,<sup>29</sup> are matters that immediately come to mind. So too are the challenges of polycentric problems which often arise in merits review proceedings. These types of matters – which Justice Preston considered at length in a recent decision – require analysis, weighing and balancing of the various environmental, social and economic impacts of a particular project.<sup>30</sup> As is the case with any area of legal practice, it is inevitable that repeatedly dealing with similar types of matters will result in greater levels of experience. For instance, in relation to polycentricity, parallels could be drawn with criminal sentencing, where judges, in determining the appropriate sentence, balance aggravating and mitigating factors which often pull in different directions.<sup>31</sup>
16. I hasten to add that expertise in relation to environmental law – or any other field of the law for that matter – does not, and certainly should not, lead to different legal reasoning processes. An adjudicator will be assisted by familiarity with

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<sup>26</sup> *Land and Environment Court Act 1979*, s 37(3).

<sup>27</sup> Referred to in eg *Protection of the Environment Administration Act 1991* (NSW), s 6; *Environmental Planning and Assessment Act 1979* (NSW), s 5(a)(vii); *Forestry Act 2012* (NSW), s 10(1)(c).

<sup>28</sup> *Protection of the Environment Administration Act 1991*, s 6(2)(a); *Contaminated Land Management Act 1997* (NSW), s 9(3)(a).

<sup>29</sup> *Protection of the Environment Administration Act 1991*, s 6(2)(b); *Contaminated Land Management Act 1997*, s 9(3)(b).

<sup>30</sup> See *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48 at [31]-[43] discussing the issue of polycentricity. The decision was upheld on appeal in *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105.

<sup>31</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A.

specific legal and scientific concepts, as well as similar cases that have been resolved previously. However, that knowledge merely assists in interpreting and applying the law. I emphasise this because some have expressed a view that environmental courts involve 'creative problem solving', rather than being 'routine appliers of the law'.<sup>32</sup> This is certainly not the case in Australia. As Justice Preston has emphasised, environmental disputes do not stand in a unique position; adjudicating such cases 'involves the same technique and logic as judging other disputes.'<sup>33</sup> However, in undertaking that task, expertise is likely to be of great assistance.

17. From the humble perspective of a generalist, there are several matters which I believe should be kept firmly in mind when designing an environmental court or tribunal. Previously, these may have been seen as reasons against the creation of specialist bodies. However, I prefer to raise them as legitimate issues which need to be addressed when determining how best to structure a specialist court.
18. The first relates to what has been variously identified as a need to avoid insularity, to ensure sufficient levels of cross-pollination or, as Chief Justice French described it rather poetically, to make sure that courts don't 'evolve into a kind of archipelago of islands of expertise separated by a sea of unknowing.'<sup>34</sup>

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<sup>32</sup> George (Rock) Pring and Catherine (Kitty) Pring, "21<sup>st</sup> century environmental and natural resource dispute resolution: there is an ECT in your future", *International Bar Association Annual Conference* (Boston, Massachusetts, 8 October 2013) at 7.

<sup>33</sup> The Hon Justice B Preston, "The art of judging environmental disputes" (2008) 12 *Southern Cross University Law Review* 103 at 127.

<sup>34</sup> The Hon R French, "'In praise of breadth' – A reflection on the virtues of generalist lawyering", *Law Summer School 2009, University of Western Australia* (20 February 2009) at 18.

To put it simply, specialist courts must not lose sight of changes in other fields of the law which may impact on the determination of environmental disputes.

19. This is not simply meant as a loose objective for specialist courts. In my view the design of a specialist body, and also the way in which it operates, should assist specialist judges to focus on their own field of expertise while remaining abreast of changes in other areas of the law. Take for instance the nature of the entity. It has been suggested that the success of an environmental body does not depend on whether it is a court or tribunal.<sup>35</sup> However, in my opinion there may be a benefit in specialist environmental bodies being structured as a division or list in a generalist court; the environmental divisions of the Supreme Court and Administrative Courts of Thailand are examples of such an approach.
20. Some in the room may suggest (perhaps fairly) that this is the generalist trying to shore up support for generalist courts. I would respond by saying there are benefits to structuring an environmental body as a specialist division, or equally as a separate stream in a general tribunal. An example of the latter might be the Environment chamber of the First Tier Tribunal, which was established in England and Wales in 2010.<sup>36</sup> A divisional structure permits flexibility; it can establish its own procedures, and importantly, judges can be transferred in and out of the division to utilise expertise while maintaining experience in other

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<sup>35</sup> See the Hon Justice B Preston, "Characteristics of successful environmental courts and tribunals", *Presentation to the Eco Forum Annual Conference Guiyang 2013: The 3<sup>rd</sup> Environmental Justice Seminar* (19-21 July 2013, Guiyang, Guizhou, China) at 2-3.

<sup>36</sup> Discussed in eg R Macrory, "The Long and Winding Road – Towards an Environmental Court in England and Wales", (2013) *Journal of Environmental Law* 1.

areas of the law. In addition, at a basic level, a divisional structure also allows specialists and generalists to work and share ideas in the same environment.

21. Equally, however, processes can be put in place in separate specialist bodies to encourage information sharing. For instance, under the *Supreme Court Act*, Justice Preston as Chief Judge of the Land and Environment Court can act as an additional judge of the Court of Appeal.<sup>37</sup> He does so regularly and has sat in the Court of Appeal at least five times this year. In addition, Supreme Court judges can act as additional judges of the Land and Environment Court,<sup>38</sup> that has occurred on several occasions in the past few months. These are simple systems that can be built into the structure of specialist bodies to allow flexibility.
22. The second matter is perhaps a consequence of the first. In my view, care must be taken to ensure the specialist body of law produced by a specialist court does not inadvertently become a disparate body of precedent. Others have described this as the potential for the ‘balkanization’ of the law.<sup>39</sup> It is important that expertise is deployed to resolve complex matters which require specialised knowledge. This will often arise in environmental disputes that involve detailed scientific evidence. However, in my opinion, the need to avoid divergent case law should be addressed when demarcating the jurisdiction of a specialist court.

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<sup>37</sup> *Supreme Court Act 1970*, s 37A. Pursuant to s 3(1A) of the *Criminal Appeal Act 1912* (NSW) the Chief Judge of the Land and Environment Court may also act as a judge of the Court of Criminal Appeal in relation to proceedings of that Court.

<sup>38</sup> *Land and Environment Court Act 1979*, s 11A.

<sup>39</sup> C Oldfather, “Judging, Expertise, and the Rule of Law” (2012) 89 *Washington University Law Review* 847 at 877-878.

23. A good example can perhaps be shown in the experience in New South Wales with the specialist body, the Industrial Court. It was not only invested with jurisdiction in matters that were purely industrial, or that concerned employment conditions, pay and the like. It was also vested with criminal jurisdiction in matters involving occupational health and safety, and with jurisdiction to set aside or vary work-related contracts which were found to be unfair.<sup>40</sup> The Industrial Court, to say the least, gave a very liberal interpretation to that provision. So much so that it attracted all manner of commercial disputes which bore only the faintest resemblance to a dispute of an industrial character.
24. Thus, the Industrial Court assumed jurisdiction over a dispute concerning dealership agreements for the sale and servicing of Caterpillar construction equipment at various locations across Australia, in circumstances where Caterpillar had purported to terminate the arrangement.<sup>41</sup> The difficulty was that in assuming jurisdiction, the Court applied principles that were seen as being inappropriate in large commercial disputes.<sup>42</sup> This led to a degree of concern and uncertainty. Ultimately, the Court of Appeal, the High Court and the legislature effectively wound back the Court's jurisdiction.<sup>43</sup> Similarly, work health and safety has moved into the mainstream of the criminal law. I would suggest that the result has been a far more efficient process for litigants.

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<sup>40</sup> *Industrial Relations Act 1996* (NSW) s 106.

<sup>41</sup> *Caterpillar of Australia Pty Ltd v Industrial Court of New South Wales* [2009] NSWCA 83; (2009) 78 NSWLR 43.

<sup>42</sup> See *Caterpillar of Australia Pty Ltd v Industrial Court of New South Wales* [2009] NSWCA 83; (2009) 78 NSWLR 43 at [99].

<sup>43</sup> See eg *Fish v Solution 6 Holdings Ltd* [2006] HCA 22; (2006) 225 CLR 180.

25. There are certainly advantages to having a specialist body dealing with disputes in a specific area. However, the fundamental role performed by Australian courts is quelling disputes – be they between citizens, or between citizens and the state – according to legislation and the common law. The structure of our judicial system means that parties will often have an avenue of appeal to a generalist court. For instance, in certain circumstances appeals lie from the Land and Environment Court to the Court of Appeal and the Court of Criminal Appeal.<sup>44</sup> From those courts, parties may then apply for special leave to appeal to the High Court of Australia. To some extent, the oversight of generalist appellate courts functions to ensure coherence in the decisions of lower courts, both specialist and generalist. It would, however, be unfortunate if divergent approaches arose in relation to issues which cut across different jurisdictions.
26. It is also important when determining the scope of a specialist court to carefully consider whether there is sufficient justification for vesting jurisdiction in that body in relation to particular matters. What for instance is the justification for having various specialist and generalist courts exercising criminal jurisdiction, particularly if they are each applying the same or similar sentencing legislation? This is not to suggest that there may not be convincing grounds for doing so. However, the breadth of a specialist court should be carefully scrutinised. It may be that as soon as the jurisdiction of a specialist court is expanded beyond its true specialisation, the original justification for the body diminishes.

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<sup>44</sup> See *Land and Environment Court Act 1979*, Divs 1 and 2 of Pt 5, and *Criminal Appeal Act 1912*, s 5AB.

27. In saying that, I am mindful of the view that the success of a specialist environmental court will depend to an extent on the breadth of its jurisdiction; bodies with a narrow area of responsibility will have a smaller case load and are less able to create a body of jurisprudence.<sup>45</sup> Ultimately, however, a balance must be struck. An environmental court should be invested with sufficient jurisdiction to capture matters which require its specialised knowledge and procedures. Planning appeals, merits review proceedings – particularly those involving polycentric problems – and cases with complex scientific evidence are examples which I have already referred to. However, as a rule, I do not believe that general cases, such as those which loosely concern the environment, should be directed to a specialist court simply because of their subject matter. As former High Court Justice Michael Kirby commented in relation to tax legislation, ‘It is hubris on the part of specialised lawyers to consider that “their Act” is special and distinct from general movements in statutory construction’.<sup>46</sup>
28. The final point that I want to make concerns the shortcomings of generalist courts. Several commentators have indicated that one of the principal drivers for creating environmental courts or tribunals is dissatisfaction with, or perceived failings of, generalist courts.<sup>47</sup> There are said to be various disadvantages

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<sup>45</sup> See eg the Hon Justice B Preston, “Characteristics of successful environmental courts and tribunals”, *Presentation to the Eco Forum Annual Conference Guiyang 2013: The 3<sup>rd</sup> Environmental Justice Seminar* (19-21 July 2013, Guiyang, Guizhou, China) at 3-5, 17-20; George (Rock) Pring and Catherine (Kitty) Pring, “Greening Justice: creating and improving environmental courts and tribunals”, *Report, The Access Initiative* (2009) at 26-28.

<sup>46</sup> *Commissioner of Taxation v Ryan* [2000] HCA 4; (2000) 201 CLR 109 at [84], extracted in the Hon M Kirby, “Hubris contained: why a separate Australian tax court should be rejected”, *Challis Taxation Discussion Group* (Union Club, Sydney, 3 August 2007) at 2. See also the Hon D G Hill, “What do we expect from judges in tax cases?” (1995) 69 *Australian Law Journal* 992 at 998.

<sup>47</sup> See eg George (Rock) Pring and Catherine (Kitty) Pring, “21<sup>st</sup> century environmental and natural resource dispute resolution: there is an ECT in your future”, *International Bar Association Annual Conference* (Boston,

which range from delay, cost, a lack of alternate dispute resolution processes and, of course, a lack of expertise in relation to technical and scientific matters. As I have said, decision-makers with expert knowledge are a persuasive reason for establishing specialist bodies to deal with complex environmental disputes.

29. However, in my opinion, failings in relation to the accessibility of, costs involved in, or delays associated with bringing proceedings in a generalist court, are not of themselves sound reasons for establishing specialist environmental bodies. Accepting such a rationale consigns environmental courts as being a Band-Aid to existing problems in the system. To the extent there are issues with litigation costs, accessing courts, inflexible ADR procedures or lengthy delays – issues that will necessarily differ between jurisdictions – then they should be dealt with. It would be unfortunate if significant failings in generalist courts came to be seen as a sound reason for creating specialist courts and tribunals. As I have said, the focus should be kept firmly on the benefits of their expertise and innovation.
30. I should now hand over to the specialists on today's panel so they can share their knowledge about the operation of environmental courts in the region. I am looking forward to hearing about the work and procedures of the Environmental Division of the Supreme Court of Thailand, and also the steps which have been taken in recent years to establish environmental courts in Malaysia.

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Massachusetts, 8 October 2013) at 6-7; George (Rock) Pring and Catherine (Kitty) Pring, "The future of environmental dispute resolution" (2012) 40 *Denver Journal of International Law and Policy* 482 at 485ff.

31. Let me finish by saying that I have no doubt the significance of environmental law will only increase further in the decades ahead. Specialist courts and tribunals will inevitably play an essential role, and their expertise will be vital in resolving complex and technical disputes. However, when establishing forums to deal with environmental issues – be it a separate court or tribunal, or a division or list within an existing body – care must be taken to maintain the law’s coherence and to ensure that specialisation does not lead to separation. Importantly for us generalists, the creation of specialist bodies does not absolve us of the need to evolve, and to address problems that exist in our own court processes. Thank you again for inviting me to participate in today’s discussion.